No. 10-1298

In the Supreme Court of the United States

ROBERT N. PEIRCE, JR., LOUIS A. RAIMOND, MARK T. COULTER, AND DR. RAY HARRON,

Petitioners,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in holding that petitioners' statute-of-limitations defense was not clearly established on the face of respondent's complaint, the court of appeals correctly applied the "injury discovery" rule that governs accrual of a civil RICO cause of action.

2. Whether, under the "injury discovery" rule, a civil RICO claim accrues when a plaintiff is placed on "inquiry notice" of an injury.

CORPORATE DISCLOSURE STATEMENT

Respondent CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10% of respondent's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent CSX Transportation, Inc. (CSXT) sued petitioners—three lawyers and a doctor—under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, alleging that they had fraudulently filed asbestos claims against it. The district court dismissed the claims as time-barred, on the ground that petitioners had filed eight of the nine asbestos claims in question more than four years (the RICO limitations period) before CSXT filed its suit.

In an unpublished decision, the Fourth Circuit vacated the district court's ruling and remanded for further proceedings. The court of appeals held that a complaint may be dismissed on limitations grounds only in the rare circumstance in which the defense is clearly established on the face of the complaint; that a RICO cause of action accrues when the plaintiff knows or should know of its injury; and that CSXT's complaint did not clearly establish that it knew or should have known of the fraud more than four years before filing suit. The court explained that the mere fact that CSXT knew that asbestos claims were filed does not demonstrate that it knew or should have known that the claims were *fraudulent*.

Petitioners seek review of the Fourth Circuit's decision. But virtually every consideration that weighs against a grant of certiorari is present in this case. The decision below does not conflict with any decision of this Court or any court of appeals, involves only the fact-bound application of settled law, has no precedential effect, is interlocutory, would come out the same way under any accrual standard,

and is clearly correct. The petition should therefore be denied.

STATEMENT

A. Legal Background

RICO makes it unlawful to conduct the affairs of an enterprise through a "pattern of racketeering activity" or to conspire to do so. 18 U.S.C. § 1962(c), (d). "Racketeering activity" includes mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343, and a "pattern of racketeering activity" means at least two acts of racketeering activity, the last of which occurred within ten years after the commission of the prior one. 18 U.S.C. § 1961(1), (5). RICO grants a civil cause of action to any person "injured in his business or property by reason of a violation of [the statute]." 18 U.S.C. § 1964(c).

In *Agency Holding Corp.* v. *Malley-Duff & Associates*, 483 U.S. 143 (1987), this Court held that a four-year statute of limitations governs civil RICO actions. *Malley-Duff* did not decide when the limitations period begins to run, however, and in light of that decision, three distinct approaches emerged in the courts of appeals.

This Court ultimately rejected two of them. In *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179 (1997), the Court rejected the "last predicate act" rule, under which the limitations period began to run anew upon the occurrence of each predicate act forming part of the same pattern. In *Rotella* v. *Wood*, 528 U.S. 549 (2000), the Court rejected the "injury and pattern discovery" rule, under which a claim accrued when the plaintiff discovered or should have discovered both an injury and a RICO pattern.

The third approach is the "injury discovery" rule, under which the clock begins to run when the plaintiff knows or should know of its injury. Although this Court has not squarely passed upon it, every court of appeals to have done so has adopted the "injury discovery" rule, including the Fourth Circuit in *Pocahontas Supreme Coal Co.* v. *Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987). See *Rotella*, 528 U.S. at 552-553 (citing *Pocahontas* and decisions of First, Second, Fifth, Seventh, and Ninth Circuits); *Mathews* v. *Kidder, Peabody & Co.*, 260 F.3d 239, 245 (3d Cir. 2001).

B. Factual Background

Asbestosis, a form of pneumoconiosis, is a chronic inflammatory lung condition caused by long-term and heavy exposure to asbestos. The National Institute of Occupational Safety and Health maintains a standard protocol, known as the "B Reader Program," for interpreting chest x-rays to determine whether they show signs of pneumoconiosis. Doctors who become certified "B readers" analyze markings on x-rays called "opacities" and record their findings on standard International Labor Organization (ILO) forms. C.A. J.A. 147-148.

