Nos. 22-381 and 22-383

IN THE

Supreme Court of the United States

ASHOT YEGIAZARYAN, AKA ASHOT EGIAZARYAN,

Petitioner,

—v.—

VITALY IVANOVICH SMAGIN, ET AL.,

Respondents.

CMB MONACO, FKA COMPAGNIE MONÉGASQUE DE BANQUE,

Petitioner,

—v.—

VITALY IVANOVICH SMAGIN, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PROFESSOR GEORGE A. BERMANN IN SUPPORT OF RESPONDENT VITALY IVANOVICH SMAGIN

ANDREAS FRISCHKNECHT
Counsel of Record
JAMES HOSKING
DAVID S. BLACKMAN
CHAFFETZ LINDSEY LLP
1700 Broadway, 33rd Floor
New York, New York 10019
(212) 257-6960
andreas.frischknecht@chaffetzlindsey.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of European Union Law, Walter Gellhorn Professor of Law, and Director of the Center for International Commercial and Investment Arbitration at Columbia Law School. He has been a faculty member at Columbia Law School since 1975, and both teaches and writes extensively on international arbitration, transnational litigation, European Union Law, and comparative law. He is also an affiliated faculty member of both the MIDS Masters Program in International Dispute Settlement in Geneva and the International Dispute Resolution LLM Program at the School of Law of Sciences Po in Paris.

For more than four decades, Professor Bermann has been an active international arbitrator in commercial and investment disputes. He is the Chief Reporter of the American Law Institute's ("ALI's") *Restatement of the U.S. Law of International Commercial and Investor-State Arbitration* (Am. Law. Inst., Proposed Final Draft 2019), a project that began in 2007 and was completed in 2019. He is also co-author of the *UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* chair of the Global Advisory Board of the New York International Arbitration Center, co-editor-in-chief of the *American Review of International Arbitration,* and a founding member of

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief. No counsel for a party in this case authored this brief in whole or in part. No one other than *amicus curiae* or his counsel contributed monetarily to the preparation and submission of this brief.

the International Chamber of Commerce Court of Arbitration's Governing Body.

Professor Bermann frequently participates as *amicus curiae* in cases before the Court, addressing questions involving private international law, including international arbitration. He is interested in this case because it presents an important question with implications for a significant federal statute's interaction with the regime for the enforcement of arbitral awards across borders. As a leading member of the arbitration community in the United States and internationally, Professor Bermann has an interest in ensuring that U.S. courts correctly interpret and apply Civil RICO (as hereinafter defined) in the context of an alleged conspiracy to frustrate enforcement of an international arbitration award in the United States.

SUMMARY OF ARGUMENT

This case raises the important question of how an arbitral award is to be made effective when the losing party not only refuses to pay the award and the judgment enforcing it, but also actively thwarts the prevailing party's ability to execute on that judgment by dissipating its assets, thus disabling the prevailing party from obtaining the compensation to which it is entitled.

In this case, Respondent Vitaly Ivanovich Smagin ("Smagin") obtained an award in a London-seated arbitration against Ashot Yegiazaryan ("Yegiazaryan"), which the latter failed to pay. Smagin took the action contemplated by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or the "Convention"), June 10, 1958, 21 U.S.T. 2517; 9

U.S.C. § 201, by bringing that award to a federal district court in California, where Yegiazaryan had assets, in order to have it "enforced," *i.e.*, reduced to judgment by a court in that state. Because Yegiazaryan still failed to pay, Smagin's only recourse was to have the judgment of enforcement itself "executed," *i.e.*, given effect through the actual relief (*e.g.*, attachment of assets) to which he was entitled.

However, Yegiazaryan, allegedly assisted by Petitioner CMB Monaco, then proceeded to frustrate execution of the judgment by transferring all of his assets to affiliate entities not themselves subject either to the award, the judgment of enforcement, or execution of the judgment. He allegedly did so through a pattern of illegal conduct prohibited by the Racketeer-Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq*. The sole purpose and effect of Yegiazaryan's conduct was to deprive Smagin of his rights as the prevailing party in an international arbitration. If this conduct is allowed to stand unredressed, not only will injustice be done to Smagin, but also, very serious damage will be done to the system of international arbitration upon which the efficacy of international commercial transactions depends. Thus, the damage inflicted by Yegiazaryan's pattern of conduct reflects not only defiance of both the rulings of an international arbitral tribunal and the judgment of a U.S. federal court, but also defiance of the treaty-based international arbitral regime of which the New York Convention is an integral part, and to which the United States is fully committed.

Petitioners essentially argue that Smagin should be denied access to the private right of action under RICO, 18 U.S.C. § 1964(c) ("Civil RICO"), because, they say, he lacks standing under the RICO statute. Specifically, Petitioners contend, Smagin suffered no

"domestic injury," as required under this Court's ruling in *RJR Nabisco, Inc.* v. *European Community*, 579 U.S. 325 (2016). They base this contention on the ground that the place of injury is the plaintiff's place of domicile.

