No. 17-1459

IN THE
Supreme Court of the United States

WORLD PROGRAMMING LIMITED,
Petitioner,

v.

SAS INSTITUTE, INC.,
Respondent.

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

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BRIEF OF SCHOLARS AND PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether federal or state law should govern the respect that must be accorded to the judgment of a foreign court in diversity and supplemental jurisdiction cases.
2. Whether courts may deny recognition to foreign judgments on public policy grounds, without a determination that the foreign judgment is repugnant to a well-defined and fundamental public policy.

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INTEREST OF *AMICI CURIAE*

Amici Curiae are scholars and practitioners with decades of experience and interest in international law, foreign relations, and the recognition and enforcement of foreign judgments.[1]

Michael Traynor is President Emeritus of the American Law Institute. He is an Advisor to the forthcoming Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction and Judgments, and the

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Counsel of record for both petitioner and respondent were given timely notice of *amici*'s intent to file this brief, and both have consented to its filing.

forthcoming Restatement (Third) of Conflict of Laws. He has taught and published articles on the recognition and enforcement of foreign judgments. He is senior counsel at Cobalt LLP, and has served as counsel in matters involving issues of recognition and enforcement of foreign judgments and the conflict of laws.

Linda Silberman is the Clarence D. Ashley Professor of Law at New York University Law School and Co-Director of NYU's Center for Transnational Litigation, Arbitration, and Commercial Law. She is a member of the Academic Council of the Institute of Transnational Arbitration. She has published on conflict of laws, transnational litigation, judgment recognition, and international arbitration. She was co-reporter for the American Law Institute's project on Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute. She has also served as an advisor on three projects of the American Law Institute: the Restatement (Third) of the U.S. Law of International Commercial Arbitration, the Restatement (Fourth) of the Foreign Relations Law of the United States, and the Restatement (Third) of Conflict of Laws.

John B. Bellinger III is a partner at Arnold & Porter and Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations. He previously served as The Legal Adviser for the Department of State from 2005 to 2009 and as Senior Associate Counsel to the President and Legal Adviser to the National Security Council from 2001 to 2005. He is a member of the Council of the American Law Institute and a Counselor to the Restatement (Fourth) of Foreign Relations Law of the U.S.

Ronald Brand is the Chancellor Mark A. Nordenberg University Professor and John E. Murray Faculty Scholar at the University of Pittsburgh. He is Academic Director of the University of Pittsburgh's Center for Inter-

national Legal Education. He has published books and articles on international law and the recognition of foreign judgments, including Transaction Planning Using Rules of Jurisdiction and the Recognition and Enforcement of Judgments (Hague Academy of International Law, Pocketbook Series, 2014).

Reeves Anderson is a partner at Arnold & Porter and co-author, with John Bellinger, of *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 Va. J. Int'l L. 501 (2014). He represents and counsels clients in cross-border litigation, including actions to recognize or resist recognition of foreign judgments.

Amici respectfully submit this brief to emphasize the importance of the legal issues at stake in this case. *Amici* take no position on the other questions presented by the petition. The views expressed in this brief are those of the individual *amici* and not of their affiliated organizations.

SUMMARY OF ARGUMENT

The Fourth Circuit denied preclusive effect to a United Kingdom judgment in an action brought against a United Kingdom company for conduct undertaken in the United Kingdom.[2] Deference to that foreign judgment, the Fourth Circuit concluded, would frustrate North Carolina's public policy of ensuring the "sanctity of contract." Pet. App. 11a.

The Fourth Circuit's deference to a vague state public policy that favors contract enforcement departed from the rationale of *Hilton* v. *Guyot*, 159 U.S. 113 (1895), this Court's seminal case concerning the recognition of for-

[2] The United Kingdom judgment was, in turn, based on a ruling sought from the Court of Justice of the European Union. Pet. App. 5a, 136a-138a.

eign-court judgments. *Hilton* explained that deference was due to foreign-court judgments as a matter of the comity *between nations*, unless they were contrary to the enforcing *nation's* fundamental values. Rather than follow this rationale and apply a national test for public policy, the Fourth Circuit seemingly joined the majority line of lower-court cases that apply *Erie Railroad Co.* v. *Tomkins*, 304 U.S. 64 (1938), to require federal courts sitting in diversity to apply state law to the recognition and enforcement of foreign judgments.[3]