The complaint at issue here alleges that petitioners Peirce, Raimond, and Coulter—three lawyers at a firm that bore their names—orchestrated a screening process designed to produce false positive readings and then prosecuted claims against CSXT with no good-faith basis in fact. Pet. App. 6-7. Peirce, Raimond, and Coulter (the lawyer petitioners) carried out this scheme by using an x-ray technician who produced low-quality films; having the x-rays read by a doctor—petitioner Harron—who pro-

vided positive reads at an impossibly high rate; and then overwhelming CSXT with thousands of resulting claims.

1. The lawyer petitioners' x-ray technician was James Corbitt. In August 1993, Corbitt was sentenced to 18 months in prison for theft of government property and tax fraud; during the decade following his release, he worked for the lawyer petitioners. Corbitt's "mobile screening company" consisted of an x-ray unit mounted on the back of a truck, and his screenings were typically conducted in hotel parking lots. Because neither Corbitt nor his x-ray equipment was properly licensed, his screenings violated the laws of nearly every State in which he operated. In 2001, after Corbitt was fined $10,000 by the State of Texas for illegal screenings, petitioner Peirce paid half the fine. Corbitt's x-rays were consistently underexposed and underinflated, producing white marks on the film that appeared to be signs of asbestosis where none actually existed. C.A. J.A. 103, 106, 128, 193-204, 218-219, 913-914, 1139-1141.

2. Between 1995 and 2003, the lawyer petitioners used petitioner Harron to read all the x-rays they produced. C.A. J.A. 963-964. Although numerous studies establish the prevalence of asbestosis in railroad workers at one to five percent, the lawyer petitioners estimated that Harron reported finding evidence of asbestosis in 65% of all workers screened, C.A. J.A. 984, and a separate analysis found that his percentage of positive X-ray reads "is in excess of 90 percent and often approaches 100 percent," C.A. J.A. 906. As Judge Jack of the Southern District of Texas found in another case, such a gross disparity "can only be explained as a product of bias—that is, of Dr.

Harron finding evidence of the disease he was currently being paid to find." *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 638 (S.D. Tex. 2005). Judge Jack also found that Harron had produced these results through a "distressing and disgraceful procedure [that] does not remotely resemble reasonable medical practice." *Ibid.* (internal quotation marks omitted).

New York's Board of Professional Medical Conduct subsequently determined that Harron "committed acts that would constitute fraud * * * had they been committed in New York," the State in which he was first licensed. C.A. J.A. 1297. Harron's medical license has since been revoked or surrendered in that State and others. C.A. J.A. 892-897, 1267-1308. At the same time, courts have dismissed claims based on medical evidence produced by Harron, and all major bankruptcy trusts have disallowed his B reads. C.A. J.A. 129, 850.

3. After using Corbitt and Harron to manufacture asbestos claims, the lawyer petitioners inundated CSXT with mass lawsuits that consolidated hundreds or even thousands of the claims. Seven such mass suits were filed between August 2001 and February 2006. C.A. J.A. 250-684. These cases were administered by the West Virginia Mass Litigation Panel, which imposed case-management orders that limited the scope of discovery and required CSXT to participate in mediation and settlement conferences for dozens of new claimants each month. C.A. J.A. 678-684. Given these restrictions, the specter of mass trials, and the relatively small value of an individual claim, it was typically more cost-effective to settle early on. CSXT had neither the ability nor the

incentive to conduct an extensive examination of each claim.

Some of the claimants attended multiple screenings and thus had more than one x-ray read by Harron. In the asbestos litigation, however, the lawyer petitioners were obligated to produce only the x-ray that served as the basis for the claim; CSXT did not have access to the earlier x-rays or corresponding ILO forms. It was not until November 2006, through discovery in *this* litigation, that CSXT was able to obtain the earlier x-rays and ILO forms for claimants with multiple x-rays. C.A. J.A. 153-156, 681, 769.

After having those materials analyzed, CSXT learned of several instances in which Harron had first found a claimant unimpaired and then later, based on a different x-ray, opined that the claimant exhibited signs of asbestosis despite the objectively unchanged condition of his lungs. The complaint at issue in this case identifies nine such instances. The resulting asbestos claims were filed in March 2000 (one), August 2001 (two), November 2001 (two), April 2002 (one), May 2003 (two), and February 2006 (one). C.A. J.A. 250-684.

C. Proceedings In The District Court

On July 5, 2007, CSXT filed an amended complaint against petitioners and others in the United States District Court for the Northern District of West Virginia. The amended complaint asserted one count each of a RICO violation and common-law fraud against the lawyer petitioners and one count each of RICO conspiracy and common-law conspiracy against the lawyer petitioners and Harron. Each of those counts alleged nine separate instances of

fraud, which correspond to the nine asbestos claims identified above. Pet. App. 7; C.A. J.A. 142-684.

