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1	IN THE SUPREME COURT OF THE UNITED STATES
2	x
3	RJR NABISCO, INC., ET AL., :
4	Petitioners : No. 15-138
5	v. :
6	THE EUROPEAN COMMUNITY, ET AL., :
7	Respondents. :
8	x
9	Washington, D.C.
10	Monday, March 21, 2016
11	
12	The above-entitled matter came on for oral
13	argument before the Supreme Court of the United States
14	at 11:17 a.m.
15	APPEARANCES:
16	GREGORY G. KATSAS, ESQ., Washington, D.C.; on behalf of
17	Petitioners.
18	ELAINE J. GOLDENBERG, ESQ., Assistant to the Solicitor
19	General, Department of Justice, Washington, D.C.; for
20	United States, as amicus curiae, supporting vacatur.
21	DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
22	Respondents.
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1	PROCEEDINGS
2	(11:17 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear argument
4	next in Case 15-138, RJR Nabisco v. The European
5	Community.
6	Mr. Katsas.
7	ORAL ARGUMENT BY GREGORY G. KATSAS
8	ON BEHALF OF THE PETITIONERS
9	MR. KATSAS: Mr. Chief Justice, and may it
10	please the Court:
11	The Second Circuit extended civil RICO to
12	claims involving foreign injuries, foreign enterprises,
13	and foreign patterns of racketeering. Its holding is
14	wrong for two reasons: First, RICO's private civil
15	cause of action does not provide redress for foreign
16	injuries; and second, RICO's substantive prohibitions do
17	not reach the infiltration and corruption of foreign
18	enterprises.
19	As to the first point, Respondents have now
20	abandoned any allegation of domestic injury. That is
21	fatal to their case because Section 1964(c), the private
22	right of action in RICO, is limited to domestic
23	injuries. Two related and mutually
24	JUSTICE GINSBURG: If if the statute
25	isn't the statute doesn't say "domestic injury," does

- 1 it?
- 2 MR. KATSAS: The statute -- statute says
- 3 "injury," Justice Ginsburg, by application of the
- 4 presumption against extraterritoriality. Injury is the
- 5 focus of Section 1964(c), and therefore, injury is
- 6 limited to domestic application absent a clear
- 7 indication to the contrary.
- 8 That is a straightforward application of
- 9 this Court's decision in Morrison, which says you
- 10 identify the focus of the provision before you, and you
- 11 limit it to domestic application unless Congress says
- 12 otherwise.
- JUSTICE GINSBURG: So you're making a
- 14 distinction between RICO when the government is using it
- 15 as a prosecutorial tool -- tool, and RICO --
- 16 MR. KATSAS: Yes. Yes. We are making a
- 17 distinction between Section 1962, which is the
- 18 underlying criminal prohibition, and Section 1964(c),
- 19 which is the private civil right of action. Different
- 20 provisions and statutes can have different foci, as
- 21 Morrison itself made clear in separately analyzing
- 22 Section 30 and Section 10(b) of the '34 Securities Act.
- 23 And -- and here the difference between the
- 24 substantive prohibition and the private right of action
- 25 is clear from this Court's private right of action

- 1 jurisprudence over the last 30 or 40 years which made
- 2 clear that the decision to prohibit certain underlying
- 3 conduct is fundamentally different from the decision to
- 4 provide a private right of action for violation of
- 5 substantive law.
- That's why Section 1964(c) has a different
- 7 focus. You don't automatically assume that because
- 8 Congress criminalized the conduct, it intended for the
- 9 private right of action to follow along to the same
- 10 extent.
- 11 JUSTICE KAGAN: Mr. Katsas, can I ask a
- 12 question that -- this is an analytical question, not
- 13 necessarily at all an argument that your result is
- 14 wrong, but I -- I guess I'm confused by what you said
- 15 now and what you say in the briefs that this is a matter
- 16 of looking to the focus of the statute, because my
- 17 understanding of Morrison is that this whole focus
- 18 inquiry came in at the second step of the analysis.
- 19 In other words, once the Court had decided
- 20 that the presumption against extraterritoriality had not
- 21 been rebutted, then there was an additional argument
- 22 that had been made like, oh, this really does involve
- 23 domestic conduct. And so the Court used this focus test
- 24 to decide whether it was the domestic conduct or the
- 25 extraterritorial conduct that was the focus of the

- 1 statute. But that doesn't seem to answer the question
- 2 whether the presumption is rebutted at all, and it
- 3 doesn't seem to answer the question that I think you're
- 4 trying to get at, and it's an important question, as to
- 5 whether we look at that presumption question section by
- 6 section or for the statute as a whole.
- 7 MR. KATSAS: I think the -- the rule that
- 8 emerges from Morrison is that what -- what has to be
- 9 domestic is the statutory focus. Morrison is Section
- 10 (b), and there were two choices. There's the element
- of deception, and there's the element of the securities
- 12 transaction. And it's foreign transaction, domestic
- 13 deception. And the Court says no -- no clear
- 14 indication.
- 15 Congress can obviously provide for or
- 16 prohibit extraterritorial application if they do that
- 17 clearly. If they don't do that clearly and -- and the
- 18 presumption is going to operate, you have to figure out
- 19 whether the focus of the statute is one element or the
- 20 other. And they said the focus is the transaction and,
- 21 therefore, that is what has to be domestic, and because
- 22 the transaction in Morrison was foreign, the application
- 23 of the statute was impermissibly --
- JUSTICE KAGAN: I -- I guess I just would
- 25 have thought that the question is whether these are

- 1 discrete provisions in some way such that a conclusion
- 2 is to the extraterritoriality of one doesn't really
- 3 effect -- doesn't tell you anything about the
- 4 extraterritoriality of the other. And it seems much
- 5 less important as to what the focus of the statute as a
- 6 whole is even if, you know, one could -- if one could
- 7 answer that question.
- 8 MR. KATSAS: There -- there will always be a
- 9 question -- if you have related provisions, there will
- 10 always be a question of whether the -- the focus of one
- 11 element in a statute carries over to the other.
- 12 This case on the -- on the question of
- injury, the issue before you is whether Section 1964(c),
- 14 the private right of action, has its own focus or
- 15 whether it just travels --
- 16 JUSTICE BREYER: Excuse me. Why -- why
- 17 did -- look -- look at the first example of what Justice
- 18 Kagan is talking about, Appendix B of the government's
- 19 brief, 1837 U.S.C. 37(b), jurisdiction over acts of
- 20 violence against a person at an international airport
- 21 outside the United States if the offender is found in
- 22 the United States.
- Now, that -- I can understand why they would
- 24 make that a crime.
- MR. KATSAS: Sure.

