

No. 08-1191

IN THE
Supreme Court of the United States

ROBERT MORRISON, Individually and on Behalf of All
Others Similarly Situated, RUSSELL LESLIE OWEN,
BRIAN SILVERLOCK and GERALDINE SILVERLOCK,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, HOMESIDE
LENDING, INC., FRANK CICUTTO, HUGH R. HARRIS,
KEVIN RACE and W. BLAKE WILSON,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

**BRIEF OF *AMICUS CURIAE*
THE ORGANIZATION FOR
INTERNATIONAL INVESTMENT
IN SUPPORT OF RESPONDENTS**

DAVID M. RICE
Counsel of Record
MATTHEW J. KEMNER
TROY M. YOSHINO
CARROLL, BURDICK &
MCDONOUGH LLP
44 Montgomery Street
Suite 400
San Francisco, CA 94104
(415) 989-5900
drice@cbmlaw.com

*Counsel for Amicus Curiae
The Organization for
International Investment*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
I. EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAW INFRINGES UPON THE AUTHORITY OF NATIONS TO REGULATE THEIR OWN COR- PORATE CITIZENS AND SECURITIES EXCHANGES	4
A. This Court Has Instructed the Lower Courts to Show Respect for the Authority of Foreign Sovereigns by Carefully Limiting the Extra- territorial Application of U.S. Law	5
B. Sovereign Nations—Including the United States Itself—Regularly and Rightfully Object to the Extraterri- torial Application of Laws Based on the Perceived Affront to their Sovereignty	8
II. A BRIGHT-LINE RULE BARRING FOREIGN-CUBED CASES IS NECES- SARY TO PROVIDE CLARITY IN THE LAW AND REDUCE UNCERTAINTIES THAT HAVE ADVERSE CONSE- QUENCES FOR U.S. INVESTMENT AND THE GLOBAL ECONOMY	12

TABLE OF CONTENTS—Continued

	Page
A. The Case-by-Case Approach Urged by Petitioners and the Second Circuit Has Created Confusion and Is Contrary to This Court’s Prior Precedents.....	12
B. A Bright-Line Rule Would Reduce Risks and Uncertainties That Deter Foreign Investment in the United States	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
<i>F. Hoffman-La Roche Ltd. v. Empagran</i> S.A., 542 U.S. 155 (2004).....	<i>passim</i>
<i>Grupo Dataflux v. Atlas Global Group,</i> L.P., 541 U.S. 567 (2004).....	14
<i>Hertz Corp. v. Friend</i> , No. 08-1107, Slip Op. (U.S. Feb. 23, 2010).....	14, 15, 20
<i>In re Alstom SA Sec. Litig.</i> , 406 F. Supp. 2d 346 (S.D.N.Y. 2005)	13
<i>In re Nat’l Australia Bank Secs. Litig.</i> , 2006 WL 3844465 (S.D.N.Y. Oct. 25, 2006).....	13
<i>In re Westinghouse Elec. Corp., Uranium</i> <i>Contracts Litig.</i> , 1978 All E.R. 434 (H.L. 1977).....	9
<i>Lapides v. Board of Regents</i> , 535 U.S. 613 (2002).....	14
<i>Lauritzen v. Larsen</i> , 345 U.S. 571 (1953)....	7
<i>McCulloch v. Sociedad Nacional de</i> <i>Marineros de Honduras</i> , 372 U.S. 10 (1963).....	8, 9, 10
<i>Merrill Lynch, Pierce, Fenner, & Smith,</i> <i>Inc. v. Dabit</i> , 547 U.S. 71, 80-81 (2006) ...	16
<i>Microsoft Corp. v. AT&T Corp.</i> , 550 U.S. 437 (2007).....	6, 7
<i>Morrison v. National Australia Bank</i> , 547 F.3d 167 (2d Cir. 2008).....	3, 4, 12, 13
<i>Munaf v. Geren</i> , __U.S.__, 128 S. Ct. 2207 (2008).....	6-7
<i>Navarro Sav. Ass’n v. Lee</i> , 446 U.S. 458 (1990).....	14
<i>New York Cent. R.R. Co. v. Chisholm</i> , 268 U.S. 29 (1925).....	6