The status quo "State by State" approach to the recognition and enforcement of foreign judgments has numerous ill effects. It has splintered U.S. law on the recognition and enforcement of foreign judgments, making it difficult for foreign-judgment creditors to enforce judgments predictably in the United States. It has also created undesirable foreign-policy outcomes, risking affront to (and retaliation from) other nations and making it difficult for the United States to negotiate international treaties concerning judgment enforcement with credibility. In light of these effects, and absent any action by Congress,[4] *amici* urge the Court to take up this important national issue and consider whether federal, not state, law applies to the recognition and enforcement of foreign judgments.

Alternatively, the Court should take this opportunity to clarify that, under the international comity principle outlined in *Hilton*, the public-policy exception is limited to foreign judgments or claims that are "repugnant" to a well-defined and fundamental public policy, regardless of

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[3] The Fourth Circuit also referred to a federal policy in favor of enforcing copyright, apparently with regard to Plaintiff's copyright claims. Pet. App. 11a. It did not conclude that the judgment was repugnant to either policy. See Part II, *infra*.

[4] See *infra* note 10 and accompanying text.

whether state or federal law supplies that policy. Applying this test, the Fourth Circuit should have concluded that North Carolina's general policy in favor of enforcement of contracts is not sufficiently well-defined or fundamental to justify withholding comity, and that respecting the UK court judgment would not be so repugnant to public policy that the judgment should be denied effect.

ARGUMENT

I. COURTS SHOULD LOOK TO FEDERAL LAW WHEN DECIDING WHETHER TO AFFORD COMITY TO FOREIGN-COURT JUDGMENTS

This Court set the legal standards for recognizing the judgments of foreign courts in *Hilton* v. *Guyot*, 159 U.S. 113 (1895). Under *Hilton*, U.S. courts recognize and defer to foreign-court judgments as a matter of "the comity of this nation" towards other nations. *Id.* at 163-164, 202-203. Although comity is not an "absolute obligation," it is observed unless certain exceptions apply, including where the judgment is "contrary to the policy or prejudicial" to the interests of the United States. *Id.* at 163-164, 233.

As conceived in *Hilton*,[5] the comity to be extended to foreign-country judgments was a matter of national importance, to be guided by federal and international law, and with due consideration of national policies and interests. However, since *Erie Railroad Co.* v. *Tomkins*, 304 U.S. 64 (1938), a majority of federal courts has concluded that they must follow state law when determining whether to afford deference to foreign-court judgments, at least so long as the court is exercising diversity jurisdiction.[6] See, *e.g.*, *Somportex Ltd.* v. *Philadelphia Chewing*

[5] *Hilton* was a diversity case, although it preceded the Court's ruling in *Erie Railroad Co.* v. *Tomkins*.

[6] Here, it appears both supplemental and diversity jurisdiction applied. As petitioner notes, Plaintiff asserted copyright claims in both

Gum Corp., 453 F.2d 435, 440-441 (3d Cir. 1971) (applying Pennsylvania law because jurisdiction was based on diversity); *Svenska Handelsbanken* v. *Carlson*, 258 F. Supp. 448, 450-451 (D. Mass 1966) (citing *Erie*, 304 U.S. at 64) (concluding that "Massachusetts rather than federal law" governed effort to recover on Swedish judgment). But see *Tahan* v. *Hodgson*, 662 F.2d 862, 864-868 (D.C. Cir. 1981) (applying *Hilton* in a diversity case and concluding that "notwithstanding *Erie*," reciprocity "seems to be [a] national rather than state [issue]"); *Evans Cabinet Corp.* v. *Kitchen Int'l, Inc.*, 593 F.3d 135, 141-142 (1st Cir. 2010) (noting that the issue of whether federal or state law applies "has not been decided definitively in this circuit").

The decision whether to give domestic effect to foreign-court judgments is a question of national concern and requires a uniform national rule, no less than other instances of potential conflict between two nations. In the absence of a uniform federal rule of recognition—flowing from a dedication to international comity—application of varying state laws inevitably leads to divergent results and frustrates U.S. foreign policy.