Consistent with *amicus*' particular areas of expertise in international arbitration and conflict of laws, this brief deals exclusively with those aspects of the present case. It does not address the disputed RICO-specific question of whether the provision creating a private right of action, 18 U.S.C. § 1964(c), provides redress only for "an economic injury suffered by the plaintiff," or also for injury to the plaintiff's "business or property," as appears to be an issue in this case. Petitioners' Br. at 21; *see also* Respondent's Br. at 25. Instead, this brief assumes, for the sake of argument only, that 18 U.S.C. § 1964(c) permits recovery only for pure economic injury.

This brief successively addresses three main questions: (i) whether California or Russia is the place where the alleged injury in this case occurred; (ii) whether California or Russian law is the law that would be applicable to the merits of the dispute were the issue before this Court the choice of law in claims sounding in tort; and (iii) whether invoking RICO in aid of the enforcement of an arbitral award is consistent with the international arbitration regime, and more particularly, the New York Convention.

In *RJR Nabisco*, this Court ruled that, in order for Civil RICO to apply, the place of alleged injury caused by the alleged RICO violation must be located in the United States. 579 U.S. at 354. In order to determine the place of injury, one must, of course, first identify the injury. Here, Smagin was entitled, following issuance and non-payment by Yegiazaryan

of the award rendered in his favor, to (a) payment of the California judgment Smagin obtained enforcing the award; and (b) execution of that judgment, if unpaid, against Yegiazaryan's assets in California. The injury in this case consisted precisely of (a) Yegiazaryan's alleged frustration of the California judgment; and (b) Yegiazaryan's alleged further frustration of Smagin's efforts to execute upon that unpaid judgment. The rights allegedly injured here thus consist of Smagin's right to payment of the California judgment enforcing the award and his right to execute against California assets to enforce that unpaid judgment. When both collection and execution of a California judgment are frustrated, the place of injury is California. It is not, as Petitioners contend, Russia, the place of Smagin's domicile.

Rather than directly identify the place of injury, within the meaning of RICO, Petitioners turn to general choice-of-law principles applicable to claims sounding in tort, as if the matter were a question of determining the applicable law in a tort case, rather than determining the applicability of RICO to the case at hand. Petitioners' Br. at 29–37.

However, even assuming the relevance to this case of choice-of-law principles in tort, Petitioners' identification and application of those principles are fundamentally flawed. Petitioners maintain that reference should be made to the rules found in the ALI's *Restatement (First) of Conflict of Laws* ("First Restatement"), according to which the law applicable in tort cases is the law of the tort victim's domicile. Their obvious purpose in localizing the alleged injury in Russia is to escape RICO on the ground that the alleged injury in this case is not domestic, as *RJR Nabisco* requires.

Petitioners ignore, however, that the First Restatement was superseded in full in 1971 by the *Restatement (Second) of Conflict of Laws* ("Second Restatement"). As further explained below, the Second Restatement fully repudiated its predecessor, flatly rejecting the notion that the law applicable in tort is necessarily the law of the victim's domicile. This position reflects the more general view taken by the Second Restatement that the law applicable to a given claim is not reducible to the law of a single predetermined jurisdiction, as under the First Restatement, without regard to the contacts the parties and the transaction may have with other jurisdictions.

Instead, the Second Restatement enshrined the principle that, for all categories of claims, the applicable law is the law of the jurisdiction having the most significant interest in the issue to be decided, and further, that the applicable law should be determined in accordance with a series of factors laid down, for each category of claim, in the Restatement itself. By following this essentially "multi-factor" approach, the Second Restatement distanced itself entirely from the First Restatement's attachment to fixed choice-of-law rules.

In sum, the conflict-of-laws rules invoked by Petitioners in the present case are shockingly outdated. To justify their application of a superseded Restatement, Petitioners suggest that the applicable choice of law in RICO cases must be determined by "the prevailing choice-of-law rules that were in operation at the time of RICO's . . . enactment" in 1970. Petitioners' Br. at 32. But there is no basis whatsoever for that proposition. It nearly goes without saying that, if a court chooses to be guided in its decision-making by a Restatement of Conflict of

Laws, it consults the Restatement in effect at the time it makes its decision.

Petitioners' avoidance of the Second Restatement is easily explained, since the jurisdiction with the strongest interest in this dispute is decidedly not Russia, but rather California. As the Court of Appeals below rightly found, the injury complained of in this case squarely occurred in California. *See* J.A. 6a–7a, 10a–11a. The district court that enforced the award in Smagin's favor was seated in California, and its judgment, rendered in California, not only remained unpaid, but was also denied execution as a result of Yegiazaryan's alleged RICO violations. The entitlements of which Smagin was deprived are all rooted in California.

The third and final question *amicus* addresses here is the relationship between RICO and the New York Convention. The Convention, to which both the United States (where Smagin sought to enforce the award) and the United Kingdom (where the award was rendered) are signatories, entitles an award creditor, absent a Convention defense, to enforcement of the award by the courts of any Convention State to which the award is brought for enforcement. The result is then a judgment of that court entitling the award creditor to the relief awarded to it by the arbitral tribunal. *See* 9 U.S.C. § 207. This case exemplifies what the New York Convention prescribes.