TABLE OF AUTHORITIES—Continued

	Page
<i>Newman-Green, Inc. v. Alfonzo-Larrain</i> , 490 U.S. 826 (1989).....	14
<i>Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.</i> , 552 U.S. 148 (2008).....	2, 16
<i>Tellabs, Inc. v. Makor Issues & Rights, Ltd.</i> , 551 U.S. 308 (2007).....	15
<i>Virginia Bankshares, Inc. v. Sandberg</i> , 501 U.S. 1083 (1991).....	16
<i>Zoelsch v. Arthur Andersen & Co.</i> , 824 F.2d 27 (D.C. Cir. 1987).....	15
<i>Corfu Channel Case (UK v. Albania)</i> , 1949 I.C.J. 244 (Dec. 15).....	7
<i>The Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804).....	7
<i>The Island of Palmas Case (US v. Neth.)</i> , 2 R. INT’L ARB. AWARDS 829 (Perm. Ct. Arb. 1928).....	7
 STATUTE	
Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3	11
 OTHER AUTHORITIES	
Agence France-Presse, <i>Spanish Lawmakers Move to Curb Foreign Human Rights Probes</i> , May 19, 2009, available at http://rawstory.com/08/news/2009/05/19spanish-lawmakers-move-to-curb-foreign-human-rights-probes/	11
Australian Chamber of Commerce and Industry, <i>The Extra Territorial Application of National Laws: An Unwarranted Burden for International Business</i> , 138 ACCI REVIEW 9 (Aug. 2006).....	17

TABLE OF AUTHORITIES—Continued

	Page
Stephen J. Choi & Andrew T. Guzman, <i>Portable Reciprocity: Rethinking the International Reach of Securities Regulation</i> , 71 S. CAL. L. REV. 903 (1998)...	10
Stephen J. Choi & Linda J. Silberman, <i>Transnational Litigation and Global Securities Class Action Lawsuits</i> , 2009 WIS. L. REV. 465 (2009).....	19
John C. Coffee, Jr., <i>Global Class Actions</i> , NATIONAL L.J., June 11, 2007.....	9, 17
Congressional Research Service, <i>U.S. Policy Regarding the Int'l Criminal Ct.</i> (Sept. 2002)	12
Jill E. Fisch, <i>Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers</i> , 87 NW. U. L. REV. 523 (1993).....	8
International Chamber of Commerce, <i>Policy Statement on Extraterritoriality and Business</i> (July 13, 2006).....	18
James K. Jackson (Congressional Research Service), <i>Foreign Direct Investment in the United States: An Economic Analysis</i> (Nov. 5, 2009), available at http://assets.opencrs.com/rpts/RS21857_20091105.pdf	1
Pricewaterhouse Coopers LLP, <i>2008 Securities Litigation Study</i> (Apr. 1, 2009), available at http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF	17

TABLE OF AUTHORITIES—Continued

	Page
<i>Sustaining New York’s and the U.S.’s Global Financial Services Leadership (“Schumer-Bloomberg Report”), Jan. 2007</i>	18
Transcript of Statement by then-U.S. Secretary of Defense Donald Rumsfeld at NATO Headquarters, June 12, 2003 ...	11
United States Dep’t of Commerce, <i>The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty</i> (Oct. 2008)	18

INTEREST OF *AMICUS CURIAE*

The Organization for International Investment (“OFII”) is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies before all branches and at all levels of government.¹ OFII is charged with representing the legal and policy interests of its members, who have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

OFII’s member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations throughout this country, as well as many others. Its members contribute substantially to the U.S. economy. The cumulative value of foreign direct investment in the United States at the end of 2008 was approximately \$2.3 trillion. James K. Jackson (Congressional Research Service), *Foreign Direct Investment in the United States: An Economic Analysis*, at 1 (Nov. 5, 2009), available at http://assets.opencrs.com/rpts/RS21857_20091105.pdf. Direct investment capital inflows in 2008 totaled approximately \$325 billion. *Id.* Most of that amount, roughly \$242 billion, was spent to acquire direct ownership interests in U.S. companies. *Id.* at 4.

