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

BRIEF OF *AMICI CURIAE* MN SERVICES VERMOGENSBEHEER B.V., SCOTTISH WIDOWS INVESTMENT PARTNERSHIP LIMITED, AND NORTH YORKSHIRE PENSION FUND, IN SUPPORT OF PETITIONERS

COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
RANDI D. BANDMAN
52 Duane Street
7th Floor
New York, NY 10007
(212) 693-1058

COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
ERIC ALAN ISAACSON
Counsel of Record
MARK SOLOMON
PATRICK W. DANIELS
NATHAN W. BEAR
AMANDA M. FRAME
655 West Broadway,
Suite 1900
San Diego, CA 92101
(619) 231-1058

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Counsel for Amici Curiae Mn Services Vermogensbeheer B.V., Scottish Widows Investment Partnership Limited, and North Yorkshire Pension Fund

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Where a foreign-based issuer of securities—that both conducts substantial business in the United States and chooses to list its securities on the New York Stock Exchange so that it will be subject to the federal Securities Exchange Act's periodic reporting requirements—files fraudulent financial statements with the U.S. Securities and Exchange Commission incorporating false information generated by American citizens at the issuer's Florida-based U.S. subsidiary, does the Securities Exchange Act of 1934 afford federal subject-matter jurisdiction over claims filed by foreign investors injured by a transnational fraud originating from the United States?

PARTIES TO THE PROCEEDINGS

A list of all parties to the proceeding in the court whose judgment is under review is as follows:

Plaintiffs-Appellants and Petitioners: Russell Leslie Owen and Brian and Geraldine Silverlock, residents of Australia and Robert Morrison, a resident of the United States.

Defendants-Appellees and Respondents: National Australia Bank ("NAB"); Frank Cicutto, an officer of NAB during the relevant time period; HomeSide Lending, Inc. ("HomeSide") a Florida-based subsidiary of NAB; and Hugh Harris, Kevin Race and W. Blake Wilson, officer of HomeSide during the relevant time period.

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BRIEF OF *AMICI CURIAE*

IDENTITY AND INTEREST OF *AMICI* [1]

Mn Services Vermogensbeheer B.V. is a Dutch firm authorized by the Netherlands Authority for Financial Markets to act as an investment and financial-asset manager. Mn Services has 60 years of experience administering pension funds and managing institutional investors' assets. With more than 600 employees, Mn Services currently administers the pension accounts of more than a million people in the Netherlands, and manages assets of approximately €80 billion for its clients. In that capacity, Mn Services is intimately familiar with the workings of international securities markets, and has an interest in their efficient and honest operation, and in the ability of investors outside the United States to recover losses suffered from transnational securities frauds originating from the United States.

Scottish Widows Investment Partnership Limited is among Europe's largest asset-management companies, managing funds worth over £140 billion for a wide range of United Kingdom and international clients—including investment trusts, charities, financial institutions, individual investors, and corporate and local-government pension funds. Its

[1] The parties consented to the filing of this *amicus* brief by filing, on December 16 and 17, 2009, blanket consents to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part. No party or its counsel made any contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or printing of this brief.

parent company, Lloyds Banking Group plc, is a leading United Kingdom financial-services group. Scottish Widows Investment Partnership Limited invests in all major asset classes—including United Kingdom and overseas equities and debt securities. Both under its own name, and in partnership with local organizations, Scottish Widows Investment Partnership Limited has a presence that stretches from the United Kingdom and continental Europe to the United States and the Far East. This international dimension heightens its awareness of global investment issues and enhances its ability to manage client relationships on a global basis. The worldwide markets in which Scottish Widows Investment Partnership Limited invests, its international client base, and the geographic spread of its business operations, all reflect the truly global nature of its interest in ensuring the honesty and integrity of any and all securities markets in which it trades, and in the ability of international investors to recover when securities fraud emanates from the United States.

North Yorkshire Pension Fund, an English pension fund organized under the United Kingdom's Local Government Pension Scheme, is administered by the North Yorkshire County Council. All aspects of the Fund's management and administration, including investment matters, are overseen by the County Council's Pension Fund Committee. The North Yorkshire County Council operates the Fund for its own employees (excluding those for whom separate statutory arrangements exist), together with employees of other local authorities within the County area, and certain other bodies within the geographical areas of North Yorkshire and the City of York. In addition to employees working in local government, a number of other public, education, and voluntary sector

employees, and certain private contractors engaged in local-authority work, can participate in the fund. Total assets under management exceed £800 million, a substantial portion of which are invested in international equities. The North Yorkshire Pension Fund accordingly has a significant interest in the integrity and honesty of global securities markets, and in the ability of investors to recover when an issuer of securities violates U.S. securities laws.