If an award debtor fails to pay the judgment enforcing the award, after also failing to pay the award, the award creditor is entitled to execution of the judgment. *See* 9 U.S.C. §§ 13, 208. Typically, execution takes the form of an attachment of the award debtor's assets located in the enforcing jurisdiction. *See, e.g.*, *TIG Ins. Co.* v. *Republic of*

Argentina, 967 F.3d 778, 780 (D.C. Cir. 2020) (litigating attachment of U.S. assets in aid of execution on judgments enforcing arbitral awards). Yegiazaryan allegedly frustrated execution of the judgment by engaging in a conspiracy, violative of RICO, to place Yegiazaryan's California assets beyond Smagin's reach, and that of the California federal court.

Making a RICO remedy available to an award and judgment creditor in such circumstances is entirely consistent with the international arbitration regime, of which the New York Convention is the centerpiece. As noted, the Convention places an obligation on courts of Convention States to enforce Convention awards in accordance with their terms. If an award debtor defies not only the award, but also the judgment of enforcement, the Convention's central purpose will be defeated.

Significantly, Article III of the Convention specifically provides for enforcement of an award according to the means provided for by the law of the place where enforcement is sought. Moreover, Article VII of the Convention entitles an award creditor to make use of any means other than the Convention that may be available to it under the law of that place. Resort to domestic remedies thus not only accords with the purposes of the New York Convention, but is specifically contemplated by it, and there is no reason not to count RICO as a domestic remedy under U.S. law. The efficacy of the Convention is altogether dependent on the availability of such a remedy when, as in the present case, an award (and judgment) debtor takes steps that render effective enforcement of an award impossible.

ARGUMENT

I. The Place of Injury in the Present Case, for Purposes of the RICO Statute's Scope of Application, Is California.

It is settled law under this Court's ruling in *RJR Nabisco* that recovery may be had under Civil RICO only if the injury complained of is a domestic one. 579 U.S. at 354 ("Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury . . . and does not allow recovery for foreign injuries.") The alleged injury in the present case plainly occurred in California and is accordingly fully domestic.

Due to Yegiazaryan's non-payment of an award rendered against him by a foreign arbitral tribunal, Smagin was constrained, as contemplated by the New York Convention, to bring an action for enforcement of that award in a jurisdiction, such as California, where assets belonging to Yegiazaryan were found. Although Smagin in that action won a judgment against Yegiazaryan for enforcement of the award, the latter refused to pay that judgment, much as he refused to pay the underlying award. J.A. 5a–6a. In that circumstance, Smagin was entitled under California law and the Federal Rules of Civil Procedure to execution of the judgment against Yegiazaryan's property in that jurisdiction. *See* Fed. R. Civ. P. 69. The rights whose enjoyment Yegiazaryan allegedly frustrated, and which Smagin accordingly lost as a result of Yegiazaryan's alleged RICO violations, thus are localized in California. Put differently, Smagin's injury consisted of his inability either to collect on a judgment rendered in his favor by a court in California, or to have that judgment executed against Yegiazaryan's California assets.

Because the injury complained of is an injury to those rights, the place of injury is California. The losses of which Smagin complains were, quite simply, sustained in California.

For this same reason, Petitioners' complaint that Smagin is seeking to invoke RICO extraterritorially is wholly unfounded. *See* Petitioners' Br. at 32–34. This Court made it plain in *RJR Nabisco* that RICO properly applies to injury occurring in the United States, as is the case here. 579 U.S. at 354. It cannot seriously be maintained that application of RICO to the present case is impermissibly extraterritorial.

In sum, because Smagin has alleged an injury sustained in California, California is the place of injury, and the requirement under RICO that the injury complained of be a domestic one is satisfied.

Because the injury alleged here is a domestic one, as required by *RJR Nabisco,* there is no need to examine further the territorial dimension of this case. However, Petitioners nevertheless seek to bar RICO's application here by reference to general conflict of laws principles applicable to cases sounding in tort. Petitioners' Br. at 32 (claiming "common-law conflicts rules [are] directly in-point."). *Amicus* seriously questions whether courts should look to tort choice-of-law principles to determine the applicability of RICO, when this Court has straightforwardly ruled that RICO is applicable in cases where the alleged injuries are domestic. However, *amicus* assumes, for the sake of argument, that general conflict-of-laws principles in tort are relevant, and explores in the next section Petitioners' use of them.

II. Petitioners' Assertion That the Court Should Apply the Conflict of Laws Principles Existing when RICO Was Enacted in 1970 Is Untenable.

To buttress their insistence that the place of injury in this case is Russia, Petitioners invoke the First Restatement of Conflict of Laws. Petitioners' Br. at 34–37. That Restatement made decisive, for choice-of-law purposes in tort, the plaintiff's place of domicile, to the exclusion of all other factors and circumstances. *Id.* at 36 (citing Restatement (First) of Conflict of Laws § 377 n.4 (1934)). The First Restatement's identification of the law of plaintiff's domicile as applicable in tort cases reflected its more general commitment to subjecting every cause of action to the law of a single jurisdiction fixed by the Restatement itself, without regard to a case's connecting factors with any other jurisdiction. (This methodology similarly resulted in applying to contract cases the law of the place where the contract was made, irrespective of all other connecting factors.) Based on the First Restatement, Petitioners firmly localize the injury asserted by Smagin in Russia.