Respondent National Australia Bank (“NAB”) is a defendant in this case because it invested in a U.S.

¹ No party’s counsel wrote this brief (in whole or in part), and no person other than *amicus* contributed monetarily to this brief’s preparation or submission. *Amicus* is informed that, by virtue of blanket consent letters filed on December 16 & 17, 2009, by Petitioners and Respondents respectively, all parties consent to the filing of this *amicus* brief.

company. But there is no U.S. plaintiff or defendant, no U.S. stock issuer, and no U.S. securities transaction at issue, making this a classic “foreign-cubed” securities class action. If NAB can be held liable under U.S. securities laws in such circumstances, that creates a serious disincentive for foreign companies to invest in U.S. companies. As OFII’s members are all U.S. subsidiaries of foreign companies, they directly benefit from foreign investment in the United States. Indeed, without such investment, many of OFII’s members would not exist. OFII and its members therefore have a substantial interest in the question presented in this case, *i.e.*, whether and to what extent foreign-cubed securities class actions can proceed in U.S. courts.

OFII and others recently filed an *amicus* brief in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), explaining why the attempted expansion of private U.S. securities lawsuits in that case threatened international trade with, and investment in, the United States. That brief was cited by this Court as helpful in delineating the adverse impact that expansion of exposure to U.S. securities laws could have on foreign business investment. *Id.* at 164. It is OFII’s hope and belief that the present brief will be of similar assistance to the Court, especially as this case even more directly threatens foreign trade and investment insofar as it targets a foreign company precisely because that company invested in the United States.

SUMMARY OF ARGUMENT

OFII urges the Court to hold that U.S. securities laws do not apply to “foreign-cubed” cases—where *foreign* plaintiffs, sue a *foreign* issuer of securities, based on securities transactions occurring in *foreign*

countries. *See Morrison v. National Australia Bank*, 547 F.3d 167, 172 (2d Cir. 2008) (defining “foreign-cubed” cases). Respondents and other *amici* who support them have offered a number of sound reasons why foreign-cubed cases do not belong in our courts, and OFII agrees with and joins in those arguments. In this brief, OFII offers additional reasons to affirm the Second Circuit’s decision on the basis of a bright-line rule barring foreign-cubed cases in U.S. courts.

First, the extraterritorial application of U.S. law in these cases improperly disrespects foreign sovereignty because it infringes upon the *authority* of nations to regulate their own citizens and securities exchanges in the manner they see fit. This infringement of national sovereignty is even more fundamental than the conflicts in the relevant laws of various nations, which are ably demonstrated by Respondents and other *amici*, and are themselves deeply troubling. Respect for foreign sovereignty is a key precept of international law, and there is no reason to believe that Congress intended to disregard that precept in choosing to regulate U.S. securities.

Second, a bright-line rule barring foreign-cubed cases is necessary to reduce uncertainties that deter foreign investment and threaten adverse consequences for the global economy. Without a clear rule eliminating the deep uncertainty that currently exists regarding the overseas reach of our securities laws, foreign investors will continue to question the wisdom of investing in the United States, and their flight to other, more predictable legal regimes will continue. This Court’s precedents have consistently urged clear jurisdictional rules, precisely to deal with concerns a case like this raises, even when the foreign defendant ultimately prevails.

I. EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAW INFRINGES UPON THE AUTHORITY OF NATIONS TO REGULATE THEIR OWN CORPORATE CITIZENS AND SECURITIES EXCHANGES

In arguing for a bright-line rule prohibiting foreign-cubed cases in U.S. courts, Respondents' *amici* demonstrated before the Second Circuit why the extraterritorial application of U.S. laws in such cases conflicts with the regulatory regimes established by other sovereign nations. *See, e.g., Amicus Br. of Ass'n of Corp. Counsel* at 22-23, 26-28 (filed July 12, 2007). The Second Circuit nevertheless declined to adopt a bright-line rule, discounting conflicts between U.S. and other laws because most countries are "generally in agreement that fraud should be discouraged." *Morrison*, 547 F.3d at 174-75.