Amici have an interest in being able to rely on the fact that an international issuer of securities has volunteered to make itself subject to American securities laws by listing its securities on an American stock exchange and filing periodic reports with the U.S. Securities and Exchange Commission ("SEC"). An issuer that has chosen to subject itself to U.S.-law periodic reporting requirements accepts both the duty of complying with those laws, and the legal consequences for filing fraudulent reports—particularly where the false information in those reports is generated by fraud at an American subsidiary. One of those consequences is legal liability not just to American investors, but to all investors injured by the fraud.

ARGUMENT

All acknowledge that HomeSide Lending, a wholly owned U.S. subsidiary of National Australia Bank ("NAB"), was America's sixth-largest mortgage-servicing company when it generated false financial statements for inclusion in NAB's financial statements and regulatory filings, including those filed with the SEC. No one disputes that American and Australian markets for NAB's securities moved in tandem in response to the fraudulent information that was included in those reports. Yet the Second

Circuit has held that even if NAB and its Florida-based subsidiary's American officers acted with fraudulent intent, insufficient conduct took place in the United States for American courts to exercise subject-matter jurisdiction *when foreign investors seek relief* for clear violation of the U.S. securities laws antifraud provisions. This holding makes little sense.

It is clear from the Petitioners' allegations—which must, at this stage of the litigation, be accepted as true[2]—that fraud was conceived and executed from NAB's Florida subsidiary. Congress could not, in framing the Securities Exchange Act,[3] have intended for the "United States to be used as a base for manufacturing fraudulent devices for export, even when these are peddled only to foreigners."[4] This Court should accordingly reject any contention "that Congress intended to allow the United States to become a 'Barbary Coast,' as it were harboring international securities 'pirates.'"[5]

The case for exercising federal subject-matter jurisdiction over foreign investors' claims in this case is made particularly compelling by the fact that NAB, with its extensive U.S. operations, *chose* to list its securities for trading on the New York Stock Exchange—in the form of American Depository Receipts ("ADRs"). By so doing, NAB voluntarily subjected itself to U.S. securities laws requiring it to file periodic financial reports with the SEC, in

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[2] *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

[3] 15 U.S.C. §78a *et seq.*

[4] *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975).

[5] *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977).

compliance with the Securities Exchange Act of 1934 and regulations promulgated thereunder. NAB thus voluntarily chose to subject itself to the consequences of violating those laws and regulations—including potential liability for violation of §10(b) and Rule 10b-5.

To deny relief to foreign investors merely because they purchased NAB securities outside the United States would be to ignore the transnational character of modern securities markets, flouting congressional intent and offending basic principles of fairness and comity.

With the Exchange Act, Congress crafted registration and reporting requirements for publicly traded securities so that reliable information would be available to all investors, *both foreign and domestic*. In §2 of the Exchange Act, Congress observed that modern securities markets are international in scope, with countless transactions establishing market prices potentially subject to manipulative practices that know no national boundaries. The statute itself declares in §2(2) that "[t]he prices established and offered in such transactions are generally disseminated and quoted *throughout the United States and foreign countries* and constitute a basis for determining and establishing the prices at which securities are bought and sold."[6] "Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control," Congress noted in §2(3).[7] Since securities prices tend to rest on publicly available information, Congress provided for the scheme of regulated periodic disclosures

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[6] 15 U.S.C. §78b(2) (emphasis added).

[7] 15 U.S.C. §78b(3).

embodied in the Exchange Act, to which companies that choose to issue securities for trading in the United States are properly subject.[8] Congress clearly intended for investors—both foreign and domestic—to be able to rely on the integrity of resulting market prices.