A. Enforcement of foreign-court judgments is a national issue

The respect shown to foreign judgments is, by its nature, part of the relationship between the United States and foreign governments. John B. Bellinger III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 Va. J. Int'l L. 501, 519 (2014) ("[I]t is indisputable that the recognition of a foreign country's judgment in the United States is an

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the United Kingdom and United States. Although those claims were not the basis for the judgment below, see Pet. 3, they provide additional federal interests supporting the application of federal law. See *id.* at 23-24.

aspect of the foreign relations * * * and part of the foreign policy of the United States."). At its core, the decision is whether to honor the official action of a foreign sovereign, rendered after a deliberative proceeding by a foreign court. Thus, "recognition and enforcement of foreign judgments is and ought to be a matter of national concern." American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute 3 (2006).

Under our Constitution, such matters, implicating "important and uniquely federal interests," Bellinger & Anderson, *supra*, at 519, are inherently within the federal government's domain. See, *e.g.*, U.S. Const. art. I, § 8 (granting Congress the power to "regulate commerce with foreign nations"); *id.* § 10 (denying certain foreign relations powers to States); *id.* art. II, § 1 (vesting the "executive power" in the President); *id.* §§ 2-3 (identifying certain limited foreign affairs powers of the executive branch). Thus, this Court consistently prohibits the States from intruding "into the field of foreign affairs which the Constitution entrusts to the President and the Congress." *Zschernig* v. *Miller*, 389 U.S. 429, 432 (1968) (citing *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941));[7] see also *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964) ("[O]rdering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.").

B. Applying state law leads to inconsistent results

A uniform federal rule is also necessary because the

[7] Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1662 n.198 (1968) ("The [decision in *Zschernig*] suggests that for state courts to consider [the integrity of foreign courts] may be an improper intrusion on the federal power over foreign relations.").

"comity of this nation" is undermined by the discordant results that application of state law necessarily produces. International law presumes that countries act at the *national* level, and for that reason, "rules of international law should not be left to divergent and perhaps parochial state interpretations." *Sabbatino*, 376 U.S. at 425. Thus, in *Sabbatino*, despite *Erie*, the Court determined that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated *exclusively* as an aspect of *federal* law." *Ibid.* (emphasis added). Anything less infringes the federal government's ability to speak with one voice on behalf of the Nation, and makes it concomitantly difficult for foreign entities and nations to predict whether their judgments will be enforced. It also at least risks undermining U.S. judgments, and the work of the integrated federal-state American judicial system, as foreign countries may refuse to enforce U.S. judgments with the regularity that is currently common, on the basis that their own judgments are not enforced (or not reliably enforced) due to the seemingly haphazard application of state law.[8]

Commentators have observed important differences in the treatment of foreign judgments because of the application of state-law standards to these issues. This case illustrates one example. To the extent courts are willing to deny comity based on vague public policies like favoring the enforcement of contracts (and on so general a

[8] For example, "in Germany, reciprocity is firmly established as a prerequisite for the recognition of foreign money judgments." Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 Berkeley J. Int'l L. 175, 186 (2005) (citing Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 328(1)(5) (Ger.)).

level, who *doesn't* support such a principle?), deference to foreign-court judgments will inevitably depend on *which State* supplies those public policies. See Pet. 16 (listing divergent state public policies on which courts have denied comity).

Other examples of differences among state-law standards include: (i) whether States require "reciprocity" as a condition to enforcement; (ii) the availability of declaratory relief; (iii) the effect of a default judgment; (iv) the preclusive effect of a foreign judgment; (v) procedures for enforcement; and (vi) limitations periods. Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, in Foreign Court Judgments and the United States Legal System 101, 105, 114 (Paul B. Stephan ed., 2014). These differences persist despite attempts by some states to achieve uniformity through the passage of the Uniform Foreign Money Judgments Recognition Act of 1962 or the Uniform Foreign Money Judgments Recognition Act of 2005. *Id.* at 102-104 (noting that 14 States have adopted the 1962 Act, and 18 states and the District of Columbia have adopted the 2005 Act, with the remaining States leaving the issue to common law).[9]

Differences among state laws can result in duplication of enforcement proceedings in an attempt to circumvent forums that are less friendly to enforcement. For example, recognition may not be available under state law in