However, the First Restatement has no place whatsoever in the analysis of this case. That Restatement, which dates back to 1934, was fully superseded in 1971 by the Second Restatement, the impetus for which was precisely a rejection of the First Restatement's rigid approach to choice of law. As the Second Restatement itself explains:

> These volumes . . . ***supersede entirely the original Restatement of this subject published by the Institute in 1934***. . . . It is a treatment that takes full account of the

> enormous change in dominant judicial thought respecting conflicts problems that has taken place in relatively recent years. The essence of that change has been the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility, according sensitivity in judgment to important values that were formerly ignored.

Restatement (Second) of Conflict of Laws Intro. (1971) (emphasis added).

The justification proffered by Petitioners for relying on the First, rather than the Second, Restatement, even though the former has long since been superseded, is that the former was in effect in 1970, when RICO was enacted. Petitioners' Br. at 30, 34. The premise of Petitioners' reasoning is that, when a court has before it a claim arising under a statute, the law applicable to the claim must be determined in accordance with the prevailing choice-of-law principles at the time the statute was enacted. In other words, according to Petitioners, the conflict-of-laws principles applicable to a given statutory claim are "frozen" at the time of enactment. The practical effect in this case would be to decide a 2023 RICO action in accordance with the law designated by a Restatement that was superseded half a century ago.

Petitioners' position is untenable. When called upon to make a choice of law determination, a court applies the conflict of laws methodology prevailing at the time of decision. As the Second Restatement explains, "[t]he rules of Conflict of Laws, and especially the rules of choice of law, are largely decisional and, to the extent that this is so, are as open to reexamination as any other common law rules." Restatement (Second) of Conflict of Laws § 5

(1971). Accordingly, courts consistently apply contemporary conflict-of-laws principles to identify the law applicable to particular issues arising in connection with a federal statute. *See, e.g.*, *Cassirer* v. *Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502, 1510 (2022) (directing court to apply "the standard choice-of-law rule" of California to determine whether substantive law of Spain or California governed disputed property rights in suit under Foreign Sovereign Immunities Act, enacted in 1976); *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496–97 (1941) (in diversity actions, federal courts must apply choice of law rules in effect in the states in which they sit); *Stromberg* v. *Qualcomm Inc.*, 14 F.4th 1059, 1073 (9th Cir. 2021) (applying current California choice-of-law analysis to antitrust claims). Moreover, in a decision that is particularly apt here, the Second Circuit in *Bascuñán* v. *Elsaca*, 874 F.3d 806, 821–22 (2d Cir. 2017), relied on the Second Restatement's approach to evaluate the locus of injury in a Civil RICO action, explaining that "the interests considered by the Second Restatement mirror the concerns underlying the presumption against extraterritoriality." *Id.* at 822.

Petitioners cite no authority (and *amicus* is aware of none) for the proposition that any choice-of-law issue arising in connection with a statutory cause of action must be determined in accordance with the choice-of-law principles prevailing when the statute was enacted, and indeed even if those principles have long since been repudiated. Petitioners fare no better with their heavy reliance on a single decision of this Court, *Chattanooga Foundry,* which dates back to 1906—117 years ago, and 17 years before the ALI was even founded. *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390 (1906).

Moreover, even in Petitioners' submission, only a ***"settled*** meaning at common law" at the "time of RICO's enactment in 1970" could justify resort to historical choice of law principles. Petitioners' Br. at 30 (quoting *Beck* v. *Prupis*, 529 U.S. 494, 500–501 (2000)) (emphasis added). But in fact, the choice-of-law principles espoused by the First Restatement were anything but "settled" at the time of RICO's enactment in 1970. The First Restatement was subject to robust criticism for a long time prior to the advent of the Second Restatement in 1971. Indeed, work on what became the Second Restatement dated back all the way to 1953, and three installments of the official drafts of the Second Restatement were approved by the ALI between 1967 and 1969. The final proposed official draft was "approved for publication by the [ALI] at the Annual Meeting of 1969," though actual publication occurred in 1971. Restatement (Second) of Conflict of Laws Intro. (1971). Thus, in 1971, within one year of RICO's enactment, the ALI formally adopted a new Second Restatement for the express purpose of doing away with what was seen as the First Restatement's woefully outdated approach. In sum, Petitioners' reliance on the First Restatement is particularly inapposite here because, at the time RICO was enacted in 1970, it was common knowledge that the original Restatement's days were numbered.

