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

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BRIEF OF *AMICI CURIAE* PRIVATE INTERNATIONAL LAW SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to its preparation or submission.

[2] *Amici* appear in their individual capacities; institutional affiliations are provided here for identification purposes only.

[3] *E.g.*, *The Brussels I Regulation Recast* (Andrew Dickinson & Eva Lein eds., 2015); Ugljesa Grusic et al., *Cheshire, North and Fawcett: Private International Law* chs. 15–18 (Paul Torremans gen. ed., 15th ed. 2017) (on recognition and enforcement of foreign judgments and arbitral awards under English law); Ugljesa Grusic & Manuel Penades Fons, *Illegality in English Arbitration Law after* Patel v. Mirza, *in* C*ontents of Commercial Contracts: Terms Affecting Freedoms* 382 (Paul S. Davis & Magda Raczynska eds., 2020); Eva Lein

Amici submit this brief in support of Petitioner for the limited purpose of offering the Court a comparative perspective—with a particular focus on the United Kingdom and the European Union—on the remedies available to private parties when a judgment or award debtor dissipates their assets in order to evade their payment obligation.

SUMMARY OF ARGUMENT

In the context of foreign arbitral award enforcement, a private action under Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–1968, is fundamentally different from what the laws of the UK and EU countries allow. When a judgment or award debtor dissipates their assets to obstruct the creditor's right to payment, there is no private cause of action akin to RICO in the UK or EU countries, and there is no possibility of treble damages. The closest analogues in English law are the tort law causes of action for "unlawful means conspiracy" and the so-called "*Marex* tort." Damages under both causes of action are strictly compensatory in nature. In addition, if called upon to enforce a RICO multiple-damages judgment,

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et al., British Institute of International and Comparative Law, *The Study on the Rome II Regulation (EC) 864/2007 on the Law Applicable to Non-Contractual Obligations* (October 2021); Manuel Penades Fons, *The Effectiveness of EU Law and Private Arbitration*, 57(4) Common Market L. Rev. 1069 (2020); Manuel Penades Fons, *Enforcement of Arbitration Agreements by National Courts: What Level of Review?*, *in 60 Years of the New York Convention: Key Issues and Future Challenges* 3 (Katia Fach Gómez & Ana Mercedes López Rodríguez eds., 2019).

courts in the UK and EU countries would generally decline to do so as contrary to public policy—a public policy evident in a broad range of substantive laws, ranging from recognition of foreign judgments to competition to choice of law.[4]

ARGUMENT

I. THE COURT SHOULD INTERPRET SECTION 1964(c) TO AVOID POTENTIAL CONFLICTS WITH THE LAWS OF OTHER NATIONS

The canon of statutory construction known as "prescriptive comity" "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164–65 (2004). As this Court has recognized, even where nations agree about the regulation of primary conduct—like unlawful evasion of an arbitral award reduced to judgment—they may "disagree dramatically about appropriate remedies." *Id.* at 167; *see also RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 347 (2016).

Accordingly, when an ambiguous U.S. statute authorizes "private treble-damages remedies" that may permit parties to benefit from significantly more generous remedial schemes than those available under their own domestic laws, application of this canon is appropriate to avoid such a result. *See Empagran*, 542 U.S. at 167–68 (citing *amicus*

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[4] *Amici* do not address the location of injuries, judgments, and awards under the laws of the UK and EU countries, which are beyond the scope of this brief.

briefs submitted by Germany, Austria, Japan and Canada); *RJR Nabisco*, 579 U.S. at 346–347 & n.9; *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

As described below, the use of Section 1964(c) in the context of arbitral award enforcement—including in the context of intentional evasion by the award debtor—contrasts sharply with the approaches of other nations. Most important, the remedies available under the laws of other nations "disagree dramatically" with Section 1964(c)'s treble damages. Under *Empagran* and *RJR Nabisco*, that disagreement is directly relevant to this Court's interpretation of Section 1964(c) in this case.

II. IN THE CONTEXT OF FOREIGN ARBITRAL AWARD ENFORCEMENT, SECTION 1964(c) IS FUNDAMENTALLY DIFFERENT FROM THE APPROACHES OF THE UK AND EU COUNTRIES

Respondent is a Russian businessman who sustained losses in Russian commercial transactions. *Smagin v. Yegiazaryan*, 37 F.4th 562, 564–65 (9th Cir. 2022). Seeking to recover his losses, Respondent initiated arbitration proceedings in the London Court of International Arbitration ("LCIA"), invoking two English law contracts that mandated dispute resolution by arbitration in London under the LCIA rules. *See* J.A. 106a–107a. The LCIA arbitral tribunal ultimately awarded Respondent over $84 million. *See Smagin,* 37 F.4th at 565. Respondent subsequently initiated a private action under Section 1964(c) for alleged RICO violations, which—if successful—would result in a trebled

award. This is fundamentally different from what the laws of the UK and EU countries allow when an arbitral award debtor dissipates assets.