- 1 JUSTICE BREYER: Why would they put it in
- 2 RICO unless they wanted somebody who was hurt to be able
- 3 to get damages?
- 4 MR. KATSAS: Well, the person -- the person
- 5 who was hurt -- as to the injury part --
- 6 JUSTICE BREYER: The injury is to somebody
- 7 at the foreign airport.
- 8 MR. KATSAS: The person -- the person who
- 9 suffers injury from violation of that Act can't recover
- 10 under RICO, because RICO is limited to recovery for
- 11 business or property. Pursuant --
- 12 JUSTICE BREYER: Look, business is hurt.
- 13 They blew up an airport in -- in Tasmania. Okay? So --
- 14 so I guess that blowing up an airport there could hurt
- 15 somebody. But my question is, what was it doing in
- 16 RICO, if in fact Congress doesn't intend a foreign
- 17 person hurt to be able to get damages? It's already a
- 18 crime.
- 19 MR. KATSAS: RICO --
- JUSTICE BREYER: That's my -- and maybe this
- 21 is the wrong example. Think of -- they have a list of
- 22 about 50.
- MR. KATSAS: Right.
- JUSTICE BREYER: Okay. So some of them, I
- 25 can ask this question to: What's it doing in RICO

- 1 unless they want somebody to get damages?
- 2 MR. KATSAS: It -- there are something on
- 3 the order of 200 predicate statutes that are in RICO.
- 4 And the Solicitor General's appendix has -- cites about
- 5 46 of them, which have extraterritorial application.
- 6 All but seven of those statutes have domestic, as well
- 7 as extraterritorial application, including the one you
- 8 just read.
- 9 When you look at the government's appendix,
- 10 what many of those statutes do is they take a statute,
- 11 statute has domestic application, and then there's a
- 12 provision that extends it extraterritorially. And
- 13 what's quoted in the government's brief is the extension
- 14 for extraterritorial application.
- So I think what your question goes to is,
- 16 well, what about the -- what about statutes that are
- 17 exclusively extraterritorial? There are seven of them.
- 18 Only -- only one of them out of the 200 RICO predicates
- 19 was specifically mentioned in RICO as one statute that
- 20 it should apply.
- JUSTICE BREYER: Okay. So your point
- 22 granted is one word -- three words. Your answer to my
- 23 question is four words: It was an accident. That's
- 24 the answer.
- 25 MR. KATSAS: No. I'm not saying it was an

- 1 accident.
- 2 JUSTICE BREYER: Well, then, if it was not
- 3 an accident -- I mean, explain to me the same question.
- 4 I don't want to repeat the same question five times.
- 5 MR. KATSAS: All -- all but -- the vast
- 6 majority --
- 7 JUSTICE BREYER: Listen, let's look at the
- 8 ones that were not, that are the seven, or if you want,
- 9 the three. Why would a human being -- now you've got my
- 10 question.
- MR. KATSAS: Yes.
- 12 JUSTICE BREYER: Why is it in RICO if they
- don't want damages?
- MR. KATSAS: Let's -- let's talk about the
- one that I mentioned. It's 18 U.S.C. 2260, that that
- 16 addresses child -- child pornography offenses abroad
- 17 with an intent to import into the United States.
- 18 That provision has perfectly meaningful
- 19 application for people who suffer -- people who suffer
- 20 domestic injuries, and for United States enterprises --
- 21 United States racketeers who could use domestic
- 22 enterprises to violate that provision.
- 23 And even if I were wrong about that, Justice
- 24 Breyer, I don't think you would use the one provision
- 25 out of 200 as the basis for saying that the -- the

- 1 statute that on it -- in the heartland of its
- 2 application will do lots and lots and lots of meaningful
- 3 work when it's applied to domestic injuries.
- 4 The related point, this isn't just the
- 5 presumption against extraterritoriality. We also have
- 6 the background common law rule that causes of action to
- 7 redress private injuries are governed by the law of the
- 8 place of the injury. Here we have only foreign
- 9 injuries. Congress legislates against the background
- 10 common law rule, and just as the cause of action in RICO
- 11 picks up background common law rules, approximate cause,
- 12 so too it picks up this lex loci delicti rule, again
- 13 absent some clear indication to the contrary.
- 14 When you look for a clear indication with
- 15 respect to the question of injury, not only don't you
- 16 find a clear indication of the contrary, you find in the
- 17 statutory findings in RICO a -- a repeated and specific
- 18 and exclusive focus on the domestic effects of
- 19 racketeering.
- 20 Congress has identified its concern. It is
- 21 -- it is impact on the American economy from
- 22 racketeering. Certainly no clear indication to extend
- 23 the cause of action to foreign harms.
- JUSTICE KAGAN: Well, that may have been
- 25 true, or largely true at the beginning, but how about

- 1 all these amendments that happened after 9/11 which
- 2 clearly seemed focus on foreign conduct, foreign
- 3 organization, foreign harm?
- 4 MR. KATSAS: There's -- there is one
- 5 amendment that is cited, it's the Patriot Act, which
- 6 does one thing to RICO. It expands the list of
- 7 predicate statutes to include one provision. It's 2230
- 8 -- 2332b(g)(5)(B). It's a reference to that statute.
- 9 When you go to that statute, it's a list. The list has
- 10 60 or so terrorism-related predicate crimes. 58 of
- 11 those crimes have domestic application.
- 12 JUSTICE KAGAN: Well, possibly they have
- 13 some domestic application. But if you ask, but why did
- 14 Congress pass this amendment at this particular moment
- 15 in time, what was -- I mean, recognizing that it's
- 16 sometimes hard to figure out what was in people's heads,
- 17 I mean, don't you think that what was in Congress's
- 18 heads at that moment in time was foreign terrorist
- 19 organizations committing terrorist conduct on foreign
- 20 soil?
- MR. KATSAS: We -- we don't know for sure.
- 22 I'll give you another possibility, which is what they
- 23 had in mind was the September 11 attacks, which were
- 24 domestic acts of racketeering. When they incorporated
- 25 that list that I mentioned, the very first statute on

- 1 that list is destruction of a commercial aircraft.
- 2 JUSTICE KAGAN: Well, this just means --
- MR. KATSAS: Which is the very offense --
- 4 JUSTICE KAGAN: -- foreign organizations,
- 5 even as to that.
- 6 MR. KATSAS: I'm sorry?
- 7 JUSTICE KAGAN: That at least suggests
- 8 foreign organizations.
- 9 MR. KATSAS: Well, that -- that at least
- 10 explains the incorporation of the -- of the predicates
- 11 relative to the events of September 11, but in any
- 12 event, with respect, I don't think that's the right
- 13 question because where the presumption applies, either
- 14 -- either on the question of injury, which I've been
- 15 discussing, or on the question of enterprise versus
- 16 pattern, again, the rule for Morrison is that you
- 17 identify the focus and then you need a clear indication
- 18 in the statute to the contrary.
- 19 JUSTICE GINSBURG: How do you deal with
- 20 Judge Lynch's example? There's a foreign terrorist
- 21 organization. It operates only abroad, but it
- 22 repeatedly cuts off the heads of U.S. citizens.
- 23 MR. KATSAS: That would -- that would be --
- 24 foreign terrorist organization --
- 25 JUSTICE GINSBURG: Operating only abroad but

- 1 its targets are all U.S. citizens.
- 2 MR. KATSAS: I think the -- the underlying
- 3 acts would be criminally prosecuted and could be
- 4 punished very severely. RICO -- if I understand the
- 5 hypothetical, the organization is foreign. In our view,
- 6 RICO doesn't cover that. Here's -- here's why.
- 7 JUSTICE KENNEDY: Either civilly or
- 8 criminally?
- 9 MR. KATSAS: Correct, because now if I'm --
- 10 I'm turning to Section 1962. Our position is that the
- 11 focus is on the enterprise. And I understand the
- 12 hypothetical to be a foreign enterprise doing a lot of
- 13 very bad things.
- 14 JUSTICE GINSBURG: And doing bad things to
- 15 U.S. citizens. It's the example the -- the section that
- 16 makes that a crime is 2332(a)(1).
- 17 MR. KATSAS: And -- and 2332(a)(1) would be
- 18 prosecutable by the government. And the people who did
- 19 those bad things probably would face the death
- 20 penalty --
- JUSTICE GINSBURG: But it -- so you're
- 22 saying only the act itself you can't superimpose RICO,
- 23 because there has been a whole pattern of these.
- 24 They've cut of a hundred heads.
- 25 MR. KATSAS: If it's -- if it's a foreign

