Nos. 22-381, 22-383

IN THE

Supreme Court of the United States

ASHOT YEGIAZARYAN,
Petitioner,

v.

VITALY SMAGIN, et al.,
Respondents.

CMB MONACO, FKA COMPAGNIE MONÉGASQUE DE BANQUE,
Petitioner,

v.

VITALY SMAGIN, et al.,
Respondents.

On Writs of Certiorari To the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a foreign-domiciled plaintiff states a domestic injury to property under civil RICO by alleging that he cannot collect from abroad on a foreign award reduced to judgment in the United States.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF often appears as an amicus before this Court to argue against the extra-territorial application of American law. *See, e.g.*, *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

WLF has long insisted that the reflexive invocation of RICO by civil litigants in garden-variety commercial disputes undermines the statute's purpose and unduly burdens the judiciary. Although Congress enacted RICO as a tool for combating America's organized crime, civil RICO is routinely invoked in "everyday fraud cases brought against respected and legitimate enterprises." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). Among the many novel expansions of RICO's reach, none are more abusive than efforts by far-flung foreign plaintiffs to bring overseas civil disputes into American courts.

WLF agrees with petitioners that when applying *RJR Nabisco*'s foreign-injury bar, this Court should hold that any economic injury to respondent was foreign because he was domiciled

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* No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, contributed money for preparing or submitting this brief.

abroad when allegedly injured. We write separately to emphasize the damage to both the rule of law and our civil-justice system that would occur were this Court to affirm the Ninth Circuit's unwarranted dilution of RICO's domestic-injury requirement.

STATEMENT

Petitioner Ashot Yegiazaryan is a former Russian politician and businessman who lived in Russia until 2010, when he fled the Russian government for California. Pet. App. 5a. Respondent Vitaly Smagin is a Russian citizen who was domiciled in Russia at all relevant times. *Id.* at 4a.

This case arises from Yegiazaryan and Smagin's failed 2003 "Europark" real-estate venture in Moscow. Pet. App. 27a. In 2010, long after their joint venture had unraveled, Smagin commenced arbitration against Yegiazaryan in the London Court of International Arbitration. *Id.* at 5a. In 2014 the panel awarded Smagin $84 million. *Id.* Smagin then confirmed that award against Yegiazaryan in the Central District of California, which entered judgment for $92 million. *Id.*

Alleging that Yegiazaryan schemed to evade collection efforts on the California judgment by shuffling his assets among foreign banks, Smagin sued Yegiazaryan and one of those banks, foreign-based petitioner CMB Monaco, in California federal court under civil RICO. Pet. App. 6a. The complaint sought treble damages for alleged injury to Smagin's judgment—an intangible asset. *Id.* Applying *RJR Nabisco*'s foreign-injury bar, the district court dismissed Smagin's complaint. *Id.* at 31a. The court

found that because Smagin was domiciled abroad at all relevant times, any injury to Smagin's judgment occurred outside the United States, where civil RICO does not reach. *Id.* at 27a.

The Ninth Circuit reversed. Pet. App. 4a. Expressly splitting from the Seventh and Third Circuits, which hold that foreign plaintiffs like Smagin cannot state RICO claims for economic harms to domestic judgments, the panel reasoned that despite Smagin's foreign domicile, the California judgment and some of Yegiazaryan's conduct was domestic. *Id.* at 10a–11a. Based on those contacts, the court held that any RICO injury to Smagin was also domestic. *Id.*

The Ninth Circuit denied rehearing en banc, Pet. App. 32a, and this Court granted certiorari.

SUMMARY OF ARGUMENT

RJR Nabisco recognized several distinct problems that accompany the extraterritorial application of American law. Its foreign-injury bar tries to ensure that our legal system avoids these problems when applying civil RICO. Yet if the Ninth Circuit's elastic balancing approach suffices to establish domesticity for foreign judgment creditors domiciled abroad, all those problems will return in spades.

To be entitled to a private remedy under civil RICO, a plaintiff "must allege and prove a domestic injury." *RJR Nabisco*, 579 U.S. at 354. *RJR Nabisco*'s foreign-injury bar serves many important purposes. Among other things, it ensures that our

courts respect other nations' sovereign interests, avoids unnecessary clashes with other nations over public policy, upholds the presumption against extraterritorial application of American law, and adheres to the bar on expanding private rights of action from the bench.