OFII respectfully submits that the Second Circuit's broad assertion, even if perhaps true in the abstract, overlooks the materiality of the conflicts that exist in, for example: how various nations define corporate "fraud" (*e.g.*, does it require "reliance" and if so what does that mean?); who may seek to prove corporate fraud (*e.g.*, individual shareholders only, private plaintiffs on behalf of a class, a governmental entity?); who can be held liable for corporate fraud (*e.g.*, the corporation itself or only individual officers or directors?); and perhaps most importantly, what the appropriate remedy or punishment should be for corporate fraud. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004) ("to apply our remedies would unjustifiably permit [foreign] citizens to bypass their [countries'] own less generous

remedial schemes, thereby upsetting a balance of competing considerations that their own domestic . . . laws embody”).

The problem is not simply that the application of U.S. securities law in foreign-cubed cases ignores serious conflict with foreign law, although that concern is serious enough. When U.S. courts apply U.S. securities law in foreign-cubed cases they disregard the rightful authority of other nations to address disputes that by definition have a minimal connection with the United States in comparison to the home nations of the involved parties. As this Court previously has recognized, whether or not there is an actual conflict in the law, a U.S. court must respect the authority of a foreign sovereign to address a dispute that arises predominantly within the foreign sovereign’s territory. That is why other nations regularly have objected to the attempted extraterritorial application of U.S. law and why, when its own interests are infringed, the United States also has complained about other nations seeking to apply their own laws to U.S. citizens.

A. This Court Has Instructed the Lower Courts to Show Respect for the Authority of Foreign Sovereigns by Carefully Limiting the Extraterritorial Application of U.S. Law

In *Empagran*, this Court prohibited extraterritorial application of U.S. antitrust laws. 542 U.S. at 159. One of the rationales for the Court’s decision was its recognition that extraterritorial application of U.S. laws “creates a serious risk of interference with a foreign nation’s ability to regulate its own commercial affairs.” *Id.* at 165. The Court observed that the

interference with the rights of a foreign sovereign would be justified “to *redress* domestic antitrust injury that foreign anticompetitive conduct has caused.” *Id.* (emphasis in original). But the Court observed that there was “no good” reason why “American law [should] supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers [*i.e.*, potential plaintiffs] from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies[.]” *Id.* at 165-66.

In other words, *Empagran* recognized that U.S. antitrust law should not apply to claims by foreign plaintiffs based upon conduct by foreign companies. In doing so, it did *not* hold that a U.S. court may apply U.S. law extraterritorially as long as there is no actual conflict in the law or disagreement regarding public policy between the U.S. and the foreign nation involved. Rather, this Court held that the driving consideration was the “risk of interference with a foreign nation’s *ability* to regulate its own commercial affairs.” *Id.* at 165 (emphasis added). Respect for a foreign nation’s *ability* to govern is respect for that foreign sovereign’s right to act as such.

In fact, *Empagran* is just the latest in a long line of this Court’s jurisprudence recognizing that “interference with the sovereign authority” of other nations is itself an important reason not to apply U.S. law extraterritorially. *Id.* at 164; *see, e.g., Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455-56 (2007); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925) (“interference with the authority of another sovereign” is a matter the “other state concerned justly might resent”); *see also, e.g., Munaf v. Geren*,

__U.S.__, 128 S. Ct. 2207, 2223 (2008) (rejecting petitioners’ request for *habeas* relief where such relief “would interfere with the sovereign authority” of another country).

This principle is equally if not more compelling in the context of foreign-cubed lawsuits. Extending U.S. jurisdiction beyond America’s citizens and borders—*e.g.*, to foreign plaintiffs alleging injury caused by a foreign company as a result of a transaction on a foreign stock exchange—is inconsistent with this Court’s longstanding respect for the legitimate legal concerns of foreign sovereigns. Application of U.S. securities laws to foreign-cubed lawsuits would be just the type of “legal imperialism” decried in *Empagran*. 542 U.S. at 164; *cf. Microsoft*, 550 U.S. at 454 (“United States law governs domestically but does not rule the world”).