In the words of the Second Restatement, an "enormous change in dominant judicial thought respecting conflicts problems" had occurred in "relatively recent years" before the Second Restatement synthesized these new choice-of-law principles. Restatement (Second) of Conflict of Laws Intro. (1971). Thus, far from being "settled," the First Restatement's outdated conflicts principles were on

the verge of being discarded at the time of RICO's enactment, with courts increasingly rejecting its formalistic approach in favor of the modern principles subsequently embodied by the Second Restatement. *See*, *e.g.*, *Griffith* v. *United Air Lines, Inc.*, 203 A.2d 796, 800–806 (Pa. 1964) (rejecting First Restatement approach to choice of law for tort claims and overruling line of cases adopting it in favor of approach subsequently adopted by the Second Restatement) (collecting cases); *Babcock* v. *Jackson*, 191 N.E.2d 279, 280–85 (N.Y. 1963) (same).

III. Were the Second Restatement To Be Consulted in Finding the Place of Injury Under RICO, that Place Would Be California, and the Injury Would Be Domestic.

The basic approach ushered in by the Second Restatement is that, when faced with a choice-of-law-question, a court should apply the law of the jurisdiction having "the most significant relationship" to the issue at hand. Restatement (Second) of Conflict of Laws § 145 (1971). And, in making that determination, courts are to take into consideration a list of factors specifically identified by the Second Restatement, according to the particular cause of action in question. *Id*. In other words, the Second Restatement espouses a conflict of laws methodology entailing precisely the kind of "multi-factor" analysis the Court of Appeals conducted here. J.A. 10a–11a ("Plaintiff obtained the judgment in California precisely because Ashot resides in California, and that is where Plaintiff desires to exercise the rights conferred by the California Judgment. . . . Our conclusion is bolstered by the fact that much of the conduct underlying the alleged injury also occurred

in, or was targeted at, California."). So radical was the change in the case law in the years leading up to the Second Restatement's enactment, and which the Second Restatement's text reflects, that it is commonly described as ushering in a "conflict of laws revolution."[2]

The multi-factor approach favored by the Court of Appeals in this case thus aligns perfectly with the methodology of the Second Restatement, which remains dominant today. *See* Restatement (Second) of Conflict of Laws § 145 (1971) (the choice of substantive law for issues in tort is "determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties" taking into account: "the place where the injury occurred"; "the place where the conduct causing the injury occurred"; "the domicil, residence, nationality, place of incorporation, and place of business of the parties"; and "the place where the relationship, if any, between the parties is centered."). Clearly, domicile of the parties is only one among a series of factors to be taken into consideration. It is anything but decisive.

Were one to apply the choice-of-law principles of the Second Restatement to the present case, the result would inevitably be application of the law of California, not the law of Russia. Most of the conduct

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[2] *See, e.g.*, Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319, 326 (1996) (describing the "conflict of laws 'revolution'" between the First and Second Restatement); Peter E. Herzog, *The 'Conflicts of Laws Revolution' in New York—and Where Did It Leave Us*, 50 SYRACUSE L. REV. 1279, 1279 (2000) ("In about the late 1950s, a . . . 'revolution,' not quite yet over, started in the field of conflict of laws, or more precisely in its subset of 'choice of law.'").

complained of in this case occurred in California or elsewhere in the United States. For example, Smagin alleges that Yegiazaryan "developed a scheme to hide assets in the United States by using shell companies owned by . . . other members of the Yegiazaryan family," including the Nevada company Clear Voices, Inc., which was allegedly "created by Suren Yegiazaryan, but controlled by Ashot Yegiazaryan, for the purpose of sheltering Ashot Yegiazaryan's U.S. assets from his creditors." J.A. 6a. Similarly, Smagin alleges that, from his residence in California, Yegiazaryan "schemed to have associates file fraudulent claims against him in foreign jurisdictions so that they could obtain sham judgments that were designed to compete with the California Judgment," ultimately resulting in a finding of contempt against Yegiazaryan in the district court in California for violating its orders restraining such behavior. J.A. 7a. Smagin's injury allegedly flowed from a series of maneuvers performed by Yegiazaryan in the United States that were designed to frustrate execution of the California judgment by hiding his U.S. assets from Smagin and the California federal court, using shell companies created or nominally owned by members of Yegiazaryan's family, but in fact controlled by him. Moreover, Smagin alleges that, in an attempt to avoid the district court's orders, Yegiazaryan submitted to the court a forged doctor's note, and, when Smagin "attempted to depose the California doctor who wrote the note," Yegiazaryan used "intimidation, threats, or corrupt persuasion" to attempt to obstruct the doctor from providing evidence to the district court. J.A. 7a.

Not only was the "conduct causing injury" (Restatement (Second) of Conflict of Laws § 145(2) (1971)) centered in California, but so, too, was the

injury of which Smagin complains. The alleged injury in this case was deprivation of rights Smagin was entitled to exercise in California under California law. It is a California federal court judgment enforcing Smagin's award against Yegiazaryan that the latter frustrated by not only failing to pay the judgment, but also by conspiring to place all of his California assets out of reach of execution. Thus, California was not only the place where the conduct complained of occurred, but also the place where Smagin sustained his injury—which is, incidentally, the critical factor for RICO purposes under *RJR Nabisco*.

By contrast, neither the conduct complained of nor the injury occasioned took place in Russia. Other than the United States, the jurisdictions in which the alleged conduct designed to thwart Smagin's ability to collect on his award occurred were the United Kingdom, Liechtenstein, St. Kitts and Nevis, and Monaco. J.A. 6a. But the center of gravity of this case, both in terms of conduct and place of injury, remains the United States. Indeed, apart from the parties' nationality and Smagin's domicile, Russia has no particular interest, much less the predominant interest, in having its law applied to the instant case.