Embracing the Ninth Circuit's rule would imperil each of these principles. It would offend other nation's sovereign interests by applying American law to remedy injuries suffered overseas by foreigners. It would subject foreign banks and foreign citizens to the vagaries of America's novel and sometimes controversial legal system. It would circumvent the longstanding presumption against extraterritoriality by inviting a flood of foreign judgment creditors and arbitration-award holders to American courts to convert those awards into treble-damages RICO windfalls. And it would ignore the separation of powers, under which the legislature, not the judiciary, decides what is wrongful, when it should be actionable in court, and who may sue over it.

Even when cabined to wholly domestic matters, civil RICO is uniquely prone to abuse. RICO is notorious for its elasticity and for enabling plaintiffs to convert ordinary civil disputes into federal racketeering claims. And RICO provides for treble damages and recovery of all costs and attorney fees for prevailing plaintiffs. Armed with the loss of goodwill and reputation that often follows news that a defendant has been accused of "racketeering" activity, a dogged civil-RICO plaintiff can extract settlements for even the most frivolous claims. Given this reality, adopting the Ninth Circuit's elastic test

for what qualifies as a domestic injury under RICO would only fan the flames of civil-RICO abuse.

ARGUMENT

I. THIS LAWSUIT BRINGS ALL THE PROBLEMS THAT ACCOMPANY THE EXTRATERRITORIAL APPLICATION OF U.S. LAW.

A. Foreign States' Sovereign Interests

"Other nations" have "legitimate sovereign interests." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). That being so, is it "reasonable to apply [our] laws to foreign conduct" that causes only "foreign harm"? *Id.* at 165. "Why should American law supplant, for example," Monaco's, Great Britain's, or Russia's "own determination about how best to protect" their citizens and their interests? *Id.* Generally, the answers to these questions are "no" and "it shouldn't." *See id.* at 166.

If American courts were to apply RICO to redress economic injuries suffered outside its borders, it could infringe on the sovereign interests of other nations. This could strain diplomatic relations between those nations and the United States. To avoid such friction, principles of prescriptive comity require American courts to respect the regulatory and enforcement schemes that other nations prefer and the policy judgments they embody. *See Empagran*, 542 U.S. at 169 (when American "policies could not win their own way into the international marketplace for such ideas, Congress, we must assume, would not have tried to

impose them in an act of legal imperialism, through legislative fiat").

Respecting the laws other nations have adopted for their citizens not only guards against hostile foreign reactions to the decisions of American courts but also benefits the larger international community by promoting reciprocity in foreign tribunals. *See N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 29 (1925) (observing that "interference with the authority of another sovereign, contrary to the comity of nations" may breed resentment); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("The expansion of American businesses and industry will hardly be encouraged if * * * we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.").

Suits by foreign-domiciled plaintiffs for economic injuries suffered overseas belong in foreign courts. Foreign nations have a greater interest in regulating the conduct at issue in such cases. To allow these suits to proceed in our courts is to trample on those nations' superior claims to jurisdiction and to sow international discord. Yet respondent brings—and the Ninth Circuit blesses—just such a suit. This Court should reject respondent's invitation to risk sowing international discord.

B. Foreign States' Public Policy

Exercising civil-RICO jurisdiction over actions that belong abroad is bad not simply because it disregards foreign interests in an abstract sense (though it does, and the consequences of its doing so

are dire). It is also bad because other countries have reasonable legal objections to policies that underlie our legal system and our laws. Easier access to U.S. courts would give foreign plaintiffs American procedural advantages (discovery, jury trials, and contingent-fee arrangements) that are simply unavailable, if not undesirable, in their home jurisdictions.

Our scheme of private civil legal enforcement is far from universal. Europe, for its part, generally prefers to enforce the law through "state actions, not private ones, directed at imposing administrative or criminal sanctions." Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 Tul. J. Int'l & Comp. L. 5, 9 n.18 (2002).

What's more, our system of private enforcement is made uniquely cumbersome, expensive, and acrimonious by how our litigation is bankrolled. We impose the "American Rule" for attorneys' fees, allow contingency fee agreements, and tolerate champerty. These practices are not international norms. *See* Br. of the United Kingdom of Great Britain & Northern Ireland as Amicus Curiae in Support of Respondents, at 9–11, *Morrison v. Nat'l Australia Bank*, No. 08-1191, 2010 WL 723009 (U.S. Feb. 25, 2010).