Indeed, failure to respect foreign sovereignty in these cases would violate clear principles of international law. *See, e.g., Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (construing Jones Act “to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law”); *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”). “Between independent States, respect for territorial sovereignty is an essential foundation of international relations.” *Corfu Channel Case (UK v. Albania)*, 1949 I.C.J. 244, at p.35 (Dec. 15); *see also, e.g., The Island of Palmas Case (US v. Neth.)*, 2 R. INT’L ARB. AWARDS 829, 838 (Perm. Ct. Arb. 1928) (similar). The responsibility to avoid interfering with the ability of foreign sovereigns to regulate their own

stock exchanges, companies, and recovery by their citizens is therefore an obligation that the United States has as a member of the international community.

To continue to fulfill America's obligations to the international community, in accord with its well-reasoned analysis in *Empagran*, this Court should again confirm that U.S. law does not apply to claims of foreign plaintiffs based upon conduct by foreign companies.

B. Sovereign Nations—Including the United States Itself—Regularly and Rightfully Object to the Extraterritorial Application of Laws Based on the Perceived Affront to Their Sovereignty

Concerns about affronting foreign sovereignty by the extraterritorial application of U.S. law are not merely abstract. Other nations—including many of America's closest allies—regularly have objected to extraterritorial applications of U.S. law of the type Petitioners and their *amici* urge. See, e.g., Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523, 523-24 (1993) (“The United States has offended the sovereignty of other countries” by “impos[ing] its regulations on [securities] transactions that may be viewed as essentially foreign”); *Empagran*, 542 U.S. at 167-68 (discussing objections by Germany, Canada, and Japan to application of U.S. law to claims of “private foreign plaintiffs” when alleged “injuries were sustained in transactions entirely outside United States commerce”); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16-17, 21 (1963) (accounting for “vigorous protests from

foreign governments,” among other considerations, in ultimately holding that National Labor Relations Act should not apply to foreign-flag ships employing foreigners); *In re Westinghouse Elec. Corp., Uranium Contracts Litig.*, 1978 All E.R. 434 (H.L. 1977) (attempts by the U.S. to apply its laws extraterritorially are “not in accordance with international law”).

The threat to foreign sovereign interests is especially acute in cases like this, where a securities class action amalgamating thousands of claims—in a manner not permitted in the vast majority of foreign countries—is filed against a foreign corporation that is a significant “engine” for a foreign economy. As Professor John C. Coffee, Jr. observed: “the United States’ foreign neighbors must fear that a global class action in a U.S. court may threaten the solvency of even their largest companies and could have an adverse impact on the interests of local constituencies, including labor, creditors, and local communities.” *Global Class Actions*, NATIONAL L.J., June 11, 2007, at 12.

In their own briefing on the merits, Petitioners have argued that a “flexible case-by-case” approach can ensure that sovereign interests “are not offended by each application” of U.S. law. Petitioners’ Br. at 40 (filed Jan. 19, 2010). As this Court recognized in *Empagran*, however, “procedural costs and delays [associated with case-by-case litigation] could themselves threaten interference with a foreign nation’s ability” to regulate its own nationals, and to make policy decisions to provide certain remedies (but not others) to injured claimants residing within its own borders. 542 U.S. at 169. In addition, as the Court recognized in *McCulloch*, the need to engage in a case-by-case “balancing” test to determine whether

U.S. law applies itself “would raise considerable disturbance . . . in our international relations as well.” 372 U.S. at 19. The problems recognized in cases like *Empagran* and *McCulloch* are severely exacerbated when cases, like the one before the Court, sit for years within the U.S. court system while the parties litigate whether the case can even proceed in the U.S. courts.

Nor should foreign governments be expected or required to monitor foreign-cubed litigation and step in to object to each involved court. It is undiplomatic, even offensive, to require a foreign sovereign to file such an objection in each of the dozens of foreign-cubed securities class actions that are being filed in the United States each year—particularly when, as described above, many nations regularly have objected to *any* extraterritorial application of U.S. law.