The amended complaint also included counts arising from the use of a positive x-ray by one CSXT employee to support the claim of another employee who was not sick. Those counts were asserted against defendants who are not petitioners here. Pet. App. 7; C.A. J.A. 171-176.

In orders issued on March 28 and April 2, 2008, the district court granted petitioners' motions to dismiss the RICO claims as time-barred. Pet. App. 39-44 (order granting lawyer petitioners' motion); C.A. J.A. 706-710 (order granting Harron's motion). The court reasoned that CSXT was "charged with notice of its injuries on or substantially near the date th[e] [asbsestos] cases were filed"; that "eight of the nine cases were filed * * * more than four years prior to [the] date [CSXT's] amended complaint was filed"; and that, "[b]ecause only one alleged act of racketeering activity is not time-barred," CSXT "has failed to show the requisite pattern" to sustain its RICO claims. Pet. App. 43-44; C.A. J.A. 709-710.

Employing similar reasoning, the district court also dismissed as time-barred eight of the nine sets of common-law claims (as to which the limitations period is two years). The common-law fraud and conspiracy allegations that were not dismissed arose from the latest of the nine asbestos claims at issue, which was filed in February 2006 on behalf of an employee named Earl Baylor. Pet. App. 8, 44-47; C.A. J.A. 710-711.

CSXT sought leave to file a second amended complaint, which would have included more recent fraudulently filed asbestos claims and detailed alle-

gations concerning the difficulty of discovering the fraud. On November 3, 2008, the district court denied the motion. Pet. App. 8; C.A. J.A. 785-795.

The allegations concerning the x-ray swap proceeded to trial. On August 14, 2009, the jury returned a verdict for the defendants. Pet. App. 8; C.A. J.A. 1312-2078.

Approximately one month later, the district court granted summary judgment to petitioners on the Baylor common-law claims. Pet. App. 8; C.A. J.A. 2083-2097.

D. The Court Of Appeals' Decision

In an unpublished opinion, a unanimous panel of the Fourth Circuit affirmed the district court's judgment in part, vacated it in part, and remanded the case for further proceedings. Pet. App. 1-33.

As relevant here, the Fourth Circuit held that the district court erred in dismissing CSXT's RICO claims as time-barred. Pet. App. 10-15. The court of appeals stated that a complaint may be dismissed on limitations grounds only in "the relatively rare circumstance[]" in which "all facts necessary to the affirmative defense 'clearly appear[] *on the face of the complaint*.'" Pet. App. 10-11 (quoting *Goodman* v. *Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007), in turn quoting *Richmond, Fredericksburg & Potomac R.R.* v. *Forst*, 4 F.3d 244, 250 (4th Cir. 1993)). The court also stated that RICO's four-year limitations period "begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." Pet. App. 11 (quoting *Pocahontas*, 828 F.2d at 220). The court then "turn[ed] to the complaint" to determine "whether all the facts necessary to conclude [that] CSX[T]'s claims are time-barred appear

on its face"—*i.e.*, "whether the face of the complaint pleads facts such that it clearly appears [that] CSX[T] was on notice of its claimed injury by July 4, 2003," four years before it filed suit. Pet. App. 11-12. The court "conclude[d] [that] a fair reading of the complaint's allegations does not establish such notice on the face of the complaint and therefore the district court erred in granting the Rule 12(b)(6) motion." Pet. App. 12.

The Fourth Circuit rejected the district court's view that "the filing of the various underlying suits * * * in and of themselves[] put[] CSX[T] on notice of the fraudulent scheme underlying the RICO counts." Pet. App. 12. As the court of appeals explained, "[t]he fact that an underlying asbestos suit was filed or settled, without more, does not establish as a matter of law that the separate gravamen of RICO fraud should have been known by that event alone." Pet. App. 14. It "does not follow from the facts pled on the face of the complaint," the court said, that CSXT "knew or should have known that the underlying asbestos lawsuits were *fraudulently* filed when they were filed." *Ibid.*

The Fourth Circuit also rejected the district court's conclusion that a RICO claim is untimely unless there are at least two racketeering acts within the limitations period. That there might be only one such act within the four-year limitations period, the court of appeals held, "would not defeat the existence of a RICO pattern provided the other predicate act took place within the applicable ten year period" for a "pattern of racketeering activity." Pet. App. 15 n.3 (citing 18 U.S.C. § 1961(5)).