From the record in this case it appears that Congress' fundamental assumptions concerning securities markets were well-grounded. NAB is a truly international operation, whose 1.5 billion shares of common stock traded "on the Australian Securities Exchange, the London Stock Exchange, the Tokyo Stock Exchange, and the New Zealand Stock Exchange," while the company listed its ADRs to trade on the New York Stock Exchange, thereby bringing itself under the Exchange Act's periodic reporting requirements and liability provisions.[9] NAB's Florida-based HomeSide Lending subsidiary, where the conduct amounting to fraud allegedly took place, was America's sixth-largest mortgage-servicing company. And it is clear from the record that the American and foreign markets moved together in response to financial information relating to NAB's American subsidiary.[10]

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[8] *See generally* Adolph A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 393-394, & nn.3-6, 395-97, 399-400 (1938); *see also* Adolph A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 268-70 (1931).

[9] *See* Petitioner's Appendix ("Pet. App.") at 2a [*Morrison v. National Australia Bank, Ltd.*, 547 F.3d 167, 168 (2d Cir. 2008)].

[10] The Second Circuit's opinion itself recites:

> In 2001, NAB revealed that the interest assumptions in the valuation model used by HomeSide to calculate the MSR were incorrect and resulted in an overstatement in the value of its servicing rights. In July 2001,

The lower courts typically have analyzed whether subject-matter jurisdiction exists for foreign victims of a transnational fraud to seek relief under the Exchange Act's antifraud provisions by asking "(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens."[11] Petitioners have urged this Court instead to adopt the formulation proposed by the SEC, that the federal securities laws should apply if "'conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme.'"[12]

Either way, this is a case that properly implicates §10(b)'s proscription of "any manipulative or deceptive device or contrivance" affecting securities transactions,[13] since the primary fraudsters *operated out of Florida*, generating phony financial statements

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> NAB disclosed that it would incur a $450 million write-down due to a recalculation in the value of HomeSide's MSR. *NAB's ordinary shares and its ADRs both fell* more than 5% on the news. In September 2001, NAB announced a second write-down of $1.75 billion of the value of HomeSide's MSR, *causing NAB's ordinary shares to plummet by 13% and its ADRs to drop by more than 11.5% on the NYSE*.

Pet. App. at 3a-4a [*Morrison*, 547 F.3d at 169].

[11] Pet. App. at 8a [*Morrison*, 547 F.3d at 171]. As the Second Circuit observed in this case, "the two parts of the test are applied together because 'an admixture or combination of the two often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court.'" *Id*. (quoting *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995)).

[12] Brief for Petitioners at 19 (quoting Pet. App. at 48a).

[13] 15 U.S.C. §78j(b).

there *for inclusion in NAB's reports filed with the SEC*. Thus, the critical wrongful conduct took place in the United States, producing false information that was in fact included in NAB's financial reports filed with the SEC. The fraud, moreover, indisputably affected NAB's securities prices, both on the U.S. market and abroad.[14]

Though the Florida fraudsters' false accounting for NAB's American subsidiary clearly affected the price of NAB securities both abroad and in the United States, the plaintiffs apparently placed little emphasis below on the price effects of the fraud in the American securities market.[15] Perhaps they eschewed arguing these domestic effects because the NAB ADRs that traded in the United States came to relatively little of the issuer's total worth. Respondents have, for example, told this Court that "ADRs held by Americans represented only a tiny fraction of NAB's equity capitalization," with U.S. residents'

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[14] *See supra* note 10.

[15] Again, from the Second Circuit's opinion:

> Another significant factor at play here is the striking absence of any allegation that the alleged fraud affected American investors or America's capital markets. Appellants press their appeal solely on behalf of foreign plaintiffs who purchased on foreign exchanges and do not pursue the "effects" test. They do not contend that what Appellants allegedly did had any meaningful effect on America's investors or its capital markets. The factor weighs against our exercise of subject matter jurisdiction.

Pet. App. at 20a-21a [*Morrison*, 547 F.3d at 176].

ADR holdings valued at "only 1.1 percent of the company's ordinary shares."[16]

But why would NAB list on an American stock exchange if it was not going to raise capital in the United States? The answer should be obvious. By voluntarily listing its securities on an American exchange and filing reports with the SEC, a foreign issuer signals to global investors its willingness to comply with—and be bound by—the U.S. law's disclosure and liability provisions. That willingness translates into greater liquidity and higher prices for its shares, whether they be the U.S.-listed ADRs or common stock traded on non-U.S. exchanges.