- 1 enterprise, that's right, and here's why. Because you
- 2 -- you have to evaluate that hypothetical in the context
- 3 of RICO. The hypothetical is designed to make it hard
- 4 for me to make it seem as though the enterprise is the
- 5 bad actor.
- But under Section 1962(c), the enterprise is
- 7 the victim of the corrupting conduct. Even in your
- 8 hypothetical, the enterprise is legally distinct from
- 9 the person -- person is the defendant -- the person
- 10 doing the corrupting. Moreover, the hypothetical you
- 11 described, the pattern itself is not actionable under
- 12 RICO.
- JUSTICE GINSBURG: You -- Judge Lynch, in
- 14 that -- in his opinion on the en banc, he said, "Any
- 15 interpretation that suggests the operatives of a foreign
- 16 enterprise can't be held accountable under RICO for a
- 17 pattern of predicate" -- "a pattern of predicate crimes
- 18 that violate Federal statutes" -- "Federal statutes
- 19 that have an express extraterritorial reach would
- 20 astonish the Congress that made such violations RICO
- 21 predicates."
- 22 MR. KATSAS: Because the focus of
- 23 Section 1962 is the enterprise, and under Morrison the
- 24 enterprise has to be domestic, absent a clear indication
- 25 to the contrary.

- 1 All of those predicate crimes are addressed
- 2 by the underlying criminal statutes. RICO doesn't
- 3 prohibit the pattern. What it prohibits is infiltration
- 4 and corruption of the enterprise.
- 5 JUSTICE KAGAN: Well, the --
- 6 MR. KATSAS: Think about --
- JUSTICE KAGAN: I mean, the whole point of
- 8 RICO is that it does both. It says "a pattern of
- 9 conduct," and it links that pattern of conduct to the
- 10 enterprise. And it seems to be, you know, a little bit
- 11 of a fool's errand to decide which the focus is, when --
- 12 when RICO is clearly something that melds the two and
- 13 says there is a pattern of conduct and it relates in
- 14 various kinds of ways to an enterprise.
- MR. KATSAS: Perhaps, but you could have
- 16 said the same thing about Morrison, under which you need
- 17 both deception and a securities transaction in order to
- 18 have a Section 10(b) violation. So --
- 19 JUSTICE KAGAN: Well, the fact that some
- 20 things can be separated doesn't mean that everything can
- 21 be separated. And the question is, how is it possible
- 22 to understand RICO except as something in which these
- 23 things are intermelded, and at the very least that --
- one is not prior to the other or more important than the
- 25 other.

- I mean, if we are going by our cases, we've
- 2 said about a hundred times that it's the predicate acts
- 3 that are -- that are the foundation of RICO.
- 4 MR. KATSAS: Congress has -- Congress has
- 5 told you in the statutory findings what they are
- 6 concerned about. It is infiltration and corruption of
- 7 domestic enterprises. Consistent with that is the
- 8 structure of Section 1962, three different provisions;
- 9 in each of them, the enterprise -- the enterprise is the
- 10 victim of the corruption. It's not the person doing the
- 11 corrupting.
- 12 It's particularly obvious with respect to
- 13 Sections 1962(a) and 1962(b), right? The racketeer uses
- 14 proceeds to invest in an enterprise. Enterprise is the
- 15 victim. That's the object of Congress's concern. Even
- 16 with regard to 1964(c), the typical case they have in
- 17 mind is infiltration and corruption of a domestic
- 18 enterprise, straight out of the findings.
- 19 JUSTICE GINSBURG: So you would -- you would
- 20 say -- I mean, the -- another example doesn't say the
- 21 -- the -- the Sicilian Mafia commits a series of violent
- 22 crimes in the United States that would violate RICO if
- 23 committed by a New York-based Mafia family. But -- so
- 24 the New York-based Mafia family, RICO applies.
- 25 Sicilian-based does the very same act; doesn't apply.

- 1 MR. KATSAS: The --
- JUSTICE GINSBURG: That is your position,
- 3 right?
- 4 MR. KATSAS: That's right. The -- the
- 5 concern about the crimes is addressed by other statutes
- 6 which criminalize the conduct. When the Sicilian Mafia
- 7 commits --
- JUSTICE GINSBURG: And not the pattern.
- 9 It's just that the statute gets at after the individual
- 10 instance. RICO says when you have a pattern, things are
- 11 a lot tougher for you.
- MR. KATSAS: So it says -- says when you
- 13 have a pattern, that impacts an enterprise.
- 14 And if I could just get on the table the
- 15 question about the 1964(c) issue with regard to domestic
- 16 enterprises. The paradigmatic case that Congress has in
- 17 mind, the racketeers infiltrate the union, use
- 18 racketeering proceeds to take it over -- that's the
- 19 1964(a) violation -- and then they use the union to do
- 20 bad things, to extort money from its members or
- 21 whatever. That's a case in which the union is the
- 22 vehicle for racketeering, but it's not the racketeer.
- 23 It is the victim of criminal conduct. The conducting
- 24 the affairs of the union in that way is an example of
- 25 corrupting conduct.

1 I'd -- I'd like to just get one more thought 2 on the table on the injury point before I sit down, 3 which is this Court's decision in Empagran, where you 4 applied the presumption and related principles of comity 5 to a case involving a -- foreign injuries caused by 6 primarily foreign conduct. And you said it would be so 7 unreasonable to do that as to violate customary 8 international law. That is exactly what we have here. 9 If you look at the complaint, the underlying conduct 10 that Respondents say injured them are a series of foreign transactions, and you can resolve this case 11 12 based on Empagran alone if you wish to not write more 13 broadly. 14 I'd like to reserve the balance of my time. 15 CHIEF JUSTICE ROBERTS: Thank you, counsel. 16 Ms. Goldenberg. ORAL ARGUMENT OF ELAINE J. GOLDENBERG 17 FOR UNITED STATES, AS AMICUS CURIAE, 18 19 SUPPORTING VACATUR 20 MS. GOLDENBERG: Mr. Chief Justice, and may 21 it please the Court: 22 I'd like to talk about both the enterprise 23 and the injury points, but I'd like to start with the 24 enterprise point, because Section 1962 most directly affects the government's ability to bring RICO 25

- 1 prosecutions and RICO civil actions.
- 2 And as some of those questions have pointed
- 3 out, there are a number of predicates that are
- 4 incorporated into RICO, into the definition of
- 5 racketeering activity, that have extraterritorial
- 6 applications. Some of them have solely extraterritorial
- 7 applications. And that is a clear indication that RICO
- 8 itself extends extraterritorially to the extent that the
- 9 predicates that are alleged in the case do. And that is
- 10 true both of the pattern itself, the conduct of the
- 11 crimes, and also of the enterprise. And you can see
- 12 that, if you look at the kinds of predicates that we are
- 13 talking about here.
- 14 As was observed earlier, many of them were
- incorporated into RICO after 9/11. Many of them
- 16 involved terrorist conduct. And the natural way in
- 17 which the provisions would operate and Congress would
- 18 have understood this is that they would have swept in
- 19 activities by foreign enterprises as well as the foreign
- 20 conduct itself. We've given a number of examples of
- 21 those kinds of provisions in our brief: The killing of
- 22 the U.S. national abroad, taking U.S. hostages abroad,
- 23 shooting at aircraft with U.S. citizens abroad with
- 24 missile systems.
- There is another example that is, I think, a