In addition to vacating the dismissal of CSXT's RICO claims, the Fourth Circuit resolved four issues

that are not raised in the petition for certiorari. The court of appeals held that the district court (1) erred in dismissing eight of the nine sets of CSXT's common-law fraud and conspiracy claims as time-barred, Pet. App. 15-16; (2) abused its discretion in denying CSXT leave to file a second amended complaint, Pet. App. 16-20; (3) erred in granting summary judgment to petitioners on the Baylor common-law fraud and conspiracy claims, Pet. App. 20-24; but (4) did not abuse its discretion in excluding certain evidence at the trial of the x-ray swap allegations, Pet. App. 25-29. Judge Davis filed a concurring opinion that addressed the Baylor claims. Pet. App. 29-33.

Petitioners filed a petition for rehearing en banc, which the Fourth Circuit denied without any judge having requested a poll of the court. Pet. App. 50-51.

REASONS FOR DENYING THE PETITION

The petition for certiorari presents two questions: whether the Fourth Circuit correctly applied the "injury discovery" rule; and whether a RICO cause of action accrues under that rule when the plaintiff is placed on "inquiry notice" of an injury. It is difficult to imagine a decision that is less deserving of review than the Fourth Circuit's here. The decision below is fact-bound, interlocutory, non-precedential, and clearly correct. There is no circuit conflict on either question presented, and the result would be the same regardless of the legal standards applied. As to the second question, moreover, petitioners do not even claim that the court below failed to apply the rule they apparently advocate; and while they do make that claim with respect to the first question, the court's opinion—most of which petitioners ignore—conclusively refutes it. The petition should be denied.

A. The Question Whether The Fourth Circuit Correctly Applied The "Injury Discovery Rule" Does Not Warrant Review

The first question presented asks whether the Fourth Circuit's decision "conflict[s] with the 'injury discovery' rule" and "resurrect[s] the squarely rejected 'injury and pattern [discovery]' rule." Pet. 20. But even the most cursory reading of the decision shows that the court of appeals employed the "injury discovery" rule, not the "injury and pattern discovery" rule. And there is no basis for reviewing the court's unexceptionable application of the proper accrual rule. Indeed, there would be no basis for review even if the court had *not* applied that rule.

1. According to petitioners, the court of appeals mistakenly believed that RICO cases are not governed by the "injury discovery" rule. Pet. 20-22. The main problem with this contention is that the court unambiguously stated that they are.

Toward the beginning of its discussion of the limitations issue, the Fourth Circuit quoted its prior decision in *Pocahontas Supreme Coal Co.* v. *Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), as follows: "This Court has held that 'the statutory period [for a RICO claim] begins to run when a plaintiff knows or should know of the injury that underlies his cause of action.'" Pet. App. 11 (quoting 828 F.2d at 220; brackets added by court). While insisting that the court of appeals did not apply the correct accrual rule, petitioners fail to mention this explicit statement of that rule in the decision they are asking this Court to review. Nor do they cite *Pocahontas*, conspicuously omitting it even from their string citations of decisions that apply the "injury discovery" rule. Pet. 9-10, 21-22; cf. *Rotella* v. *Wood*, 528 U.S.

549, 553 (2000) (including *Pocahontas* in string citation of decisions that apply the rule). But ignoring the court of appeals' statement of "the applicable law," Pet. App. 11, cannot make it disappear, and the statement by itself undermines petitioners' assertion that the decision below is "in direct conflict" with the "injury discovery" rule, Pet. 22.

That is not the only language in the opinion, moreover, demonstrating that the court of appeals employed the "injury discovery" rule. Two sentences after the quotation from *Pocahontas*, the court "note[d] [that] the complaint [in this case] was filed July 5, 2007, so the specific inquiry is whether the face of the complaint pleads facts such that it clearly appears [that] CSX[T] was *on notice of its claimed injury* by July 4, 2003." Pet. App. 11-12 (emphasis added). The court then "conclude[d] [that] a fair reading of the complaint's allegations does not establish *such notice* on the face of the complaint and therefore the district court erred in granting the Rule 12(b)(6) motion." Pet. App. 12 (emphasis added). This discussion—which the petition also ignores—cannot be read as anything other than a straightforward application of the "injury discovery" rule.

