

1 defendant and saying, we believe you are violating U.S.
2 law and we seek redress for that, that is perfectly
3 appropriate.

4 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.

15 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.

13 JUSTICE BREYER: But do they get a judgment
14 against the foreign bank?

15 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
15 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.

14 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.

20 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?

22 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
25 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.

4 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
14 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.

11 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.

15 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.

8 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.

15 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.

20 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.

10 Finally, Mr. Frederick said this case
11 involves United States conduct. Petitioners are four
12 transactions removed from the original problem in
13 Europe, and two transactions removed from the cigarette
14 sales. All of -- all of those involve European
15 transactions. And Reynolds' alleged conduct involves
16 transactions in Europe, Central and South America.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 The case is submitted.

19 (Whereupon, at 12:16 p.m., the case in the
20 above-entitled matter was submitted.)

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