The University of Denver's Professor J. Robert Brown, Jr., writes that "[t]he United States is often viewed as a gold standard for purposes of accurate and complete disclosure, and foreign markets reward companies that meet these standards. As a result, foreign companies often list in the United States not because they want to raise capital but because of the resulting increase in share prices that comes with increased investor confidence."[17] "Many foreign companies have elected to list on U.S. exchanges in part because of the positive signal conveyed to investors by the issuer's willingness to comply with fuller disclosure requirements and greater protection for

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[16] Brief for Respondents in Opposition to Petition at 2 (citing Court of Appeals App. 280; Pet. App. at 33a).

[17] J. Robert Brown, Jr., *Criticizing The Critics: Sarbanes-Oxley And Quack Corporate Governance*, 90 Marq. L. Rev. 309, 327 (2006).

minority investors," agrees Tulane University Professor Onnig H. Dombalagian.[18]

The cachet of American listing—and the message it communicates of compliance with U.S. securities regulation—may be important for companies in the developing world.[19] Yet evidence suggests "that stocks from developed markets benefit more from cross-listings in the United States than do stocks from emerging markets," with one study finding "an average 30 percent increase in the home market value of trading after listing on the NYSE."[20] After

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[18] Onnig H. Dombalagian, *Demythologizing The Stock Exchange: Reconciling Self-Regulation And The National Market System*, 39 U. Rich. L. Rev. 1069, 1129 (2005).

[19] "Historically, companies from less-developed or less-regulated countries would also purposely list in the United States to subject themselves to the stringent U.S. regulatory standards, thereby providing investors with confidence. Being listed on a U.S. exchange gave these companies credibility so they could attract investors who ordinarily might not have purchased their shares in a foreign marketplace." Cory L. Braddock, *Penny Wise, Pound Foolish: Why Investors Would Be Foolish To Pay A Penny Or A Pound For The Protections Provided By Sarbanes-Oxley*, 2006 B.Y.U. L. Rev. 175, 200 (2006).

[20] Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe*, 3 Va. L. & Bus. Rev. 207, 230 (2008) (citing Katherine Smith & George Sofianos, *The Impact of an NYSE Listing on the Global Trading of Non-U.S. Stocks*, 2-3 (New York Stock Exchange, Working Paper No. 97-02, 1997) (study covering 128 non-U.S. stocks listed on the NYSE between 1985 and 1996) (available online at http://www.nyse.com/pdfs/wp97-02.pdf (last visited January 23, 2010))). Another study found that for companies trading on the Toronto Stock Exchange, cross-listing securities in the United States has positive effects on their home exchange. *See* Jackson & Pan, *Regulatory Competition*, 3 Va. L. & Bus. Rev. at 228.

conducting a detailed study of European issuers, the Harvard Law School's Professor Howell E. Jackson and Cardozo Law School's Professor Eric J. Pan together concluded that European companies list in the United States not just to access "additional demand from U.S. investors," but also to enjoy "the prestige associated with entering the U.S. market" for what it says to global investors.[21]

Investors worldwide rely on the fact that a company chooses to subject itself to U.S. securities regulation by listing on an American exchange and complying with the Exchange Act. The empirical evidence shows that a foreign company's stock generally rises on news that it is listing in the United States and will be subject to U.S. securities laws.[22] The current A.A. Berle Professor of Law at Columbia University, John C. Coffee, Jr., explains:

> Of the thirteen thousand companies now registered with the SEC as "reporting" companies, it

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[21] Jackson & Pan, *Regulatory Competition in International Securities Markets: Evidence From Europe*, 3 Va. L. & Bus. Rev. at 224.

[22] Risk and return are related, so that relatively risky securities must pay a higher return than less risky securities (compare, for example, high-return junk bonds with the lower return of investment-grade bonds). Thus if listing on an American exchange and committing to periodic filings with the SEC is perceived to signal reduced risk of losses from misinformation and fraud, one would expect a security's price to rise on news of listing on an American exchange, followed by lower investment returns thereafter—reflecting investors' perceptions of reduced risk. The empirical evidence bears this out. *See* Stephen R. Foerster & G. Andrew Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidenced from Foreign Stocks Listing in the United States*, 54 J. Fin. 981, 982 (1999).