Nor is there anything in the court of appeals' reasoning to suggest that it was requiring discovery of "both an injury and a pattern of RICO activity," *Rotella*, 528 U.S. at 553, before the limitations period could begin to run. The basic justification for the court's holding that dismissal was improper was that nothing clearly appears on the face of the complaint that "establish[es] that CSX[T] knew or ought to have known by July 2003 that the alleged fraud was afoot." Pet. App. 12-13. There are many other statements in the opinion to the same effect. See,

e.g., Pet. App. 12 ("when the fraud commenced"); *ibid.* ("notice of the fraudulent scheme"); Pet. App. 14 ("fraud should have been known"); *ibid.* ("knew or should have known that the underlying asbestos lawsuits were *fraudulently* filed"). All of these statements focus on the "injury" (a fraudulently filed lawsuit) and say nothing about a "pattern" (multiple related acts of racketeering).

Petitioners are thus mistaken in asserting that the decision below "requires discovery of all the elements of a claim and that an injury was the result of a RICO violation." Pet. 21. The decision requires no such thing. For the same reason, petitioners err in contending that the decision below "is in direct conflict with this Court's decision in *Rotella* as well as every Court of Appeals decision rendered after *Rotella*." Pet. 22. The decision is fully consistent with both.

In the end, petitioners' theory that the court of appeals employed an "injury and pattern discovery" rule rests entirely upon a pair of sentences in the court's opinion. The first is this: "Viewed in the light most favorable to CSX[T], it is not at all clear from these facts when CSX[T] knew or should have known of the alleged RICO violations, that is, when the fraud commenced." Pet. 20 (quoting Pet. App. 12; emphasis omitted). The second is this: "[T]he case at bar necessitates a fact-intensive inquiry as to when CSX[T] knew or should have known of the existence of the claimed RICO violations." *Ibid.* (quoting Pet. App. 13-14; emphasis omitted). This isolated language cannot bear the weight that petitioners place on it. In light of the court of appeals' explicit statement that it was applying the "injury discovery" rule, its citation of *Pocahontas*, the absence of any

suggestion in its reasoning that the court was imposing a "pattern discovery" requirement as well, and the court's equation of "RICO violations" with "fraud" in the first sentence quoted above, it is perfectly apparent that the court was using "RICO violations" in this context as a shorthand for "injury."

2. Contrary to the essential premise of the first question presented in the petition, therefore, the court of appeals clearly did employ the "injury discovery" rule. And there is no basis for reviewing the court's application of the rule, because its decision on that point is (a) fact-bound; (b) interlocutory; and (c) clearly correct.

a. The court of appeals applied two settled legal principles—that a RICO cause of action accrues when the plaintiff knew or should have known of the injury; and that a complaint may be dismissed on limitations grounds only when all facts necessary to the defense clearly appear on the face of the complaint—to a unique set of facts—those alleged in the particular complaint in this case. The court held simply that "a fair reading of the complaint's allegations does not establish * * * notice [of CSXT's injury] on the face of the complaint." Pet. App. 12. A petition for certiorari is "rarely granted" when all that can be asserted is a "misapplication of a properly stated rule of law." Sup. Ct. R. 10.

b. After holding that no time bar was established on the face of the complaint, the court of appeals vacated the district court's dismissal of the RICO claims and remanded for further proceedings. Certiorari is therefore unwarranted for the additional reason that the decision below is interlocutory. This Court will "generally await final judgment in the lower courts before exercising [its] certiorari jurisdic-

tion," *Va. Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari), and there is good reason to follow that practice here.

Far from having directed the entry of final judgment in CSXT's favor on its RICO claims, the court of appeals determined only that the claims may proceed beyond the pleading stage. Petitioners might yet prevail on remand, thereby obviating the need for this Court's intervention. Indeed, the court of appeals specifically noted the possibility that petitioners could prevail on the very statute-of-limitations defense that they raise in this Court. See Pet. App. 13 ("Additional factual development may or may not prove that [the RICO claims are time-barred], but it is not apparent on the face of the complaint."); Pet. App. 15 n.3 ("While we have determined that, at the motion to dismiss stage, the district court erred in finding the CSX[T] claims time-barred, some of those claims may yet be determined as time-barred at a later stage of the proceedings."). Regardless of the fate of the RICO claims, moreover, there will be further proceedings in the district court on the Baylor common-law claims, as to which the court of appeals vacated summary judgment for petitioners. See Pet. App. 20-24.