Nothing like civil RICO, with its breadth—both in terms of the sheer number of predicate offenses and the broad range of RICO's conspiracy provisions—and the staggering allure of treble damages, exists in other countries. The rest of the world has made different regulatory and legal-policy

choices than the United States. We should respect those choices.

C. The Presumption Against Extra-territoriality

The problems that come with trying to impose our laws on foreign events and foreign parties are not new. It has long been understood that "United States law governs domestically but does not rule the world." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007). A federal law thus applies extraterritorially only if Congress explicitly says so. *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020) ("We presume that statutes do not apply extraterritorially to ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.").

When it passed civil RICO, Congress did not expect that an injury to intangible property could be suffered anywhere besides where the plaintiff is domiciled. That is because absent "other indication," Congress "intends to incorporate the well-settled meaning of the common-law terms it uses" in statutes. *United States v. Castleman*, 572 U.S. 157, 162 (2014) (cleaned up). RICO is not exempt from this venerable interpretative canon. *Beck v. Prupis*, 529 U.S. 494, 504 (2000) ("Congress meant to incorporate common-law principles when it adopted RICO."); *see also Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992) (importing the common law's proximate-cause test to determine whether a civil-RICO plaintiff was injured "by reason of" the alleged fraud).

At common law, Joseph Story confirms, "the right and disposition of moveable[] [property] is to be governed by the law of the domicil[e] of the owner, and not by the law of their local situation." Joseph Story, *Commentaries on the Conflict of Laws* § 376 (1834). Under this "old concept of '*mobilia secquuntur personam*,' * * * intangible personal property is found at the domicile of its owner." *Texas v. New Jersey*, 379 U.S. 674, 681 n.10 (1965). This "maxim [was] so fixed in the common law of this country and England, in so far as it relates to intangible property, * * * that it must be treated as settled." *Blodgett v. Silberman*, 277 U.S. 1, 9–10 (1928).

This common-law rule was still in force when Congress enacted RICO more than 50 years ago. As Judge Friendly recognized in 1973, purely economic injuries were "deemed to be suffered where its economic impact is felt, normally the plaintiff's residence." *Sack* v. *Low*, 478 F.2d 360, 366 (2d Cir. 1973). And it remains the only sensible rule to this day. *See, e.g., Armada (Sing.) PTE Ltd. v. Amcol Int'l Corp.*, 885 F.3d 1090, 1094 (7th Cir. 2018) ("It is well understood that a party experiences or sustains injuries to its intangible property at its residence."). Here, everyone agrees that respondent was domiciled overseas at all relevant times. Seeing no "other indication" in RICO's text to abrogate the well-settled common-law rule that an economic injury occurs at the plaintiff's domicile, the Court should hold that a civil-RICO plaintiff suffers injury to his intangible property where he is domiciled.

D. The Bar On Expanding Private Rights Of Action From The Bench

Although Congress created a private right of action under RICO for remedying domestic injuries, 18 U.S.C. § 1964(c), "[n]othing in § 1964(c) provides a clear indication that Congress intended to create a private right of action for injuries" to intangible property "suffered outside the United States." *RJR Nabisco*, 579 U.S. at 349. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Courts may not imply a remedy for injuries that Congress did not expressly redress in the statute. These "[c]oncerns with the judicial creation of a private cause of action caution against its expansion." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 165 (2008).

When a court expands the reach of a "claim for damages on the ground that doing so furthers the 'purpose' of the law, the court risks arrogating legislative power." *Hernandez*, 140 S. Ct. at 741 (2020). This Court has been careful to guard against such expansion. *See RJR Nabisco*, 579 U.S. at 349–52; *Morrison*, 561 U.S. at 261 & n.5. As *RJR Nabisco* reminds, allowing a "private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct." *RJR Nabisco*, 579 U.S. at 346–47.

Any argument that § 1964(c)'s private right of action should be expanded to cover injuries to intangible property suffered abroad—the attendant

risks to comity, foreign states' public policy, and the presumption against extraterritoriality be damned—must be taken to Congress. "Congress is available to make any policy decisions that are required." *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987). Respondent's alternative approach, trying to persuade the judiciary to slip foreign disputes into American courts case-by-case, must fail.