> is estimated that more than one thousand are foreign.
>
> The accelerating pace of this migration may seem surprising when one realizes that foreign issuers incur extensive regulatory costs when they enter the U.S. markets *and that most have never thereafter made securities offerings in the United States*. Why then do they list? Arguably, companies in smaller markets gain liquidity and possibly also some international recognition and prestige from a U.S. listing. But greater motivation probably lies in the finding, repeatedly observed by financial economists, that *the announcement of a dual listing on a U.S. exchange by a foreign firm typically increases the firm's share value*.[23]

As a matter of fact, one study found the greatest market-price effect was for Australian companies that listed in the United States.[24]

In this case, NAB *chose to list* its securities as "Level III ADRs, the most prestigious and costly type of listing, requir[ing] full SEC disclosure with Form 20-F and compliance with the exchange's own

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[23] John C. Coffee, Jr., *The Future As History: The Prospects For Global Convergence In Corporate Governance And Its Implications*, 93 N.W.U.L. Rev. 641, 673-74 (1999) (emphasis added).

[24] Foerster & Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidence from Foreign Stocks Listing in the United States*, 54 J. Fin. at 994 (noting "the largest average weekly rise for the Australian firms" in a 153-firm sample of Canadian, European, and Asia-Pacific region companies choosing to cross-list in the United States between 1976 and 1992).

listing rules."[25] Respondents themselves confirm that "[b]ecause of the ADRs, NAB filed its Australian disclosures with the SEC on forms 6-K and 20-F."[26] Thus, by listing securities on the New York Stock Exchange, and by filing periodic reports with the SEC, NAB signaled to investors its willingness to comply with—and be bound by—U.S. securities laws. That NAB did so in order to signal to global investors that it intended to subject itself to U.S. law is confirmed by the fact that NAB has not raised significant capital by issuing securities in the United States, despite its massive U.S. operations through its HomeSide Lending subsidiary, which the Second Circuit recognized was "America's sixth biggest mortgage service company."[27]

Having listed its securities in an American stock exchange, and volunteered to comply with U.S. securities laws, NAB should not be permitted to evade the full force of those laws. Respondents counter that petitioners "'do not allege that they were even aware of the SEC filings, much less relied upon them.'"[28] That individual plaintiffs did not *actually see* NAB's false SEC filings should be entirely beside the point. Even when reliance is an element of a federal securities claim, it may be satisfied by reliance on the integrity of securities' market price. When Congress with the Exchange Act inserted a

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[25] Foerster & Karolyi, *The Effects of Market Segmentation and Investor Recognition on Asset Prices: Evidence from Foreign Stocks Listing in the United States*, 54 J. Fin. at 984.

[26] Brief for Respondents in Opposition to Petition at 2.

[27] Pet. App. at 3a [*Morrison*, 547 F.3d at 169].

[28] Brief for Respondents in Opposition to Petition at 2 (citations omitted).

reliance requirement for certain claimants under §11 of the Securities Act of 1933, for example, it specified that "such reliance may be established without proof of the reading of the registration statement."[29] This Court held in *Basic Inc. v. Levinson*, 485 U.S. 224, 241-47 (1988), that the same holds for §10(b) claims.

When it enacted the nation's federal securities laws, Congress knew how securities markets operate from articles and books published by Columbia law professor Adolph Augustus Berle Jr.—a member of Franklin Roosevelt's "brain trust" and one of the most influential legal academics of his time. "With the increasing public demand for liquidity of value—which in practice means the maintenance of an active trading market in securities—there has arisen another method by which corporate managements can control the stockholder's position," Professor Berle observed in his 1928 book *Studies in The Law of Corporation Finance*.[30] "This is control of the market price of securities through manipulation of information concerning the corporate affairs."[31] Such manipulation of market prices, Professor Berle observed, is of "immediate importance to that increasing body of stockholders who gauge their position by daily market reports and take action accordingly."[32]

In a 1931 article on *Liability for Stock Market Manipulation*, Professor Berle wrote that "*all markets* move in a nexus of information gathered from

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[29] 15 U.S.C. §77k(a); *see infra* at 18-20.

[30] ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATION FINANCE 176 (Chicago: Callaghan & Co., 1928).