In addition, it is unrealistic to assume that foreign sovereigns will simply continue to object in court when they feel their legitimate sovereign interests are being ignored. Some will instead choose to engage in self-help measures that will harm U.S. interests in other contexts. *See, e.g.*, Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 914 (1998) (extraterritorial applications of U.S. securities laws could cause other countries to retaliate and “seek[] to regulate activities of U.S. parties that impact their countries”); *cf. McCulloch*, 372 U.S. at 21 (recognizing that infringements of foreign sovereignty caused by overbroad applications of U.S. law may “invite retaliatory action from other nations”). As this Court learned in *Empagran*, some nations have already reacted to the efforts of some U.S. courts to apply U.S. law

extraterritorially by enacting “blocking statutes” and rejecting enforcement of U.S. judgments. *See, e.g., Amicus Brief of the Federal Republic of Germany in Empagran, available at 2004 WL 226388, at *27-*28 (Feb. 3, 2004); Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3 (Australia’s “blocking statute,” passed in response to prior extraterritorial applications of U.S. law). Whether or not appropriate, such a response is natural to a reasonably perceived insult to foreign sovereignty.*

When other countries have applied their own law extraterritorially, the United States has objected and threatened adverse consequences. For example, Belgium originally attempted to extend its laws to allegations of human rights violations occurring extraterritorially. In response to Belgium’s actions, the U.S. sent a strong message, noting that “Belgium appears not to respect the sovereignty of other countries. [It] needs to realize that there are consequences to its actions.” Transcript of Statement by then-U.S. Secretary of Defense Donald Rumsfeld at NATO Headquarters, June 12, 2003. Belgium later eliminated universal jurisdiction concepts from its laws and required that, at a minimum, either the victim or the accused be a Belgian national. Based on pressure from a number of foreign sovereigns, including the United States, India, and China, Spain’s Congress also recently passed a resolution to eliminate provisions that applied Spanish law extraterritorially to certain claims. *See Agence France-Presse, Spanish Lawmakers Move to Curb Foreign Human Rights Probes, May 19, 2009, available at <http://rawstory.com/08/news/2009/05/19spanish-lawmakers-move-to-curb-foreign-human-rights-probes/>.*

The American position has long been that even trial by an international tribunal, such as the International Criminal Court, would “imping[e] on the sovereignty of the United States” to the extent that it would give others an ability to second-guess U.S. policy decisions. Congressional Research Service, *U.S. Policy Regarding the Int’l Criminal Ct.*, at 3-4 (Sept. 2002). To date, other nations have frequently shown respect for American objections to their assertion of extraterritorial jurisdiction, which has avoided international incidents. The United States can only harm its international standing on such issues, however, if it insists upon asserting authority over foreign-cubed class actions. As explained in the following section, only a clear, bright-line rule that is consistent with the position the United States itself takes when the tables are turned can avoid the legitimate condemnation of foreign sovereigns.

II. A BRIGHT-LINE RULE BARRING FOREIGN-CUBED CASES IS NECESSARY TO PROVIDE CLARITY IN THE LAW AND REDUCE UNCERTAINTIES THAT HAVE ADVERSE CONSEQUENCES FOR U.S. INVESTMENT AND THE GLOBAL ECONOMY

A. The Case-by-Case Approach Urged by Petitioners and the Second Circuit Has Created Confusion and Is Contrary to This Court’s Prior Precedents

As noted above, the Second Circuit in this case rejected a bright-line rule, in favor of a case-by-case analysis. In other words, the court held that each foreign-cubed case must be analyzed on its own specific facts to determine whether to assert subject matter jurisdiction. *Morrison*, 547 F.3d at 173-74.

The Second Circuit itself conceded that application of its standard “can be an involved undertaking.” *Id.* at 174. Other courts discussing such *ad hoc* standards have been less generous. For example, one of the district judges in the Second Circuit observed that “any notion that a single precedent or cohesive doctrine may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe.” *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005).

As the district court in this case observed, “articulation of the conduct test [at issue here] is easy, its application is not . . . [The] analytical undertaking is complicated by the commercial realities that imbue modern international securities transactions. . . . The complexity of the required analysis means that individual cases are decided on very fine distinctions.” *In re Nat’l Australia Bank Secs. Litig.*, 2006 WL 3844465, at *3-*4 (S.D.N.Y. Oct. 25, 2006).