II. CIVIL RICO IS UNIQUELY PRONE TO ABUSE, AND DILUTING THE FOREIGN-INJURY BAR WOULD MAKE MATTERS WORSE.

Though Congress enacted RICO as a novel tool for combating organized crime, civil RICO is rarely used for that purpose. Instead, most civil-RICO suits target ordinary business activities that would not fit most people's definition of "racketeering." And because courts have consistently construed RICO's text so broadly, civil-RICO claims now arise in disputes that Congress did not intend for the statute to cover. Opening civil RICO to foreign judgment creditors seeking a treble-damages payday in U.S. courts would stray even farther afield from Congress's purpose.

"Through innovative lawyering," the basis for civil-RICO claims have run the gamut, "including sexual harassment, the 1986 air strike on Libya, mismanagement of hazardous waste sites, anti-abortion protest activities, a parishioner's grievances against her former church, a strict products liability suit involving defective infant formula, and a wrongful-discharge action." Petra J. Rodrigues, *The Civil RICO Racket: Fighting Back with Federal Rule of Civil Procedure 11*, 64 St. John's L. Rev. 931, 936–37 (1990).

RICO's allure for private plaintiffs and their attorneys is not hard to grasp. RICO applies not only to individuals but also to corporations, and it promises treble damages and full recovery of costs, including attorney fees, to prevailing plaintiffs. *See Sedima,* 473 U.S. at 504 (Marshall, J., dissenting) ("RICO is out of control not only because it is so easy to claim grounds for a suit, but because the appeal of treble damages plus legal fees has proved irresistible for plaintiffs and their lawyers."). And RICO's liberal venue provision, which allows for suit in any district in which the defendant "resides, is found, has an agent, or transacts his affairs," 18 U.S.C. § 1965(a), allows a civil-RICO plaintiff to effectively shop for a forum of her choosing.

In criminal settings, RICO's proclivity for abuse is at least constrained by prosecutorial discretion. But RICO's civil remedy is constrained by no such discretion. No wonder, then, that civil RICO is seen as "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). Given the statute's remarkable breadth and generous remedies—and given how easily a motivated plaintiffs' attorney can bring everyday business activities under its ambit—civil RICO is an invitation for *in terrorem* suits.

"Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations." Robert K. Rasmussen, *Introductory Remarks & a Comment on Civil RICO's Remedial Provisions*, 43 Vand. L. Rev. 623, 626 (1990). Civil-RICO plaintiffs (and their attorneys) can leverage the disastrous public-

relations impact of RICO's title to force settlements from firms that, understandably, fear the loss of goodwill and reputation that would accompany news of alleged "racketeering" activity. Simply put, the "danger of vexatiousness" is off the charts in civil-RICO suits. *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987).

What's more, data suggests that private plaintiffs routinely file RICO lawsuits for alleged "racketeering" that federal prosecutors see no reason to pursue. Between 2001 and 2006, for example, plaintiffs brought "an average of 759 civil-RICO claims" each year. Nicholas L. Nybo, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 Roger Williams U. L. Rev. 19, 24 (2013). Yet during that same stretch of time, "a paltry average of 212 criminal RICO cases were referred to the United States Attorney's Office." *Id.* Similarly, a 2002 study found that, of all RICO cases decided by federal appellate courts between 1999 and 2001, 78% were civil and only 22% were criminal. Pamela H. Busy, *Private Justice*, 76 S. Cal. L. Rev. 1, 22 & n.111 (2002). Even when properly focused on purely domestic injuries, civil RICO is uniquely prone to abuse.

No surprise, then, that judges and legal scholars have routinely criticized civil RICO's overly expansive reach for giving "many ordinary civil cases" an "entrée to federal court." Anne B. Poulin, *RICO: Something for Everyone*, 35 Vill. L. Rev. 853, 857 (1990); *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471–72 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is

undesirable is widespread."); William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 13 (1989) (inviting "amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court").

In short, affirming the decision below will unleash foreign litigation into the United States, where it does not belong. Allowing foreign plaintiffs to "domesticate" foreign injuries by simply confirming foreign arbitration awards in U.S. courts as the basis for civil-RICO claims would not only erode the bar against applying U.S. law extraterritorially but also amplify the burden on the federal courts, impose higher litigation costs on multi-national businesses, and force defendants into coercive settlements. The Court should decline respondent's invitation to dilute RICO's domestic-injury requirement and instead hold that a foreign-domiciled plaintiff cannot suffer a domestic injury to intangible property.

CONCLUSION

The Court should reverse.

Respectfully submitted,

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