Accordingly, even if certiorari were otherwise warranted, the interlocutory posture of this case would "of itself alone furnish[] sufficient ground" for the denial of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Bhd. of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Am. Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893).

c. In addition to being fact-bound and interlocutory, the decision below is clearly correct.

Statute of limitations is an affirmative defense, and thus ordinarily must be pleaded and proved by the defendant. See Fed. R. Civ. P. 8(c)(1). A motion to dismiss for failure to state a claim, which is addressed solely to the complaint, "generally cannot reach the merits of an affirmative defense," including "the defense that the plaintiff's claim is time-barred." Pet. App. 10 (quoting *Goodman* v. *PraxAir, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007)). Otherwise, a plaintiff would be put in the absurd position of having "to plead affirmatively in his complaint matters that might be responsive to affirmative defenses even before the affirmative defenses are raised." Pet. App. 11 (quoting *Goodman*, 494 F.3d at 466). A court may grant a limitations defense raised in a motion to dismiss only in the "relatively rare" case in which "all facts necessary" to the defense "'clearly appear[] *on the face of the complaint*.'" Pet. App. 10-11 (quoting *Goodman*, 494 F.3d at 464, in turn quoting *Richmond, Fredericksburg & Potomac R.R.* v. *Forst*, 4 F.3d 244, 250 (4th Cir. 1993)). The Fourth Circuit correctly held that this is not such a case.

The nine asbestos claims at issue were filed between 2000 and 2006; CSXT's complaint was filed in July 2007. Pet. App. 12. The district court found a time bar because eight of the nine asbestos claims were filed more than four years before CSXT's complaint. Pet. App. 7-8, 42-44. In so ruling, the district court adopted the view that "the filing of the various underlying suits * * *, in and of themselves, put[] CSX[T] on notice of the fraudulent scheme underlying the RICO counts." Pet. App. 12. As the court of appeals explained, however, "nothing 'clearly ap-

pears' on the face of the complaint to show that the filing of these suits * * * establish[es] that CSX[T] knew or should have known by July 2003 that the alleged fraud was afoot." Pet. App. 12-13.

Petitioners do not deny that a complaint may be dismissed on limitations grounds only in the unusual case in which all facts necessary to the defense clearly appear on the face of the complaint. And they do not dispute the court of appeals' conclusion that nothing in the complaint at issue here clearly establishes CSXT's actual or constructive knowledge of petitioners' fraud more than four years before it filed suit. Instead, petitioners take the position that CSXT did not need to have such knowledge for the complaint to establish a time bar. Under the "injury discovery" rule, according to them, the "injury" that triggered the four-year limitations period was simply the filing of an asbestos suit. Pet. 28-29. This view presumes that the limitations period for a RICO claim with fraud predicates begins to run when the statements at issue are made (the statements here being representations that lawsuits have been filed in good faith), even though the person to whom the statements are made has no reason to believe they are false (the falsity here being that the lawsuits have *not* been filed in good faith).

That is obviously not the law. A lawsuit by itself, which is presumed to be filed in good faith, is not a legally cognizable injury; it is a *fraudulently filed* suit that constitutes the injury for limitations purposes. As the court of appeals correctly held, the cause of action thus accrued, not when CSXT knew or should have known that an "asbestos suit was filed," but when it knew or should have known that an "asbestos lawsuit[] w[as] *fraudulently* filed." Pet.

App. 14. The court's holding faithfully applies the "injury discovery" rule. The whole point of that rule, which has its origins "in fraud cases," is that, "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1793-1794 (2010) (quoting *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946); emphasis omitted).

3. Even if the court of appeals had in fact applied an "injury and pattern discovery" rule, as petitioners maintain, further review would still be unwarranted. That is true for three independent reasons.

First, the court of appeals' opinion is unpublished and, as the opinion itself explicitly states, "[u]npublished opinions are not binding precedent in th[e] [Fourth] [C]ircuit." Pet. App. 4. Thus, even if the decision below had applied an "injury and pattern discovery" rule, the Fourth Circuit would "not [be] bound" by the decision in future cases. *Pressley* v. *Tupperware Long Term Disability Plan*, 553 F.3d 334, 339 (4th Cir. 2009). Instead, the court would be bound by its *published* 1987 decision in *Pocahontas*, which, in agreement with every other court of appeals that has since considered the question, explicitly adopted the "injury discovery" rule. There is thus no basis for concern about "the outcomes of cases potentially turning on the happenstance of the plaintiff's geographical location" or about "intentional forum shopping by plaintiffs." Pet. 23.

