























































































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.)

21

22

23

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25

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