Focusing on the comparative strength of the interests of California and Russia, as the Second Restatement requires, California's interests clearly prevail over those of Russia. California has an interest of the utmost significance not only in having the judgments of courts located in California respected, but also in ensuring that execution on the unpaid judgments of such courts against the debtor's assets, effected under state law, is unimpeded.

In short, to the extent relevant, as Petitioners argue, Petitioners' Br. at 32 (claiming "common-law conflicts rules [are] directly in-point"), contemporary conflict-of-laws principles point to California, not Russia, as the jurisdiction with the most significant interest in Smagin's RICO claim, and thus with the strongest case for having its law applied to the current dispute.

IV. Treating the Plaintiff's Domicile as the Place of Injury in RICO Cases Would in Any Event Lead to Absurd and Untenable Results.

Petitioners' position—that the place of injury is categorically the place of claimant's domicile—would also lead to the perverse result that a party alleging conduct violative of RICO is denied access to the remedies afforded by RICO solely because it a foreign domiciliary. There is no indication either in the statute itself, or its legislative history, or the *RJR Nabisco* decision, that only U.S. domiciliaries have standing under RICO. *See RJR Nabisco*, 579 U.S. at 353 n.12 (noting that the distinctions in language between the Clayton and RICO Acts "do[] not mean that foreign plaintiffs may not sue under RICO"). Indeed, there is virtually no U.S. regulatory statute that reserves standing to U.S. domiciliaries. Certainly neither the antitrust nor the securities acts do so. *Pfizer*, *Inc.* v. *Government of India*, 434 U.S. 308, 313 (1978) (noting that "the :Sherman and Clayton Acts explicitly include[]" foreign persons as potential plaintiffs); *Morrison* v. *National Australia Bank, Ltd.*, 561 U.S. 247, 267–70 (2010) (endorsing "transactional test" for standing under securities laws, not a plaintiff-domicile requirement). As Petitioners would have it, in otherwise identical

circumstances, a U.S. domiciliary with a valid RICO claim would recover under the statute, while a foreign domiciliary would not. There is simply no basis for suggesting that RICO should be applied in so discriminatory a fashion, or that recovery by a foreign domiciliary should be viewed as an abuse of the statute. But that is precisely what Petitioners effectively maintain. Petitioners' Br. at 18.

To appreciate the implausibility of Petitioners' reasoning, consider that, if the tables were turned and Yegiazaryan was the award creditor, he, as a California domiciliary, would be perfectly within his rights under RICO to enforce his hypothetical award against Smagin. But, according to Petitioners, the exact same claim, as asserted by Smagin against Yegiazaryan, would amount to an inherent "misuse" of RICO. Hence, at its core, Petitioners' proposed rule treats creditors of international arbitration awards differently in otherwise identical circumstances solely based on their domicile. Petitioners argue that making RICO recovery dependent on the plaintiff's domicile has all the advantages of a "bright-line" rule that would allow RICO coverage to be determined with relative ease. Petitioners' Br. at 47–52. However, they ignore that, under their approach, award creditors would have access to RICO where the award debtor engages in illegal activity to thwart enforcement *wholly outside the United States,* and even where the dispute has no other connection with this country, solely because the award creditor is a U.S. domiciliary. That cannot be what the drafters of RICO anticipated.

Nor is such discrimination compatible with the New York Convention, which disallows disparate treatment of award creditors based on their nationality or domicile. *See generally* Gary Born,

International Commercial Arbitration 3715 (3d ed. 2021) ("Article III [of the New York Convention] imposes a form of 'national treatment' requirement . . . adopt[ing] a general non-discrimination principle, requiring that Contracting States treat Convention awards no less favorably than domestic awards."); *see also* New York Convention, Art. III ("There shall not be imposed substantially more onerous conditions . . . on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on . . . domestic arbitral awards.").

V. The RICO Statute Contains No Carve-Out for Claims Arising in an Arbitration Context.

Contrary to Petitioners' assertion, RICO is not limited to cases involving "criminal infiltration of legitimate enterprises . . . ." Petitioners' Br. at 55. The statute contains no limitation on the spheres of activity to which it may be applied. Instead, RICO claims have been maintained in a wide variety of contexts. *See*, *e.g.*, *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 642–45 (2008) (RICO claim based on filing of allegedly false compliance attestations in tax lien auction); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 252–54 (1994) (RICO claim based on alleged pattern of racketeering activity in connection with allegedly extortionate anti-abortion campaign); *American National Bank & Trust Co. of Chicago* v. *Haroco, Inc.*, 473 U.S. 606, 607–608 (1985) (RICO claim based on allegedly fraudulent representations regarding interest rates charged on bank's loans). This Court has unambiguously rejected attempts to create extra-textual limitations on the RICO statute. *Sedima,*

S.P.R.L. v. *Imrex Co., Inc.*, 473 U.S. 479, 495, 497 (1985) ("[W]e perceive no distinct 'racketeering injury' requirement. . . . RICO is to be read broadly.") Provided all the constitutive elements of a RICO claim are established, there is no basis for creating an exception to recovery for violations that happen to take place in an international arbitration context.