The UK and EU countries are, like the United States, signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), June 10, 1958, 21 U.S.T. 2517. However, in the context of arbitral award enforcement, they do *not* provide a private cause of action akin to RICO, or any other mechanism which leads to treble damages. The closest analogues in English law are the tort law causes of action for "unlawful means conspiracy" and the so-called "*Marex* tort," which can be relied on in some circumstances by award creditors whose enforcement efforts are intentionally obstructed.

A 2021 decision issued by the High Court of England and Wales ("EWHC") illustrates these causes of action. In *Lakatamia Shipping Co. Ltd. v. Su* [2021] EWHC 1907 (Comm), the EWHC confirmed that English law provides tort law causes of action for (i) unlawful means conspiracy, and (ii) intentional violation of a creditor's rights in a judgment debt (also called a "*Marex* tort").[5] In the underlying proceeding, a shipping company obtained a Commercial Court judgment against multiple defendants for breach of contract and an asset-freezing injunction ordering the defendants

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[5] *See Marex Financial Limited v. Sevilleja* [2017] EWHC 918 (Comm). The defendant in *Marex* had stripped the assets of two companies, following the release of a draft judgment against them. Justice Knowles ruled that the defendant's actions could amount to a tortious claim of unlawful interference.

not to dissipate their assets. The defendants executed a series of international financial and asset transfers in order to evade the judgment and the injunction. The EWHC held that English law applied and afforded two tort law causes of action, one for unlawful means conspiracy and one analogous to intentionally inducing a contractual breach, *i.e.*, the *Marex* tort. There is no reason that the same analysis would not apply to English judgments confirming domestic or foreign arbitral awards under Sections 66(2) and 101(3) of the Arbitration Act 1996, c. 23 (UK).

Under English law, damages for unlawful means conspiracy and the *Marex* tort are compensatory in nature.[6] Therefore, even where—as in *Lakatamia Shipping*, and as alleged here—an award or judgment debtor conspires to obstruct and evade enforcement efforts, English law does *not* authorize a damages multiplier, or exemplary or punitive damages. The use of a private action under Section 1964(c) in the context of the enforcement of a foreign arbitral award would lead to a

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[6] *See* Andrew Tettenborn, *Clerk & Lindsell on Torts* chs. 22 & 27 (23d ed. 2022); *Lakatamia Shipping* [949] ("In terms of the quantum of compensatory damages . . . [a] plaintiff in a civil action for conspiracy must prove actual pecuniary loss, though if he proves actual pecuniary loss the damages are at large, in the sense that they are not limited to a precise calculation of the amount of the actual pecuniary loss actually proved. . . . Equally, the principles governing the award of damages for the *Marex* tort are the same as for the tort of inducing a breach of contract. Damages for the latter tort are, as in the case of unlawful means conspiracy, at large.").

fundamentally different outcome and is not in line with international practice.

III. TREBLE DAMAGES UNDER SECTION 1964(c) ARE CONTRARY TO PUBLIC POLICIES REGARDING CIVIL REMEDIES IN THE UK AND THE EU

The UK and EU states are hostile to treble damages as well as other non-compensatory exemplary or punitive damages of a disproportionate nature. Two public policies common to these nations ground this hostility. First, the aims of punishment and deterrence underlying treble and punitive damages are proper to criminal law rather than to civil law, as they interfere with the state's monopoly on penalization. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, 118 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 312 (Ger.) (holding that it is a fundamental legal principle of German law to award damages with the sole objective of reimbursing what the victim has lost).

Second, the primary objective of private enforcement is compensation. For example, under EU Directive 2014/104/EU,[7] which governs actions for damages for infringements of competition law, "[f]ull compensation shall place a person who has

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[7] Directive 2014/104, of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, 2014 O.J. (L 349) 1.

suffered harm in the position in which that person would have been had the infringement of competition law not been committed." *Id.* art 3(2). This includes the right to recover actual loss, lost profits, and pre-trial interest, but expressly excludes "overcompensation, whether by means of punitive, multiple or other types of damages." *Id.* art. 3(3).