- 1 very clear one, that is Section 2339D, which is
- 2 receiving military-type training from a foreign
- 3 terrorist organization. Although I suppose it is
- 4 possible that somebody could go and receive that
- 5 training in connection with their activities with a
- 6 domestic enterprise, the very natural operation of that
- 7 provision is going to be that they are going to be
- 8 carrying out the affairs of a foreign enterprise -- in
- 9 fact, a very foreign terrorist organization -- that is
- 10 holding the military-type training and has those
- 11 training camps.
- 12 And so we think that it's clear that the
- 13 provision has -- that Section 1962 has extraterritorial
- 14 applicability, both with respect to the foreign pattern
- of conduct and with respect to the enterprise, to the
- 16 extent that a predicate with extraterritorial
- 17 applicability is implicated.
- 18 I've heard Petitioners talk about two
- 19 reasons why they think that might not be true, both of
- 20 which I think are incorrect. One is that the government
- 21 could just prosecute the underlying crimes themselves
- 22 and not use RICO, and the other is that -- well, in
- 23 situations in which you have some people in the United
- 24 States, you could kind of break them off and call them a
- 25 domestic enterprise. And I don't think either of those

- 1 is a workable approach to Section 1962.
- 2 With respect to just prosecuting the
- 3 underlying crimes, of course the very point of RICO was
- 4 that Congress thought, where there were patterns of
- 5 serious crimes, that just prosecuting the crime itself
- 6 was not a strong enough tool for the government, and
- 7 that it was important for the government to have these
- 8 special advantages that RICO confirms in order to root
- 9 out the things that are causing these patterns of
- 10 crimes.
- 11 CHIEF JUSTICE ROBERTS: But RICO imposes, it
- 12 seems to me, as we've even observed in the domestic
- 13 context, far more significant -- the impact
- 14 internationally could be far more significant than
- 15 prosecution simply of the underlying offenses. It
- 16 obviously provides the government with extremely strong
- 17 prosecutorial reach and penalties, far beyond what the
- 18 substantive elements do. And I'm wondering why that
- 19 shouldn't cause us to be more concerned with respect to
- 20 the comity interests that are at stake when you're
- 21 talking about extraterritorial applicability.
- 22 MS. GOLDENBERG: Well, I think, as this
- 23 Court observed in Empagran, when you're talking about
- 24 Section 1962 or something like Section 1962, where it is
- 25 the government that is choosing whether to prosecute or

- 1 whether to bring a civil action, the government has the
- 2 ability, it has the incentive, to take those kinds of
- 3 concerns into account and to regulate itself, either to
- 4 be constrained in bringing that kind of action where it
- 5 might cause some comity concerns, or to deal
- 6 government-to-government with another government, to try
- 7 to make sure that those comity concerns are smoothed
- 8 over. It's on the private side, under Section 1964(c),
- 9 where you have private parties bringing treble damages
- 10 actions, that the concerns about comity, I think, are
- 11 much greater, because private parties don't have that
- 12 same ability or incentive to regulate. When they are
- 13 bringing actions, they are trying to get their treble
- 14 damages.
- 15 JUSTICE BREYER: Well, I thought this was
- 16 the same question, but I'm elaborating a bit because
- 17 it's both for you and Mr. Frederick's reading.
- 18 I thought the answer to my first question
- 19 would be that the government just wanted the forfeiture
- 20 provisions -- that's why it put them in -- or the
- 21 criminal provisions -- that's why it put these other
- 22 things in -- and you say, that's right. You say, but
- 23 they didn't want the damages to extend abroad. That's
- 24 your position.
- 25 MS. GOLDENBERG: Yes. That's correct.

- 1 JUSTICE BREYER: You wrote it into your
- 2 brief.
- 3 MS. GOLDENBERG: Yes.
- 4 JUSTICE BREYER: And you're the State
- 5 Department for this purpose, and you ought to know.
- But then they're the EU, and moreover, not
- 7 only do they tell us that the 27 nations of the EU don't
- 8 agree with you, but in fact, what's very confusing about
- 9 this is, in the Alien Tort Statute case -- which, after
- 10 all, involved torture, and not simply money
- 11 laundering -- the EU countries, at least three, were in
- 12 here with briefs -- I think it was Germany, the
- 13 Netherlands and Britain -- saying, stay out of this
- 14 stuff. Not completely, but basically. And you were on
- 15 the other side. Okay? So what's going on?
- 16 (Laughter.)
- 17 JUSTICE BREYER: That is, I mean -- and it's
- 18 not just a -- that's not a criticism. We have to write
- 19 this. And I think what you think and what those
- 20 countries think is very important in matters like this.
- 21 And here they're taking what seem to be contradictory
- 22 positions. Who do you talk to? Who do they talk to?
- 23 Is this the right hand not knowing what the
- 24 left hand is doing in Britain and in -- and in Germany?
- 25 Is it that no one actually spoke to anybody

- 1 except the lawyer at the EU, and then the EU never spoke
- 2 to anybody in any of the relevant Ministries of Justice
- 3 or Embassy?
- Is it that you actually went and talked to
- 5 the ambassadors of England, Germany, the Netherlands and
- 6 asked them why do you want us to take a different
- 7 position in this case than -- it seems to be -- than you
- 8 took in the other case?
- I mean, I have a few pages here. I can't
- 10 work with a few pages. I have no idea what the right
- 11 result is here in one important aspect unless I know
- 12 what afterthought and consideration you, the State
- 13 Department, and those other countries, and their
- 14 ambassadors, et cetera, actually think.
- Do I have enough here to deal with it? What
- 16 do I do?
- MS. GOLDENBERG: Well, I think you do have
- 18 enough here to show what we actually think.
- 19 Mr. Frederick --
- JUSTICE BREYER: Did you consult with the
- 21 embassies? Did the State Department go out and ask them
- 22 to have their legal departments over in Germany look up
- 23 what the actual effect would be of the damages? Or was
- 24 it the EU that bore total responsibility for this matter
- 25 without even consulting from Brussels what happens in

- 1 Germany or some other place? I mean, how did it work?
- MS. GOLDENBERG: Well, to my knowledge, we
- 3 didn't have those consultations, although I understand
- 4 that the EU informed the Justice Department before it
- 5 filed the --
- 6 JUSTICE BREYER: And did it consult with the
- 7 other three? You see where I'm going, and I'd like your
- 8 best answer --
- 9 MS. GOLDENBERG: Well, I think that this is
- 10 a very unusual case where you have foreign sovereigns as
- 11 the private RICO plaintiffs. I think that won't usually
- 12 be true. And the rule that we are coming in here to
- 13 advance is going to be the rule for the usual case, as
- 14 well as the unusual case.
- And so although it may be that, you know,
- 16 the EU has special views about comity concerns here
- 17 where it's the plaintiff, in the usual case the
- 18 plaintiff is going to be a private party, and it's going
- 19 to be a situation in which the conduct and the injury
- 20 took place somewhere else. And the country where that
- 21 conduct and that injury took place may very well have
- 22 its own interest in regulating, may not be appreciative
- 23 of plaintiffs being able to come to the United States to
- 24 get remedies here, particularly treble damages remedies,
- 25 which, as this Court pointed out in Empagran, is