[9] Since Professor Silberman published her article, New Jersey also enacted the 2005 act, bringing the total to 19 states. Foreign Country Money Judgments Recognition Act of 2015, 2017 N.J. Laws 365. New Jersey, like other States, did not adopt the Uniform Act without alteration. For example, New Jersey directs courts to consider whether foreign judicial processes meet "standards developed by the American Law Institute and the International Institute for the Unification of Private Law to govern resolution of transnational disputes." N.J. Stat. § 2A:49A-16.4(b)(1).

the State in which assets exist. The judgment creditor may then bring the recognition action in another State, and subsequently seek to obtain recognition and enforcement of *that* judgment under the Full Faith and Credit Clause back in the State where assets are located. See, *e.g.*, *Standard Chartered Bank* v. *Ahmad Hamad Al Gosaibi & Brothers Co.*, 99 A.3d 936, 940-946 (Pa. Super. 2014) (recognizing a New York judgment that had recognized a Bahraini judgment); *Ahmad Hamad Al Gosaibi and Brothers Co.* v. *Standard Chartered Bank*, 98 A.3d 998, 1003-1008 (D.C. Ct. App. 2014) (refusing to grant Full Faith and Credit recognition to the same New York judgment). The resulting back-door approach to obtaining effective recognition of a foreign judgment unnecessarily increases litigation costs, imposes duplicative judicial burdens, and results in divergent judicial decisions. See Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 Col. J. Transnat'l L. 277, 299-308 (2017).

C. Applying state law creates foreign-policy issues

The application of non-uniform state law to issues of foreign judgment recognition also risks the disruption of U.S. foreign policy.

First, the defenses available to resist recognition or enforcement of foreign judgments may themselves cause affront to foreign nations. Silberman, *supra*, at 110. For example, recognition may be refused on the basis of determinations regarding the integrity of foreign judicial systems. That such decisions may be made under state law "is likely to generate foreign relations concerns." *Id.* at 111. In addition, there is the potential for States to reach "conflicting conclusions about the judicial systems of the same foreign country." Bellinger & Anderson, *supra*, at 519 ("[T]he patchwork of state laws allows judges in different states to determine—without any consultation with the federal government or reference to federal

standards—whether foreign judicial systems or specific judicial proceedings are corrupt or lacking in due process.").

Second, the United States cannot credibly negotiate international treaties where it appears to lack the authority to implement them. Foreign countries have significantly diminished incentives to negotiate with the United States if they perceive that important issues surrounding recognition are subject to state rather than federal authority. See Ronald A. Brand, *Implementing the 2005 Hague Convention: The EU Magnet and the US Centrifuge*, in Liber Amicorum Alegria Borras 267, 276 (Joaquim Joan Forner Delaygua, Cristina González Beilfuss, & Ramon Viñas, eds. 2013) (discussing problems with the negotiation and implementation of treaties developed at the Hague Conference on Private International Law).

Certiorari is warranted here to determine whether the national interests at stake in enforcement of foreign judgments, particularly in the context of copyright claims, place this issue outside of *Erie*'s command to apply state law in diversity-jurisdiction cases. A federal statute would certainly be one way to clarify the application of federal law, and some of these *amici* have called for such a statute.[10] *Amici* also recognize that adopting a federal standard here would constitute a departure from the *status quo* and reduce the effect of state efforts to resolve these issues through adoption of either the 1962 or 2005 Uniform Act. Nevertheless, the constitutional and judicial-management concerns here present a pressing question of federal common law that, as in *Sabbatino*, should be clarified by this Court subject to modification

[10] See Silberman, *supra*, at 112-117; Bellinger & Anderson, *supra*, at 537-543; ALI, Recognition and Enforcement of Foreign Judgments, *supra*, at 1-6.

by Congress if necessary. Allowing the current state of affairs to continue without *any* national voice is unacceptable, and for that reason, this Court should grant the petition and resolve the questions presented.

II. Regardless Of The Source Of Public Policy, International Comity Requires Deference To Foreign-Court Judgments Unless They Are Repugnant To A Well-Defined, Fundamental Policy

Regardless of whether federal or state law supplies the public policies on which enforcement may be denied, the federal international-comity considerations outlined in *Hilton* require more than a cursory reference to a vague or highly generalized public policy that opposes enforcement. Rather, courts should refuse to afford comity only where the judgment or legal theory upon which it rests is repugnant to a clearly articulated and fundamental public policy.