Second, the result in this case would be the same regardless of whether the court of appeals employed the "injury discovery" or the "injury and pattern discovery" rule. Under either rule, a RICO claim is

timely if the plaintiff did not have actual or constructive knowledge of the *injury* more than four years before the filing of the complaint. Because that is all that the court of appeals held here, see Pet. App. 12-14, the choice of accrual rule makes no difference to the outcome. This Court sits "to correct wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

Third, even if the district court were correct that eight of the nine RICO predicates were untimely, CSXT would still be able to proceed with RICO claims. The court of appeals rejected the district court's view that "the existence of a RICO pattern" requires that more than "one of th[e] [racketeering] acts] occurred within the statute of limitations period," Pet. App. 15 n.3, and petitioners have not challenged that aspect of the Fourth Circuit's decision.

B. The Question Whether A RICO Cause Of Action Accrues Under The "Injury Discovery Rule" When A Plaintiff Is Placed On "Inquiry Notice" Of The Injury Does Not Warrant Review

The second question presented in the petition is "[w]hether, under the 'injury discovery' rule, a civil RICO claim accrues when a plaintiff is put on 'inquiry notice' of an injury." Pet. i. For multiple reasons, review of that question is unwarranted as well.

First, while petitioners appear to be *proponents* of an "inquiry notice" standard, the petition does not contend that the court of appeals failed to apply it. On the contrary, the petition seems to assume that it did. "To the extent the Fourth Circuit panel applied inquiry notice in this case," petitioners argue, "it was inquiry notice of the elements of the alleged RICO

violation, not inquiry notice of the injury." Pet. 26. Petitioners' complaint, in other words, is not that the court should have applied an "inquiry notice" standard, but that it should have applied that standard using an "injury discovery" rather than an "injury and pattern discovery" rule. The second question presented in the petition thus collapses into the first, and we have already explained why the first question does not warrant a grant of certiorari.

Second, while petitioners contend that there is a "conflict between circuits on use of inquiry notice" in RICO cases, Pet. 5, the three cases they cite do not bear this out. Petitioners suggest that the point at which a plaintiff is on "inquiry notice" of an injury may be earlier than the point at which the plaintiff has "constructive knowledge" of it. See *Merck*, 130 S. Ct. at 1797. But one of their cited decisions, which petitioners claim "applied the concept of 'inquiry notice,'" Pet. 24, treats "inquiry notice" as the equivalent of "constructive knowledge." See *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 60 (2d Cir. 1998) (per curiam) ("Inquiry notice is notice such that a reasonable investor of ordinary intelligence would have discovered the existence of the fraud." (internal quotation marks omitted)). And another of the decisions, which petitioners claim "rejected" the concept of "inquiry notice," Pet. 24, does not discuss the concept at all. See *Love* v. *Nat'l Med. Enters.*, 230 F.3d 765 (5th Cir. 2000).

Third, even if there *were* a conflict on the issue of "inquiry notice," this case would not be an appropriate vehicle for resolving it, because the court of appeals did not address whether there is a difference between "inquiry notice" and "constructive knowledge," and it did not otherwise analyze the issue.

See Pet. App. 10-15. Indeed, the only time it even employed the phrase "inquiry notice" was in quoting the district court. Pet. App. 7. This is "a [C]ourt of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Fourth, this case is also an unsuitable vehicle because the result would be the same even if the limitations period began at "the point where the facts would lead a reasonably diligent plaintiff to investigate further." Pet. 24 (quoting *Merck*, 130 S. Ct. at 1797). Nothing on the face of the complaint clearly establishes that that point predated the filing of CSXT's 2007 complaint by more than four years. In arguing otherwise, petitioners rely on CSXT's settlement of two asbestos cases in 2002, Pet. 25-26, but they do not explain how the mere settlement of two cases clearly shows that CSXT should have been investigating the possibility that those cases (or any others) had been fraudulently filed.

Fifth, the decision below is non-precedential. Even if the Fourth Circuit had squarely rejected an "inquiry notice" standard in its unpublished decision in this case, therefore, nothing would prevent it from adopting that standard in a published decision in a future case.

Sixth, the decision below is interlocutory. Petitioners might yet prevail on remand, which would obviate the need for this Court's intervention on the "inquiry notice" issue (or any other).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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