

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 LTD., HOMESIDE
LENDING INC., FRANK CICUTTO, HUGH HARRIS,
KEVIN RACE and W. BLAKE WILSON,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

SUPPLEMENTAL BRIEF FOR PETITIONERS

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Pursuant to Supreme Court Rule 15.8, Petitioners file this supplemental brief to bring to the Court's attention possible implications flowing from a decision issued only last week. In *Reed Elsevier v. Muchnick*, No. 08-103, 2010 WL 693679, at *8 (U.S. Mar. 2, 2010), the Court held that the registration requirement of the Copyright Act, 17 U.S.C.A. § 411(a), is not jurisdictional. The Court, evidencing "a marked desire to curtail such 'drive-by jurisdictional rulings,'" *id.*, at *5 (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511-12 (2006)), reversed "the judgment of the Court of Appeals for the Second Circuit and remand[ed] this case for proceedings consistent with this opinion." *Id.* at *11. For the reasons set forth in *Reed Elsevier*, Petitioners request that this Court vacate the rulings below and remand the matter.

This is the second time since Petitioners filed their writ of certiorari on March 23, 2009, that the Court has addressed the question of subject matter jurisdiction in the statutory context. This is the only issue before the Court in the present matter. Petitioners sought review of a Second Circuit judgment in which the court affirmed the dismissal of Petitioners' federal securities law claims on grounds that the court lacked subject matter jurisdiction. The lower courts' rulings were limited to this jurisdictional analysis under Fed. R. Civ. P. 12(b)(1). See Appendix to the Petition for a Writ of Certiorari, filed March 23, 2009, at 5a.

The Court granted certiorari on November 30, 2009. Eight days later, this Court issued its Opinion in *Union Pacific Railroad Co. v. Brotherhood of Locomotive*

Engineers and Trainmen General Committee of Adjustment, Central Region, 130 S. Ct. 584 (2009), in which the Court reaffirmed its holding in *Arbaugh* that subject matter jurisdiction is a matter of statutory construction and should not be confused with the need to prove the essential elements of a claim for relief.

Last week, the Court issued its Opinion in *Reed Elsevier*, 2010 WL 693679, in which the Court reaffirmed its holdings in *Arbaugh* and *Union Pacific*.

All briefing is complete in this appeal, with the exception of Petitioners' Reply Brief. Petitioners, Respondents and 19 amici, including the Solicitor General, all agree that the Second Circuit's jurisdictional holding was wrong. Not one party or amici seeks to defend the holding of the Second Circuit.

Respondents candidly state that the Second Circuit's ruling on subject matter jurisdiction "was wrong." Brief For Respondents at 22. The Solicitor General similarly argued that the Second Circuit "erred in treating the limits in Section 10(b)'s [15 U.S.C. § 78j(b)'s] transnational application as constraints on their subject matter jurisdiction." Brief For The United States As Amicus Curiae Supporting Respondents at 6. As the Court has noted, "When the Government has suggested that an error has been made by the court below, it is not unusual for us to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court." *Alvarado v. United States*, 497 U.S. 543, 544 (1990).

Petitioners cannot identify the live issue before the Court if all parties concede that the subject matter jurisdictional ruling cannot stand. The only order below was a decision under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction, and no other issue has been addressed by any Court. That order was the subject of appeal and the subject of the Petition to this Court. No other party has appealed or presented any other point of error to the Court.

Accordingly, Petitioners urge that the proper course of action is to remand for the courts below to review their rulings in light of *Union Pacific* and *Reed Elsevier*. In those recent cases, the Court has made clear that lower courts cannot “miss the ‘critical difference[s]’ between true jurisdictional conditions and nonjurisdictional limitations on causes of action.” *Reed Elsevier*, 2010 WL 693679, at *5 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)).

The requested relief is appropriate under the circumstances set forth by Justice Scalia in *Lawrence v. Chater*, 516 U.S. 163 (1996):

- (1) where an intervening factor has arisen that has a legal bearing upon the decision,
- (2) where, in a context not governed by *Michigan v. Long*, 463 U.S. 1032 (1983), clarification of the opinion below is needed to assure our jurisdiction, and
- (3) (in acknowledgement of established practice, though not necessarily in agreement with its validity) where the respondent or

appellee confesses error in the judgment below.

Id. at 191-92.

Here, there have been two intervening factors that have a legal bearing upon the decisions: *Union Pacific* and *Reed Elsevier*. In such cases “[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and it appears that such a redetermination may determine the ultimate outcome of the litigation, a [grant, vacate, reversal] order is, we believe, potentially appropriate.” *Lawrence*, 516 U.S. at 167.

In addition, this Court has used its “granted, vacated, and remanded” power to allow for “further consideration” in the lower court “in light of the position asserted by the Solicitor General” before the Court. *See, e.g., Brown v. United States*, 538 U.S. 1010 (2003); *Jackson v. Massanari*, 534 U.S. 801 (2001). Here, the Solicitor General raised for the first time in her Brief For The United States As Amicus Curiae Supporting Respondents that “[t]he SEC’s reasonable interpretation of Section 10(b)’s scope is entitled to deference.” *Id.* at 18. While the SEC advanced a form of the “significant and material conduct” test in its amicus brief submitted to the Second Circuit, it did not claim deference and the lower court did not consider it. We believe that the Second Circuit’s view might very well be altered by the SEC’s interpretation of

Section 10(b) and invocation of the deference doctrine given the Second Circuit's location in the heart of the nation's financial center and its special expertise in matters pertaining to securities.

In sum, the district court and the Second Circuit limited their rulings to subject matter jurisdiction, and did not consider the merits of Petitioners' complaint or other grounds for dismissal. By reversing and remanding the case, the Court "conserves the scarce resources of the Supreme Court, assists the court below by flagging a particular issue that it does not appear to have fully considered, and Supreme Court by procuring the benefit of the lower court's insight before ruling on the merits." *Wellons v. Hall*, 130 S. Ct. 727 (2010).

For the foregoing reasons, Petitioners request that the Court vacate the judgment of the Second Circuit and remand the case for further proceedings consistent with *Reed Elsevier*.

Respectfully submitted,

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