These same policies are recognized in areas ranging from choice-of-law instruments to national blocking statutes. For instance, the Rome II Regulation[8] is the choice-of-law instrument for the determination of the law applicable to non-contractual obligations, including international torts, in force in the EU. (It has been retained and incorporated into English domestic law post Brexit.) Recital 32 provides that the application of a provision of the relevant law that would have "the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum." In the UK and most EU countries, this would very likely be the case:[9] English courts and the courts of EU nations are able to use this public policy exception to exclude

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[8] Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L 199) 40.

[9] *See* Alex Mills, *Recognition of Punitive Damages in the United Kingdom*, *in Punitive Damages and Private International Law* 187, 197 (Bariatti Stefania, et al., eds., 2019).

otherwise-applicable foreign law if it provides for multiplied damages of an excessive nature.

The British Protection of Trading Interests Act of 1980, c. 11 ("PTIA"), is perhaps the best illustration of the UK's opposition to disproportionate, non-compensatory exemplary or punitive damages, including treble damages. The PTIA "directs British courts not to enforce treble damage awards against British firms, and this same [A]ct's 'clawback' provision allows non-United States firms doing business in the United Kingdom to sue there to recover two-thirds of treble damage awards levied against them in the United States." *Laker Airways Ltd. v. Pan Am. World Airways*, 559 F. Supp. 1124, 1137 (D.D.C. 1983), *aff'd sub nom. Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984).

As the court in *Swiss Life v. Kraus* [2015] EWHC 2133 (QB) [10] described, the English public policy against multiple damages was *not* a reaction to "a device dreamt up by US lawyers in the context of antitrust . . . and then extended to other areas of public policy, such as RICO." Rather, it was the product of historical experience: the practice of awarding treble damages for competitive harms had originated in the English Statute of Monopolies of 1624, and had since been recognized as "objectionable and egregious to English eyes." *Id.* "The [PTIA] has seen English law come full circle. In 1624 treble damages were vogue; by 1980 they were rogue." *Id.*

UK courts have applied this policy to judgments issued to private parties under RICO. In *Lewis v. Eliades* [2004] 1 WLR 692, for example, the

Court of Appeal of England and Wales applied the PTIA to prevent the enforcement of a treble-damages judgment obtained under Section 1964(c). The Court of Appeal severed the multiplied portion of the judgement from the compensatory portion, ruling that only the latter was recoverable.[10] And when a clean division of trebled and compensatory damages is not feasible, the PTIA will block the entire judgment. In *Service Temps Inc. v. MacLeod* [2013] CSOH 162, the Lord Ordinary, Lord Hodge (now a Justice of the UK Supreme Court) refused to enforce a Texas judgment because it was not possible to "sever" the "compensatory element" from "its excess." *Id.* [39]. The PTIA thus barred enforcement of the entire judgment, a result that followed the "broad intention of the legislation, which is to discourage the extraterritorial enforcement" of treble damages. *Id.* [37].

The tension between U.S.-based treble damages and the PTIA has recently resulted in warring injunctions between U.S. and UK courts. In *SAS Institute, Inc. v. World Programming Ltd.*, 952 F.3d 513 (4th Cir. 2020), the U.S. plaintiff obtained a treble-damages judgment under a North Carolina unfair trade practices statute. *Id.* at 518-19. The UK-based defendant obtained relief in the UK from enforcement of this U.S. judgment, which was found to contravene the PTIA. The defendant also obtained a claw-back of two-thirds of the judgment already paid under Section 6 of the PTIA, which allows a

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[10] *See also Pace v. Dunham* [2012] EWHC 852 (Ch) (refusing to enforce an award for treble damages under North Carolina law for unfair and deceptive trade practices).

qualifying defendant who has paid treble damages abroad to recover against the claimant two-thirds of the amount paid. *SAS Inst., Inc. v. World Programming Ltd.* [2018] EWHC 3452 (Comm). The English court also awarded an injunction in favor of the defendant, preventing the plaintiff from pursuing its own remedial injunction in U.S. courts on the grounds that such injunctions would interfere in matters that fell within the English court's jurisdiction. *SAS Inst., Inc v. World Programming Ltd.* [2020] EWCA 599 (Civ), *reversing in part* [2019] EWHC 2481 (Comm); *see also SAS*, 952 F.3d at 519–20. The plaintiff then obtained its own anti-anti-injunction injunction from a U.S. court. *SAS*, 952 F.3d at 520–21.

CONCLUSION

In the context of arbitral award enforcement, the UK and EU countries do not—by design—provide a cause of action akin to Section 1964(c) or allow treble damages even when a judgment or award debtor dissipates their assets to evade payment, and the courts in those countries generally would not enforce a multiple-damages judgment under Section 1964(c). Under *Empagran* and *RJR Nabisco*, that "dramatic" disagreement is highly relevant here.

Respectfully submitted,

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