VI. Allowing Award Creditors Access to Civil RICO as an Enforcement Tool Is Entirely Consistent with the New York Convention and Enforcement of International Arbitral Awards Generally.

There is nothing in the New York Convention, or international arbitration more generally, to suggest that, in a case like this one, recourse of an award and judgment creditor to RICO is improper.

The New York Convention establishes the right of an award creditor to enforcement of an award rendered in its favor, as well as imposing an affirmative obligation on courts of Contracting States to enforce those awards, absent a Convention defense to enforcement. *See* New York Convention, Art. III. In the United States, enforcement of an arbitral award requires, first and foremost, an action for a judgment enforcing the award. *See* 9 U.S.C. § 207; *Pao Tatneft* v. *Ukraine*, 21 F.4th 829, 835 (D.C. Cir. 2021) *cert. denied* 143 S. Ct. 290 (2022) ("The New York Convention in general requires American courts to enforce international arbitral awards."). But, if the debtor then fails to comply with the resulting judgment, the court will, upon request, execute upon the judgment against the debtor's locally situated assets, as it would with any domestic judgment. *See, e.g.*, Fed. R. Civ. P. 69(a) (providing for enforcement

of monetary judgments by writ of execution); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys. Inc.*, 665 F.3d 1091, 1094 n.1 (9th Cir. 2011) (once a foreign arbitration award is reduced to judgment, it "has the same force and effect of a judgment in a civil action and may be enforced by the means available to enforce any other judgment").

While the Convention specifically addresses recognition and enforcement, it also indirectly addresses execution of the judgments by which awards are enforced. Thus, Article III of the Convention requires contracting States to enforce awards in accordance with their domestic rules of procedure. *See* New York Convention, Art. III ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ."); *CBF Indústria de Gusa S/A* v. *AMCI Holdings, Inc.*, 850 F.3d 58, 75 (2d Cir. 2017) (explaining that Article III of the New York Convention leaves the availability of "a theory of alter ego liability, or any other legal principle concerning the enforcement of awards or judgments" to "the law of the enforcing jurisdiction"). Enforcement of an award is worthless if, when a judgment of enforcement has been rendered, it remains unpaid and cannot be executed upon by attachment of the judgment debtor's assets.

Execution thus forms a critical part of the award enforcement process. Under Article III of the New York Convention, States are to apply whatever procedural rules are at their disposal to achieve effective enforcement of awards. In the United States, RICO is precisely one such means of redress where, as here, the award (and judgment) debtor is alleged

to have engaged in activities constituting a RICO violation in an effort to defeat effective enforcement.

Moreover, Article VII of the Convention expressly provides that a party seeking enforcement of a Convention award may avail itself, alongside the Convention, of any remedy in aid of enforcement of an award available under domestic law. New York Convention, Art. VII ("The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."). The New York Convention thus invites award creditors to make use, in addition to the Convention itself, of any other means available under the law of the place of enforcement to effectuate a foreign arbitral award. *See Commissions Import Export S.A.* v. *Republic of the Congo*, 757 F.3d 321, 328 (D.C. Cir. 2014) ("[T]he underlying rationale of Article VII is that the 'Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon.'") (quoting Albert Jan van den Berg, *The New York Convention of 1958: An Overview, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 39, 66 (Emmanuel Gaillard & Domenico Di Pietro, eds., 2008)); *In re Arbitration of Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp.* v. *Arab Republic of Egypt*, 939 F. Supp. 907, 910 (D.D.C. 1996) ("[U]nder the Convention, [the award creditor] maintains all rights to the enforcement of this Arbitral Award that it would have in the absence of the Convention."); *cf. Photopaint Tech., LLC* v. *Smartlens Corp.*, 335 F.3d

152, 159 (2d Cir. 2003) (explaining that "an action at law offers an alternative remedy to enforce an arbitral award"). Although RICO was certainly not established for the specific purpose of ensuring that arbitral awards are enforced and judgments of enforcement executed, if the requirements of the RICO statute are satisfied, a Civil RICO claim represents one such means of enforcement under U.S. law within the meaning of Article VII.

To date, Smagin has taken every legal step available to him to obtain the relief awarded to him in the foreign arbitral proceeding. There are no further measures available to him within the international arbitration system as such. He now must look elsewhere for relief. A perfectly appropriate avenue of redress is RICO, provided all the required elements of a RICO claim are established, including the existence of a domestic injury. Accordingly, application of RICO to circumstances in which conduct violative of RICO frustrates both enforcement of an award and execution of a judgment enforcing the award fully comports with the letter and spirit of the New York Convention.