[31] *Id.*

[32] *Id.*

all sources and circulated in a variety of ways, recognized and unrecognized."[33] He elaborated:

> Most exchanges require the corporation or its sponsors to give information respecting the corporation whose stock is placed on the market, as a condition precedent to the admission of that security trading. The older and better established exchanges require such information in great detail. Where, in such statement, false information is included, any purchaser in the market would seem to have an action in deceit or fraud for damage suffered therefrom.[34]

Professor Berle's 1931 article laid out the basics of what this Court would eventually embrace as the "fraud on the market" theory of reliance:

> Is it necessary that the purchaser knows of the specific false statement? Probably not; the only decision on the point indicates that where the effect of the statement was to create a false valuation or appraisal by the entire market, and the buyer relied upon the state of the market, he had, at second hand as it were, relied on the statement itself. The chain of causation between the statement relied upon and the price adopted by the investor is slightly longer than in the ordinary case of deceit, but is no less direct. If the X corporation states that its earnings are $13 a share when, in fact, its income statement should really show a loss, and the market estimates the value of the stock at $130 on the basis of such statement, and the investor buys at the market

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[33] Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 268 (emphasis added).

[34] *Id*. at 268-69 (footnotes omitted).

> price, he has relied on the market situation, which in turn resulted from the false statement.
>
> In like manner, if an outsider circulates a false report as to the earnings of a particular corporation which affects the price of its stock thereby subserving his own concealed interest, relief may be had against him by any person buying or selling in the market, where it appears that the report was designed to affect the market. It may be asked if this is a variation of the common law rule that the statement must be intended to be relied upon. Obviously not; for while the maker of the false representation has not singled out a specific individual for his victim, he has tossed his squib into a crowd, one or many of whom may be hit; and this fact is, or at least should be, known to him.[35]

In their 1932 landmark *The Modern Corporation and Private Property*, Professors Adolph A. Berle, Jr., and Gardiner C. Means restated the basics of fraud-on-the-market reliance in market-manipulation cases.[36] Thus, "if a corporation consciously over-

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[35] *Id*. at 269-70 (footnotes omitted). "Writing in 1931, Adolf Berle, probably the era's most influential commentator on corporate finance, asserted that courts had already gone much further than commonly assumed to protect the stock market from fraud." Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 Stan. L. Rev. 385, 407 n.96 (1990).

[36] *See* ALDOPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 314 & n.1, 322 (New York: The MacMillan Co., 1932). Berle and Means generally are deemed "[t]he most influential corporate commentators in the first half of the twentieth century." Eric A. Chiappinelli, *The Moral Basis of State Corporate Law Disclosure*, 49 Cath. U.L. Rev. 697, 709 (2000). Theirs was "the most influential

stated its income leading to a rise in the value of the shares, a buyer on the faith of such valuation should have no greater difficulty in recovering" than would an investor to whom false statements were directly made.[37]

Though some later lower-court decisions tie the concept of investor reliance in such cases to recent notions of informational "efficiency," the central premises of market reliance—that securities prices may be manipulated by fraud, and that those who

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book on corporation law and 'the Bible' of the Roosevelt administration." David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 Geo. L.J. 61,100 (2003). Widely read and highly influential when published in 1932, their book "remains as one of the most cited works in recent decades." Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 Law & Soc. Inquiry 179, 180 (2005). *See also* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 Yale L.J. 1519, 1519 (2004) ("still by far the most influential book ever written on American corporate law, was Adolf A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* (1932)"); Cynthia A. Williams, *The Securities Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197, 1220 n.122 (1999) ("Berle and Means's *The Modern Corporation and Private Property* may be the most influential book written in corporate law scholarship."); Robert Hessen, *A New Concept of Corporations: A Contractual and Private Property Model*, 30 Hastings L.J. 1327, 1329 (1979) ("the single most influential book ever written about corporations"); Robert Hessen, *The Modern Corporation and Private Property: A Reappraisal* 26 J.L. & Econ. 273, 273-74, 278-81 (1983) (observing that Berle and Means influenced New Deal securities legislation); George J. Stigler & Claire Friedland, *The Literature of Economics: The Case of Berle and Means*, 26 J.L. & Econ. 237, 258 (1983) ("Means can properly be counted among the most influential economists of our century.").