- 1 something that often causes foreign countries a great
- 2 deal of consternation --
- JUSTICE GINSBURG: That's -- why isn't forum
- 4 non conveniens the answer to that? If -- if -- the
- 5 question is, where should -- who should provide a remedy
- 6 to this conduct, and if it's -- really is centered in
- 7 that other state, a forum non conveniens motion should
- 8 be -- should be made to dismiss the action, because it's
- 9 a far more appropriate forum abroad.
- 10 MS. GOLDENBERG: This Court suggested in
- 11 Empagran that going case-by-case with this kinds --
- 12 these kinds of comity concerns was too burdensome and
- 13 too difficult for courts, and it would be better to make
- 14 a blanket judgment about the comity concerns with
- 15 respect to the cause of action as a whole. And here, of
- 16 course, we're talking not only about what court you're
- 17 going to be in, but what law is going to apply.
- 18 The courts in the United States are not
- 19 being closed to RICO plaintiffs if they can't bring a
- 20 private claim for treble damages under Section 1964(c).
- 21 There may be other kinds of claims that they can bring.
- This is a question about whether, under this
- 23 particular Federal statute, there is a recovery that's
- 24 -- that's permissible. And --
- 25 JUSTICE KAGAN: Ms. -- please. Sorry.

- 1 MS. GOLDENBERG: Well, all -- I was just
- 2 going to say that in addition to comity concerns, I
- 3 think there are other things that point in the
- 4 direction --
- 5 JUSTICE KAGAN: Well, then, can I interrupt
- 6 and talk about your comity concerns, because I
- 7 understand them. I mean, they seem very important. But
- 8 once you say that the presumption against
- 9 extraterritorial is rebutted, on both the pattern of
- 10 racketeering and the enterprise, once you say that, then
- 11 drawing the line where you draw it seems to be very
- 12 policyish. There doesn't seem to be a whole lot of law
- 13 behind it. So I want to give you an opportunity to make
- 14 it as law-like as you can, drawing the line here.
- 15 MS. GOLDENBERG: Sure. There are a number
- 16 of things, I think. One is that just on the face of the
- 17 provisions, you can see that Section 1964(c) is not
- 18 co-extensive with -- with Section 1962. Congress chose
- 19 to provide for recovery only for injury to business or
- 20 property, not for personal injury, even though many of
- 21 these predicates might be likely to cause personal
- 22 injury.
- 23 In addition to that, I think you have the
- 24 comity concerns, which are an important underpinning of
- 25 the presumption against extraterritoriality. And as

- 1 Petitioner's counsel pointed out, you do have this
- 2 background common law rule that the place of injury is
- 3 going to be the place where -- that -- that's going to
- 4 have the law govern whatever injury you're talking about
- 5 rather than the law of some the other jurisdiction.
- 6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- 7 Mr. Frederick.
- 8 ORAL ARGUMENT OF DAVID C. FREDERICK
- 9 ON BEHALF OF THE RESPONDENTS
- 10 MR. FREDERICK: Thank you, Mr. Chief
- 11 Justice, and may it please the Court:
- The European Union and 26 of its Member
- 13 States brought this case in the United States against a
- 14 United States corporation for the actions it committed
- 15 in the United States and from the United States, that
- 16 had effects in Europe. This was a completely logical
- 17 and natural place for this case to be brought --
- 18 JUSTICE ALITO: Why is that? Why is that
- 19 so, Mr. Frederick? Isn't it rather strange that
- 20 countries in Europe, Member States of the European
- 21 Union, are suing in the courts of the United States for
- 22 injuries sustained to their business interests in
- 23 Europe? Why didn't they just sue in their own courts?
- MR. FREDERICK: Well, first, the fact that
- 25 RJR has no subsidiary in Europe raised a question of

- 1 personal jurisdiction that would have affected the
- 2 enforceability of judgments. And you had an issue where
- 3 you had 26 Member States that were being affected, and
- 4 the logical place for them in working together would be
- 5 in the United States court.
- For precisely the reason that when the legal
- 7 advisor in 1982 testified after this Court's Pfizer
- 8 decision about the applicability and reciprocity of
- 9 having foreign countries come to United States courts,
- 10 the legal advisor testified that the United States had
- 11 brought cases in over 50 jurisdictions around the world.
- 12 JUSTICE ALITO: Well -- well, are you saying
- 13 that the -- the law of personal jurisdiction in the --
- 14 the Member States of the European Union is similar to
- 15 that in the United States, that they would not -- under
- 16 their laws, they would say they do not have personal
- 17 jurisdiction over RJR?
- 18 MR. FREDERICK: Justice Alito, what I'm
- 19 saying is that it varies among the Member States. But
- 20 what we do know is the defendant, the evidence, the
- 21 witnesses are here in the United States, and the
- 22 allegation is that they violated U.S. law. And it is
- 23 the same kind of action that the United States has
- 24 brought in European Member States for many, many
- 25 years --

1 JUSTICE BREYER: Did you, in fact, ask them? 2 MR. FREDERICK: We did -- we --3 JUSTICE BREYER: What happened there? 4 Because look, I'm faced with a situation where the State 5 Department is telling me one thing. And -- and I --6 it's an area I don't know about. What will really 7 happen in international relations? That's their job. And you are representing the EU, which seems to be 8 9 taking a position somewhat different than it took 10 previously, and I want to know who did you talk to. 11 MR. FREDERICK: Justice Breyer --12 JUSTICE BREYER: How -- how did it work? 13 MR. FREDERICK: Thank you for asking me this question. We presented information to the U.S. 14 15 officials before the suit was filed, and were told that the U.S. would be neutral as to it. 16 17 Furthermore, I can tell you that in 20 years of practicing before this Court, this is the single most 18 comprehensively vetted exercise on my brief that I have 19 20 ever had. 21 EU officials have gone over every single 22 line and compared with the positions taken by Member 23 States in other cases. And the reason why this isn't 24 important to the EU, and the consistency with which

those positions is made, rests on four very important

25

- 1 principles.
- 2 When Congress extended RICO
- 3 extraterritorially, there are one of four components
- 4 that is present in every single one of the 40-some
- 5 statutes that the Solicitor General puts in Appendix B:
- 6 The victim is an American; the defendant is an American,
- 7 the perpetrator; there is effect on U.S. interests; or
- 8 there is conduct that occurs in the United States.
- 9 Every one of those four components tracks
- 10 with an important principle of international law. The
- 11 extraterritoriality principle, the nationality
- 12 principle, the passive protective personality principle,
- 13 and the protective personality.
- So these issues are things that Congress was
- 15 considering and was aware of when it made the decision
- 16 to extend these crimes extraterritorially --
- 17 JUSTICE KENNEDY: But if -- if --
- 18 MR. FREDERICK: -- it posed a domestic
- 19 requirement. Sorry.
- JUSTICE KENNEDY: If you prevail, and there
- 21 is a case with mostly foreign conduct and foreign
- 22 injuries, and if personal jurisdiction and forum non
- 23 conveniens are satisfied, then these actions could be
- 24 brought under RICO in foreign courts, correct?
- 25 MR. FREDERICK: Sorry. In foreign courts,

- 1 or in the United States?
- JUSTICE KENNEDY: In foreign courts.
- MR. FREDERICK: Well, not under RICO. I
- 4 don't think that a foreign government or foreign country
- 5 would be using the law --
- JUSTICE BREYER: Let's say a private person
- 7 is injured in England can bring a -- I take it bring a
- 8 suit in English court and invoke RICO.
- 9 MR. FREDERICK: Not that I'm aware of.
- 10 JUSTICE KENNEDY: Why not?
- 11 MR. FREDERICK: Because I'm not aware
- 12 that -- that the English courts would apply RICO in this
- 13 case. I have no brief to defend, Justice Kennedy, in
- 14 this respect.
- JUSTICE KENNEDY: Well, you're saying it
- 16 applies extraterritorially.
- MR. FREDERICK: No, what -- what it does,
- 18 Justice Kennedy, and this is why it's actually important
- 19 to go through statute by statute all of the provisions
- 20 in the Solicitor General's appendix, and we've got a
- 21 binder that's got every single one of them, and you can
- 22 ask me about every one.
- 23 Congress imposed a domestic proof
- 24 requirement as to every extension of extraterritoriality
- 25 for those crimes. The victim had to be an American.