Quite simply, the “flexible case-by-case” approaches espoused by some lower courts and Petitioners in this case have led to massive confusion and prolonged disputes. The case at bar is a good example. Petitioners argue before this Court that their foreign-cubed claims are permissible because they meet a test requiring conduct “predominantly” in the United States. Petitioners’ Br. at 26-27. Respondents disagree with this notion. Respondents’ Br. at 51 & n.33 (filed Feb. 19, 2010); Respondents’ 2d Cir. Br. at

41-42 (filed July 2, 2007). What has followed is more than six years of litigation—now up to this Court—simply on the question of whether a motion to dismiss for lack of subject matter jurisdiction was properly granted in this case.

Petitioners’ proposal for a “flexible case-by-case” analysis (Petitioners’ Br. at 40) contravenes this Court’s repeated admonitions that “jurisdictional rules should be clear.” *Lapides v. Board of Regents*, 535 U.S. 613, 621 (2002); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836-37 (1989); *Hertz Corp. v. Friend*, No. 08-1107, Slip Op. at 1, 15 (U.S. Feb. 23, 2010) (“we place primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible”). The Court’s basic rationale has been precisely to avoid the type of extensive litigation over jurisdictional matters that has gone on, not only in this case for years, but throughout the lower courts for decades now: “It is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources.” *Navarro Sav. Ass’n v. Lee*, 446 U.S. 458, 465 n.13 (1990); accord *Hertz*, Slip Op. at 15 (“Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims.”); *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 582 (2004) (rejecting dissent’s proposed rule because it “would impair the certainty of our jurisdictional rules and thereby encourage similar jurisdictional litigation”).

Judge Bork observed that it is “counterproductive to adopt a balancing test, or any test that makes jurisdiction turn on a welter of specific facts. . . . As we know from our experience in the extraterritorial application of antitrust law, such tests are difficult to apply and are inherently unpredictable. . . . They thus present powerful incentives for increased litigation” *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987). This Court substantially clarified, by simplifying, the analysis required to determine the extraterritorial reach of U.S. antitrust laws in *Empagran*. The Court should now put an end to similar disputes about the extraterritorial reach of U.S. securities laws.

B. A Bright-Line Rule Would Reduce Risks and Uncertainties That Deter Foreign Investment in the United States

As this Court very recently reaffirmed: “Simple jurisdictional rules . . . promote greater predictability. Predictability is valuable to corporations making business and investment decisions.” *Hertz Corp. v. Friend*, No. 08-1107, Slip Op. at 16 (U.S. Feb. 23, 2010). Predictability regarding the overseas reach of U.S. law is especially important when foreign companies are deciding whether to invest in the United States.

This Court previously has observed that U.S. securities class actions, “if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). The potential for abuse is high because U.S. securities class actions almost always involve multi-billion-

dollar prayers for relief and the promise of “protracted discovery, with little chance of reasonable resolution by pretrial process.” *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105 (1991); accord *Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006).

Based in part on an *amicus* brief filed by OFII and others, the Court also has recognized that the expansion of liability under U.S. securities law “raise[s] the costs of doing business” in America, such that “[o]verseas firms with no other exposure to [U.S.] securities laws could be deterred from doing business here.” *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (citing OFII *amicus* brief).

Similar to petitioners in *Stoneridge*, Petitioners and their *amici* in this case seek a rule that would deter foreign investment in the United States. Discouraging such investment not only has adverse consequences for U.S. companies who are subsidiaries of foreign corporations, but it also substantially harms both the U.S. and global economies generally. What Petitioners refer to as a “flexible case-by-case” approach to foreign-cubed class actions (Petitioners’ Br. at 40), well-intentioned or not, is a prescription for uncertainty—which, in investment terms, translates into inestimable financial risk. As this case and many others demonstrate, parties will litigate for years the question of whether an alleged set of facts allows a foreign-cubed class action to proceed in the United States, regardless of what “flexible” standard is adopted.