Petitioners complain that Smagin, as award creditor, has sought and achieved enforcement "by courts in [both] Liechtenstein and the United States." Petitioners' Br. at 16. However, the New York Convention has never been understood to bar a creditor from seeking enforcement in multiple jurisdictions, provided double recovery is not awarded. *E.g. Salini Costruttori S.p.A.* v. *Kingdom of Morocco*, 233 F. Supp. 3d 190, 201 (D.D.C. 2017) ("The New York Convention scheme for enforcement of an arbitral award explicitly allows for confirmation of an award in multiple jurisdictions.") No support

can be found for the contrary proposition. A creditor is not required to confine its enforcement efforts under the Convention to a single jurisdiction, and no Convention State can escape its enforcement obligations on the ground that enforcement has been sought, and possibly achieved, elsewhere, again assuming no double recovery.

VII. Petitioners' Alleged Pattern of Conduct Defeats the Purposes of the Convention and Seriously Jeopardizes Its Efficacy.

The availability of a RICO remedy in the circumstances of this case is not simply consistent with the purposes of the New York Convention. More than that, allowing an award debtor to refuse, with impunity, to comply with an award rendered against it, to disregard a judgment of enforcement pursuant to the Convention, and then to wholly defeat execution of that judgment through illegal means, would severely undermine the Convention. As this Court has explained, following the United States' accession to the New York Convention and its implementation in the Federal Arbitration Act, the federal policy in favor of arbitration "applies with special force in the field of international commerce." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *see also AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333, 345 (2011) ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration.").

Unfortunately, as this case shows, circumstances inevitably arise in which vindication of the fundamental purposes of the Convention requires recourse to means of legal redress available under domestic law. Civil RICO is one such means of

ensuring compliance with New York Convention awards. Petitioners argue, but thus fail to establish, that Yegiazaryan's failure to pay the underlying Convention award or the resulting California federal judgment, and his frustration of execution on that judgment, even if "accompanied by allegedly unlawful activities," do not warrant "an action for treble damages under RICO." Petitioners' Br. at 54.

CONCLUSION

The place of injury sustained by Smagin in the present case is unquestionably California. That is where Smagin suffered the loss of his rights to enforcement and execution of a judgment rendered in his favor. Smagin therefore alleges a domestic injury, as required by *RJR Nabisco*. This conclusion is unaffected by the fact that Smagin is domiciled in Russia.

To support the proposition that the place of injury is Russia, Petitioners turn to the rules on choice of law in tort found in the First Restatement, which made the plaintiff's domicile decisive. Doing so is questionable, since this case does not entail choosing between the tort laws of California and Russia, but rather merely identifying the place of injury for purposes of RICO. Even so, Petitioners' reliance on the First Restatement is fundamentally misplaced. That Restatement was superseded over a half century ago by the Second Restatement, which flatly rejected the notion that the law applicable in tort is necessarily that of the place of plaintiff's domicile. Nor can resort to the First Restatement be justified based on the notion that, when a court seeks guidance from a Restatement on the law applicable to a statutory claim, it necessarily refers to the Restatement in effect at the time the

statute was enacted (even where that Restatement has long since been superseded). That notion has no foundation. On the contrary, when courts invoke a Restatement in support of their decision, they invoke the Restatement in its current version as of the time of decision.

The Second Restatement replaced its predecessor's rigid rules with a multi-factor test designed to identify the State having the most significant interest in the case or issue in play, much like the test applied by the Court of Appeals in this case. Nor would treating the plaintiff's place of domicile as the place of injury for all Civil RICO claims make sense. If adopted, Petitioners' proposed "bright-line" rule to that effect would lead to RICO's application to cases having no connection whatsoever with the United States, while denying its application to cases having everything to do with this country.

Making RICO available in a case such as this is also fully consistent with the regime governing the enforcement of foreign arbitral awards, as embodied in the New York Convention. The Convention makes clear that an award creditor has a right to enforce its international arbitral award in the United States using all of the procedural tools available to it under local law, and that Convention States are obligated to make those tools available. There is no reason why, in the United States, those means should not include, if necessary, a Civil RICO claim, provided the statute's substantive requirements are otherwise met. The availability of Civil RICO is not only consistent with the Convention, but essential to its efficacy under circumstances such as those alleged to exist in this case. There is no basis for carving out from RICO's scope of application entire categories of claims arising in particular domains, such as the

enforcement or execution of arbitral awards here. Nor is there anything in the Convention that requires award creditors to confine themselves to enforcement in a single jurisdiction. Enforcement may be sought concurrently or successively in multiple fora, provided it does not result in double recovery.

In sum, where all the required elements of a RICO claim, including domestic injury, are satisfied, there is no reason why an aggrieved creditor whose rights to enforcement and execution of an arbitral award have been wholly frustrated cannot seek recovery under RICO. In the present case, Petitioners' RICO violations allegedly robbed Smagin of his right under California law to have a California federal judgment in his favor enforced and, if need be, executed. The alleged injury to Smagin's rights took place in California.

This Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

ANDREAS FRISCHKNECHT
Counsel of Record
JAMES HOSKING
DAVID S. BLACKMAN
CHAFFETZ LINDSEY LLP
1700 Broadway, 33rd Floor
New York, New York 10019
(212) 257 6960
andreas.frischknecht@chaffetzlindsey.com

Counsel for Amicus Curiae

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