- 1 The defendant had to be an American. Conduct had to
- 2 occur in the United States or there had to be some
- 3 important interest of the United States that was at
- 4 stake. If those four elements were not required or not
- 5 part of the statute, then it would not track with the
- 6 normal international law principles by which nations
- 7 respect through comity the regulations of conduct
- 8 emanating from the shores of that country.
- 9 CHIEF JUSTICE ROBERTS: I thought the victim
- 10 here was the European Community.
- 11 MR. FREDERICK: It is, but the Defendant is
- 12 an American and conduct was occurring here in the United
- 13 States. And if you look at the money laundering
- 14 statute, Mr. Chief Justice --
- 15 CHIEF JUSTICE ROBERTS: I'm sorry. I just
- 16 thought earlier you were citing it. You said the victim
- 17 is the --
- 18 MR. FREDERICK: One of those four --
- 19 CHIEF JUSTICE ROBERTS: Oh, it's just one.
- MR. FREDERICK: All I'm saying is one of the
- 21 four. Here we have two of them. If you look at the
- 22 money laundering statute, conduct occurred in the United
- 23 States and the defendant was in the United States
- 24 national. And so international law is satisfied.
- 25 Comity principles are satisfied.

- In those cases, like the Alien Tort Statute
 where you did not have a cause of action that had been
- 3 drafted by Congress and so, therefore, you did not have
- 4 a legislative determination of the effect on comity
- 5 interests internationally, you're left with a situation
- 6 where you had judge-made law, and this Court, I think
- 7 appropriately, followed the guidance and advice of
- 8 foreign nations which said, be careful how far you
- 9 extend judge-made law.
- 10 There is a different principle at stake when
- 11 there is a considered legislative judgment and the
- 12 limitation on that extraterritorial impact is one that
- 13 has a very clear tie to the United States.
- 14 CHIEF JUSTICE ROBERTS: You -- you can
- 15 easily -- you can easily envision situations where
- 16 private parties prosecuting RICO actions for -- against
- 17 European entities might implicate serious comity
- 18 concerns whether the racketeering enterprise is a
- 19 State-owned actor or an -- an entity that's strongly
- 20 supported by the -- the government. And in those
- 21 situations, how would comity concerns of the foreign
- 22 government be taken into account in the private treble
- 23 damages action?
- MR. FREDERICK: So it's hard for me to see,
- 25 based on your hypothetical, Mr. Chief Justice, which of

- 1 the predicate crimes would be asserted as the underlying
- 2 pattern of -- of racketeering. I've actually thought of
- 3 a lot of them.
- 4 CHIEF JUSTICE ROBERTS: So here we have
- 5 racketeering --
- 6 MR. FREDERICK: I haven't found one.
- 7 CHIEF JUSTICE ROBERTS: Yeah.
- 8 MR. FREDERICK: I haven't found one.
- 9 CHIEF JUSTICE ROBERTS: Here the -- you have
- 10 racketeering activity that goes to the illegal
- 11 trafficking and cigarettes, right?
- MR. FREDERICK: Yes.
- 13 CHIEF JUSTICE ROBERTS: So, I mean, what
- 14 if -- what if -- and you have a -- domestic crime
- 15 predicates, what -- what if the cigarettes were marketed
- 16 through, you know, I don't know, an enterprise very
- 17 important to the government of -- you know, some
- 18 government that sells cigarettes, the -- you can imagine
- 19 other products.
- 20 In other words, it's -- it's -- here you
- 21 have sort of an organized crime enterprise. But the way
- 22 the racketeering statute works, and we have a lot of
- 23 experience with this domestically, it reaches far beyond
- 24 what you would have thought Congress had in mind when it
- 25 used the word "racketeering" and certainly involves

- 1 otherwise legitimate enterprise.
- 2 MR. FREDERICK: But, Mr. Chief Justice, my
- 3 point is that if you look at each one of the acts that
- 4 is incorporated and has an extraterritorial component,
- 5 there is a direct tie to the United States, and the
- 6 crimes have to be unindictable under Federal or State
- 7 law.
- 8 So with respect, I think what you're
- 9 hypothesizing is a situation that would be a null set,
- 10 and that's where these crimes are occurring in Europe
- 11 under European member State laws, and somehow there is
- 12 going to be a tie in to RICO, that wouldn't be possible
- 13 under a plain reading of the RICO statute.
- 14 JUSTICE GINSBURG: Because it's only the
- 15 statute that has the extraterritorial -- the
- 16 extraterritoriality built into them.
- 17 MR. FREDERICK: That's correct.
- 18 JUSTICE GINSBURG: Most statutes that are --
- 19 crimes that are punishable under RICO will have -- will
- 20 not have the extraterritorial provision in the
- 21 underlying statute.
- 22 MR. FREDERICK: That's correct. There are
- 23 roughly three-quarters of the statutes that are
- 24 incorporated into RICO that do not have an
- 25 extraterritorial effect, and those would not be subject

- 1 to a RICO case that would have extraterritorial
- 2 consequences.
- JUSTICE GINSBURG: Candidly, is -- why is
- 4 the EU suing here? Does it have something to do with no
- 5 one else having a treble damage provision like RICO?
- 6 MR. FREDERICK: Actually, treble damages are
- 7 not at all the reason why this case was brought in the
- 8 United States. And, in fact, if you want me to
- 9 stipulate that we will not accept treble damages, I've
- 10 been authorized by my clients to say that that is not
- 11 what we are seeking here.
- 12 What we are seeking here is a situation
- 13 where an American company is operating through largely
- 14 illegal cutouts and middlemen and organized criminal
- 15 operators in Europe and in the Mediterranean and
- 16 violating and affecting European enterprises.
- 17 The complaint in this case, which is very
- 18 detailed with respect to the introduction of cigarettes
- 19 made and marketed in the United States are targeted to
- 20 foreign country audiences, but they are being sold
- 21 through illegal channels through Panama, through other
- 22 countries and into Europe through organized crime and
- 23 drug cartel operators.
- I have seen the evidence for this. I have
- 25 looked at the documents from RJR. I can tell you this