Under *Hilton*, a foreign judgment is "prima facie evidence, at least, of the truth of the matter adjudged," and "held conclusive upon the merits tried in the foreign court *unless some special ground is shown* * * * that, by the principles of international law and by the comity of our own country, it should not be given full credit and effect." *Hilton*, 159 U.S. at 206 (emphasis added). See also *id.* at 233 (Fuller, C.J., dissenting as to the majority's reciprocity holding) ("[T]he rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done.") (emphasis added).

This presumption in favor of comity applies with even greater force where, as here, the foreign-court action was brought by a U.S. party that now seeks to resist the effect of that judgment. See *id.* at 170 (maj. op.) (noting

that certain cases are more conducive to recognition, including where "a citizen [like SAS] sues a foreigner [like World Programming], and judgment is rendered in favor of the latter"); Ronald A. Brand, *Understanding Judgments Recognition*, XL N.C. J. Int'l L. & Com. Reg. 877, 899 (2015) (noting that *Hilton* assumed recognition of "judgments in which a citizen of the forum state sued a foreigner and the judgment was rendered in favor of the foreigner").

Applying *Hilton*'s presumption in favor of enforcement, courts have concluded that comity should be granted unless the judgment or claim is "'*repugnant to fundamental notions of what is decent and just* in the State where enforcement is sought.'" *De Csepel* v. *Republic of Hungary*, 714 F.3d 591, 606 (D.C. Cir. 2013) (emphasis added) (quoting *Tahan*, 662 F.2d at 864); see also Restatement (Third) of Foreign Relations Law § 482(2)(D) cmt. f (Am. Law Inst. 1987). Thus, the current draft of the American Law Institute's Fourth Restatement of the Law states, "to the extent provided by applicable law, a court in the United States need not recognize a judgment of a court of a foreign state if * * * the judgment * * * is repugnant to the public policy of the State in which recognition is sought or of the United States." Restatement of the Law (Fourth): The Foreign Relations Law of the United States Jurisdiction 81 (Am. Law. Inst., Tentative Draft No. 3, 2017). See also ALI, Recognition and Enforcement, *supra*, at 55-56 (§ 5(a)(vi)) (proposing an exception to recognition of foreign judgments where the judgment or claim is repugnant to the public policy of the United States, or a State, where the relevant legal interest is regulated by state law).

This narrow reading of public policy is consistent with courts' understanding in related contexts. For example, in arbitration cases, the public-policy defense is "'construed very narrowly' to encompass only those circum-

stances 'where enforcement would violate our most basic notions of morality and justice.'" *Telenor Mobile Commc'ns AS* v. *Storm LLC*, 584 F.3d 396, 411 (2d Cir. 2009) (quoting *Europcar Italia S.p.A.* v. *Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998)); see also *Belize Bank Ltd.* v. *Gov. of Belize*, 852 F.3d 1107, 1111 (D.C. Cir. 2017) (construing the public-policy defense narrowly and applying it "only where enforcement would violate the [United States'] most basic notions of morality and justice") (alteration in original) (quoting *TermoRio S.A. E.S.P.* v. *Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007)); *Am. Postal Workers Union, AFL-CIO* v. *U.S. Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986) ("[T]his rule, which is sometimes referred to as a public policy exception, is *extremely narrow*.") (emphasis in original). So as to avoid providing a blank check to deny comity, the asserted public policy must be "'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Asignacion* v. *Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1016 (5th Cir. 2015) (quoting *United Paperworkers Int'l Union, AFL-CIO* v. *Misco, Inc.*, 484 U.S. 29, 43 (1987)).

Here, the Fourth Circuit failed to identify any well-defined, fundamental federal or state policy that would be frustrated by recognition of the United Kingdom judgment. Instead, the court below referred to general public policies in favor of "protection of intellectual property" and "sanctity of contract." Pet. App. 11a. But neither the United States nor North Carolina protect *all* intellectual property, nor do they enforce *all* contracts. If courts can deny recognition on the basis of minor frustrations to such general policies, international comity loses its cohesive force. The Court should take this opportunity to clarify that the federal interest in international com-

ity requires more than a passing reference to a countervailing public policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

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