Exacerbating the problem, the threat posed by class actions against foreign issuers is only increasing. In 2008 (the last full year for which data was

available), 36 such class actions were filed in U.S. federal courts, up from 14 in 2006 and 27 in 2007. In 2008, claims against foreign issuers accounted for 17 percent of all federal securities class actions filed that year. Pricewaterhouse Coopers LLP, *2008 Securities Litigation Study*, at 43 (Apr. 1, 2009), available at <http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF>.

The uncertainty of jurisdictional rules governing foreign-cubed cases, particularly when coupled with the substantial costs and exposure posed by even meritless class actions, creates financial risk and causes foreign companies to be fearful of investing in the United States. See, e.g., John C. Coffee, Jr., *Global Class Actions*, NATIONAL L.J., June 11, 2007, at 3 n.3 (the “fear of U.S. private antifraud litigation” is tied to the “growing disenchantment of foreign issuers with the U.S. market”). As the Australian Chamber of Commerce and Industry recently observed:

The extraterritorial application of national laws by some countries, notably the USA, has created uncertainty and added cost to the operation of businesses involved in international trade and commerce. Beyond the standard risks, . . . businesses operating across national borders are confronted with the added burden of potential uncertainty in legal jurisdiction.

Australian Chamber of Commerce and Industry, *The Extra Territorial Application of National Laws: An Unwarranted Burden for International Business*, 138 ACCI REVIEW 9, 12 (Aug. 2006).

The Australians are by no means alone in their concerns. The International Chamber of Commerce also has recognized that the extraterritorial application of laws “creates considerable commercial and legal uncertainty. This uncertainty discourages international businesses from engaging in trade and investment and distorts trade and investment decisions by international business.” *Policy Statement on Extraterritoriality and Business*, at 2 (July 13, 2006).

In the mid-2000s, a survey of hundreds of business leaders commissioned by United States Senator Charles Schumer and New York Mayor Michael Bloomberg found that “a fair and predictable legal environment” was ranked second (behind only the skill of the labor force) amongst the most important factors considered in making investment decisions. *Sustaining New York’s and the U.S.’s Global Financial Services Leadership* (“Schumer-Bloomberg Report”), Jan. 2007, at 15-16. Foreign companies responded to the survey by stating that they were less likely to invest in the United States than ever before because they perceive risks posed by, among other things, “the increasing extraterritorial reach of U.S. law and the unpredictable nature of the [American] legal system.” *Id.* at 73-77; *see also, e.g.*, United States Dep’t of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, at 2 (Oct. 2008) (“The U.S. share of global FDI [foreign direct investment] has declined since the 1980s and the competition to attract FDI has grown more intense.”). Survey respondents bluntly noted that there is concern about investing in the United States because it is “harder to manage legal risk in the U.S. than in many other jurisdictions.” Schumer-Bloomberg Report, *supra*, at 77.

To establish the predictability needed by foreign companies if they are to continue to invest in the United States, *amicus* respectfully requests that this Court establish a clear rule rejecting U.S. jurisdiction in foreign-cubed class actions. *See, e.g.*, Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class Action Lawsuits*, 2009 WIS. L. REV. 465, 500 (2009) (listing many reasons why clarity would provide an “appealing rule”).

CONCLUSION

Allowing foreign-cubed class actions to proceed in U.S. courts infringes upon the authority of sovereign nations to regulate their stock exchanges and companies, and provide remedies to their citizens, as they see fit. The “flexible case-by-case” approach urged by Petitioners and others “is at war with administrative simplicity.” *Hertz*, Slip Op. at 13. It has led to years of litigation in this case—and many others—over threshold jurisdictional questions alone. Such litigation not only harms judicial efficiency, but also creates uncertainty and risk that poses adverse consequences for the U.S. and global economy. This Court should put an end to litigation over foreign-cubed class actions in the United States.

Respectfully submitted.

DAVID M. RICE

Counsel of Record

MATTHEW J. KEMNER

TROY M. YOSHINO

CARROLL, BURDICK &

MCDONOUGH LLP

44 Montgomery Street

Suite 400

San Francisco, CA 94104

(415) 989-5900

drice@cbmlaw.com

Counsel for Amicus Curiae

The Organization for

International Investment

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