- 1 is the most serious misconduct, and it involves very,
- 2 very serious allegations that have been proved by the
- 3 internal documents of the company itself.
- 4 JUSTICE ALITO: Isn't it -- isn't it strange
- 5 for a government to choose to sue in the courts of
- 6 another country?
- 7 MR. FREDERICK: Well, in fact --
- 8 JUSTICE ALITO: Unless there is something to
- 9 your personal jurisdiction point, and I really -- my
- 10 understanding of -- of the law of a lot of the European
- 11 countries is that they have a very broad understanding
- 12 of personal jurisdiction. But putting -- putting that
- 13 aside, it would seem very strange to choose to sue in
- 14 the courts of another country.
- 15 MR. FREDERICK: Justice Alito, if -- if the
- 16 European nations know that they are eventually going to
- 17 have to come to the United States to enforce the
- 18 judgment and there is no -- there are no assets to
- 19 attach in Europe by RJR, because it doesn't have
- 20 subsidiaries there, the simplest thing to do would be a
- 21 one-step process.
- This suit was filed almost 16 years ago, 15,
- 23 16 years ago and we are still at the motion to dismiss
- 24 stage. You can imagine that from the perspective of
- 25 litigation efficiency coming into the home forum of the

- 1 defendant and saying, we believe you are violating U.S.
- 2 law and we seek redress for that, that is perfectly
- 3 appropriate.
- If I could turn to the injury question, the
- 5 RICO statute incorporated language of the Clayton Act
- 6 which, before 1970, had been construed to permit foreign
- 7 plaintiffs to come into the United States and obtain
- 8 foreign damages as a result of U.S. violations by the
- 9 company in the United States.
- 10 The Continental Ore case, which was decided
- 11 by this Court in 1962, is directly on point. That case
- 12 holds that injury suffered by Canadian entities could
- 13 come in and come into the United States and get damages
- 14 as a result of the violation of the Clayton Act.
- In Pfizer, the government of India, coupled
- 16 with governments in Iran and the Philippines, came to
- 17 the United States and alleged that Pfizer owned --
- 18 JUSTICE BREYER: I'm -- just a moment. I
- 19 know this. You're absolutely right on that. The -- the
- 20 question that -- can you, when -- when you sue -- the EU
- 21 sues, A, an American company. Now, it's been in league
- 22 with six foreign countries, and they have agreements.
- 23 And what the crime is, is money laundering, and the
- 24 money laundering took place in Belgium, and you win.
- 25 Now, can you go to Belgium and get the damages? You

- 1 see?
- 2 There are six Belgium banks. They are not
- 3 accused. They are unindicted co-conspirators.
- 4 And under this -- does this statute allow a -- the EU to
- 5 come to Philadelphia, find RJR, accuse them of money
- 6 laundering with unindicted co-conspirators in Brussels,
- 7 get damages, and then go to Brussels and collect them
- 8 from the other banks?
- 9 MR. FREDERICK: I -- I would assume that the
- 10 Belgium courts -- and I'm not going to profess to be an
- 11 expert on the enforceability of judgments in Belgium,
- 12 Justice Breyer, and so I give you that answer.
- JUSTICE BREYER: But do they get a judgment
- 14 against the foreign bank?
- MR. FREDERICK: To get a -- well, presuming
- 16 that there was personal jurisdiction in the United
- 17 States, assume --
- 18 JUSTICE BREYER: The EU -- the jurisdiction
- 19 only against RJR unindicted co-conspirators or helpers,
- 20 whatever.
- 21 MR. FREDERICK: I -- I don't know the answer
- 22 to your question.
- 23 JUSTICE BREYER: I think they are worried
- 24 about something like this. I think that's what the
- 25 State Department is worried about.

- 1 MR. FREDERICK: Here is the answer, though.
- 2 The answer is that if those Belgium banks are in a
- 3 conspiracy with RJR, it surely cannot be the case that
- 4 U.S. law does not cover RJR.
- 5 If there is a question about the
- 6 enforceability of a judgment against the Belgium banks,
- 7 presumably the Belgium banks will make that argument,
- 8 and they will claim in Belgium that -- that somehow a
- 9 suit prosecuted in the United States in which they were
- 10 co-conspirators is somehow not going to cover their
- 11 activity.
- 12 Our point is that it can't be the case
- 13 where, for centuries, the United States courts have been
- 14 open to allow foreign plaintiffs to come in alleging
- injury caused by U.S. actors under U.S. law, that
- 16 somehow we're going to read the Morrison principle as a
- 17 way of constricting the available remedies. Nothing in
- 18 Morrison suggests that you would do that kind of
- 19 extraterritorial slicing and dicing, where once you had
- 20 concluded that the underlying action here was one that
- 21 observed and respected international norms and went to
- 22 extraterritorial lengths provided in this case, that
- 23 there is a tie to the United States. And whatever
- 24 remedies are available are available.
- 25 And after Pfizer, a number of U.S. companies

- 1 were concerned about it, and they went to Congress and
- 2 they asked Congress to restrict it. And the hearings
- 3 that we have laid out in our brief -- and this is page
- 4 45, note 11 -- goes into the legislative history of
- 5 this. And the State Department, Justice Breyer, took
- 6 exactly the opposite position, because the State
- 7 Department said, reciprocity demands that we be allowed
- 8 to go into other nations' courts and the availability of
- 9 our courts for foreign nations to come in for violations
- 10 of the U.S. And if you look at footnote 13, which is on
- 11 page 55, the State Department testified to Congress that
- 12 the United States had brought more than 50 actions in
- 13 nations around the world.
- So the idea about comity is one that,
- 15 respectfully, is a decision that is made by Congress,
- 16 and it is not for the executive branch to change its
- 17 position for the purpose of trying to snuff out a remedy
- 18 that otherwise would be available to a foreign
- 19 plaintiff.
- JUSTICE KAGAN: Well, Mr. -- Mr. Frederick,
- 21 I understand that argument with respect to what's the
- 22 ordinary remedial provision of a statute. But this is
- 23 something a little bit more than that, right? Because
- 24 this statute also -- this provision also includes
- 25 substantive elements that don't apply except in the

- 1 civil suit for damages. Isn't that right?
- 2 MR. FREDERICK: That's true.
- 3 JUSTICE KAGAN: So why doesn't that make the
- 4 difference?
- 5 MR. FREDERICK: It could. And, Justice
- 6 Kagan, if you were to decide that the three verbs that
- 7 are in 1962(a), (b) and (c), which are influencing,
- 8 buying, or investing in, had to have a domestic
- 9 component, we still would satisfy that, because our
- 10 allegations in the complaint are that RJR from its
- 11 corporate headquarters in New York and Winston-Salem was
- 12 engaging in those conducts to effect and corrupt the
- 13 foreign enterprise, or the domestic enterprise, as was
- 14 the case with Brown & Williamson.
- 15 JUSTICE ALITO: Well, if we look just at
- 16 1964(c) and apply the Morrison analysis in a
- 17 straightforward way, would that analysis work in this
- 18 way? There isn't any reference in 1964(c) to
- 19 extraterritorial application. And where would be the
- 20 focus of 1964(c)? Would it be the injury to business or
- 21 property?
- MR. FREDERICK: So, Justice Alito, I would
- 23 have two responses. '64, 1964, incorporates directly
- 24 1962. So there is a direct reference to the definition
- of "racketeering" that has the some 46 predicate acts

- 1 that have a clearly textual extraterritorial effect. So
- 2 I think that by incorporation, you would interpret it
- 3 that way.
- And the second thing is that when Congress
- 5 used that language in 1964, it was tracking the Clayton
- 6 Act. And the Clayton Act had a -- a predetermined and
- 7 pre-understood meaning as to what those words meant.
- 8 JUSTICE ALITO: But at that time, RICO would
- 9 not have an extraterritorial application, would it?
- 10 MR. FREDERICK: No. My position is that the
- 11 -- the extraterritorial application has gotten stronger
- 12 over time, but if you were to adopt the normal canon of
- 13 construction, which is that when Congress adopts words
- in a statute, they carry with it the meaning that this
- 15 Court has given those words. The same words are in the
- 16 Clayton Act as they were adopted in 1970, and as Justice
- 17 Kagan pointed out, the case has only become stronger
- 18 with the Money Laundering and post-PATRIOT Act additions
- 19 of those predicate acts.
- 20 But the third answer I would give you,
- 21 Justice Alito, is that even in Morrison itself, the
- 22 Court's opinion says once we have found there to be
- 23 extraterritorial application, it's not for us to be
- 24 deciding that there are different provisions that
- 25 shouldn't have that. And that's essentially the

- 1 argument that is being made as to take an extension of
- 2 Morrison beyond where the Court was --
- 3 JUSTICE BREYER: But there is a problem with
- 4 the Clayton Act, even at this time. It's been a
- 5 nightmare for foreign countries, and there has always
- 6 been controversy around it. And there were cases called
- 7 Tamburlaine and others which, you know, led -- led to
- 8 the kind of thing that the SG has described in his
- 9 brief. So the Clayton Act is helpful in one respect,
- 10 but not helpful in the other respect.
- MR. FREDERICK: And my answer is, Congress
- 12 has addressed some of those concerns in the antitrust
- 13 area with various amendments that affect -- that -- that
- 14 only go to conduct.
- And classically, what Congress is getting at
- 16 is conduct, not remedy. But in the conduct area, what
- 17 Congress has done in one of the antitrust amendments for
- 18 the Sherman Act was to say, we are only going to affect
- 19 foreign conduct if it has a domestic effect, but it is
- 20 still a focus on conduct and not on remedy. Congress is
- 21 very well-equipped to deal with this issue should it
- 22 proceed that -- there to be a concern, but Justice
- 23 Breyer, I would point out that it would be odd to
- 24 suppose that Congress is intending to turn the United
- 25 States into a place where criminal activities could

- 1 occur from the United States that was affecting our
- 2 closest allies and there was nothing those allies could
- 3 do about it by going into the United States and trying
- 4 to vindicate and -- and seek redress for those harms.
- 5 That would be a very, very stark departure from this
- 6 country's long history of having respect and -- and
- 7 provide a remedy for foreigners who are harmed by
- 8 actions of the United States and its citizens.
- 9 If I could just address the -- I think I've
- 10 addressed the Empagran question, because that's the
- 11 statute that was affected. And if I could just note
- 12 that the PATRIOT Act -- footnote 10 of our brief points
- 13 out that then-Senator John Kerry, now Secretary of
- 14 State, was very conscious of the effect that this would
- 15 have on foreign nations and foreign litigants. And when
- 16 the PATRIOT Act extended certain of these predicate acts
- 17 into RICO, he stated on the floor -- we cited the
- 18 provision in our brief -- the reason for doing that was
- 19 to give foreign nations that had been affected and who
- 20 were treaty allies an opportunity to come and seek
- 21 redress in our courts.
- 22 The last point is that Mr. Katsas noted the
- 23 choice-of-law principle, where there is a foreign injury
- 24 and there is a decision to apply foreign law, and he
- 25 says, why shouldn't that apply here? That only applies

- 1 where there is a conflict between the laws that would
- 2 apply here -- we are asserting that there is a U.S.
- 3 statutory violation by a U.S. company for actions that
- 4 it committed in part in the United States. There's no
- 5 reason to apply a choice of law, because you have a
- 6 foreign company that is -- or foreign interests that are
- 7 asserting a violation of U.S. domestic law.
- In every instance where Congress made the
- 9 decision to apply RICO extraterritorially, it imposed
- 10 important domestic proof requirements. That is the
- 11 limiting principle on which the Court ought to decide
- 12 this case.
- 13 Thank you.
- 14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
- Mr. Katsas, you have four minutes remaining.
- 16 REBUTTAL ARGUMENT OF GREGORY G. KATSAS
- 17 ON BEHALF OF THE PETITIONERS
- 18 MR. KATSAS: Justice Breyer, you asked about
- 19 government's positions.
- The United States is the party that has to
- 21 live with the consequences of your decision one way or
- 22 the other. They are telling you here that there is a
- 23 comity problem with respect -- there is no inconsistency
- 24 with what they said before. In Empagran, they told you
- 25 the same thing: That providing remedies for foreign

- 1 injuries caused by largely foreign conduct would be a
- 2 problem.
- 3 The EU is here as a party in this case, but
- 4 take a look at what they said in many other cases where
- 5 they were in the more detached position: As an amicus
- 6 in OBB, in Kiobel, in Sosa, and most importantly, in
- 7 Empagran itself, which is the case involving foreign
- 8 injuries caused by largely foreign conduct. They said
- 9 in that case there would be a huge comity problem with
- 10 extending American law.
- 11 With regard to comity, Justice Kagan, you
- 12 asked is it -- is it too policy-ish. It's not because
- 13 you have all of these background presumptions and
- 14 principles. I spoke about the presumption against
- 15 extraterritoriality and about the common law background
- 16 rule of lex loci delicti.
- 17 A third principle is the Charming Betsy
- 18 canon, that you construe Federal statutes not to violate
- 19 international law absent a very clear statement to the
- 20 contrary, and that's what we have here, because Empagran
- 21 says that applying U.S. law to provide redress for
- 22 foreign injuries caused by largely foreign conduct would
- 23 be unreasonable, and therefore, a violation of customary
- 24 international law.
- 25 You also ask why draw the line at injury?

- 1 Once you established the underlying, the underlying
- 2 predicate applies extraterritorially.
- 3 First reason is that the decision to create
- 4 a private right of action is -- is different from the
- 5 decision to criminalize the conduct. The money
- 6 laundering statute applies extraterritorially, but
- 7 there's no private right of action for people injured by
- 8 money laundry.
- 9 The second reason is that Empagran applies
- 10 that principle to the question of injury, and
- 11 specifically does so with regard to the very antitrust
- 12 provisions that were in effect pre-1982, in effect when
- 13 RICO was enacted to say there's this category of cases
- 14 involving foreign injury where the government can
- 15 prosecute but the private party cannot bring an action
- 16 for civil redress.
- 17 And that's an important distinction
- 18 precisely because private parties are not constrained by
- 19 prosecutorial discretion. It is aggressive to apply
- 20 American criminal law, but at least the government --
- 21 the Justice Department has to talk to the State
- 22 Department and take into account any comity concerns,
- 23 any problems that particular prosecutions might bring.
- 24 That is not the case with respect to private plaintiffs.
- 25 JUSTICE BREYER: Okay. Go ahead.

1	MR. KATSAS: Mr. Frederick said that the
2	underlying predicates here track international law.
3	That is true to in the sense that they are written to
4	be consistent with Section 402 of the third restatement
5	of Foreign Relations, but there is an independent
6	requirement that the application in a particular case
7	must be reasonable under Section 403. That is the
8	provision that you invoked in Empagran. That is the
9	position that is the problem with this case here.
LO	Finally, Mr. Frederick said this case
L1	involves United States conduct. Petitioners are four
L2	transactions removed from the original problem in
L3	Europe, and two transactions removed from the cigarette
L 4	sales. All of all of those involve European
L5	transactions. And Reynolds' alleged conduct involves
L 6	transactions in Europe, Central and South America.
L7	CHIEF JUSTICE ROBERTS: Thank you, counsel.
L8	The case is submitted.
L 9	(Whereupon, at 12:16 p.m., the case in the
20	above-entitled matter was submitted.)
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