[37] BERLE & MEANS, THE MODERN CORPORATION, *supra*, at 322.

rely on the market's integrity may suffer—significantly predate the idea that securities markets are allocatively or informationally "efficient."[38] The fact that market prices incorporate information does not depend upon the Efficient Capital Market Hypothesis, with its supposition that *some* market prices do so almost instantaneously.[39]

Congress took note of these principles. Securities Act §11's liability rules, for example, are based on Congress' understanding that information in offering documents tends to determine the price at which new securities sell, even if they do not yet trade in a strictly "efficient" market. The 1933 Act's House Report explained that representations in a registration statement, "although they may never actually have been seen by the prospective purchaser, because of their wide dissemination, determine the market price of the security, which in the last analysis reflects those manifold causes that are the impelling

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[38] *See* Adolf A. Berle, Jr., *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. 264, 268-70 (1931); Adolf A. Berle, Jr., *Stock Market Manipulation*, 38 Colum. L. Rev. 393, 393-94 & nn.3-6, 395-97, 399-400 (1938); *Rex v. De Berenger*, 3 Maule & Selwyn Rep. 67, 105 Eng. Rep. 536 (King's Bench 1814) (noting effect on British securities markets of false rumors that Napoleon Bonaparte had died and that peace with France was imminent); *United States v. Brown*, 5 F. Supp. 81, 84-95 (S.D.N.Y. 1933) (reviewing common law precedents pre-dating the Efficient Capital Market Hypothesis), *aff'd*, 79 F.2d 321 (2d Cir. 1935).

[39] *See generally* F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519 (1945) (explaining how prices, in general, impound information); Berle, *Liability for Stock Market Manipulation*, 31 Colum. L. Rev. at 268-70 (explaining how stock market prices impound information, decades before the Efficient Capital Market Hypothesis was framed).

motive of the particular purchase."[40] "Inasmuch as the value of a security may be affected by the registration statement," the express civil remedies under §11 originally were "given to all purchasers regardless of whether they bought their securities in an interstate or intrastate transaction and regardless of whether they bought their securities at the time of the original offer or at some later date, provided, of course, that the remedy is prosecuted within the limitations provided by section 13."[41]

With the Exchange Act, Congress amended §11 in 1934 to require that an investor purchasing a registered security after the issuer provided audited financial statements for a year following its registered offering must prove reliance, "but such reliance may be established without proof of the reading of the registration statement."[42] The Conference Report

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[40] H.R. Rep. No. 85, 73d Cong., 1st Sess., at 10 (1933), *reprinted in* 2 J.S. ELLLENBERGER & ELLEN P. MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 18 (Littleton, Colorado: Fred B. Rothman & Co., 2001).

[41] H.R. Rep. No. 85 at 22; *see also* H.R. Rep. No. 1838, 73d Cong., 2d Sess., at 41 (1934), *reprinted in* 5 J.S. ELLENBERGER & ELLEN P. MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 20 (Littleton, Colorado: Fred Rothman & Co., 2001) (amending the 1933 Act).

[42] Securities Exchange Act of 1934 §206(a), 48 Stat 907, amending Securities Act §11(a), codified at 15 U.S.C. §77k(a):

> If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration

explained: "The basis of this provision is that in all likelihood the purchase and price of the security will be predicated on that statement rather than the information disclosed upon registration."[43] But showing an effect on price was (and is) what mattered to prove reliance, "without proof of the reading of the registration statement."[44]

The Exchange Act's legislative history reflects a general understanding, that "[t]he disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of security values truth does find relatively quick acceptance on the market," provided true information indeed is disclosed.[45]

Thus, this Court held in *Basic* that principles of market reliance apply to §10(b) claims under the Exchange Act. "In drafting that Act, Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets," this Court observed, as set out in the House Report, which it then quoted:

> statement and not knowing of such omission, *but such reliance may be established without proof of the reading of the registration statement by such person*.

15 U.S.C. §78k(a) emphasis added).

[43] H.R. Rep. No. 1838, 73d Cong, 2d Sess., at 41 (1934) (Conference Report), *reprinted in* 5 ELLENBERGER & MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 20.

[44] 15 U.S.C. §77k(a).

[45] H.R. Rep. No. 1383, 73d Cong., 2d Sess., at 11 (1934), *reprinted in* 5 ELLENBERGER & MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 18.

> "No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [*sic*] about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value."[46]

"An investor who buys or sells stock at the price set by the market," this Court concluded, "does so in reliance on the integrity of that price."[47] "Because most publicly available information is reflected in market price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action."[48]

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[46] *Basic*, 485 U.S. at 246 (quoting H.R. Rep. No. 1383, at 11 [*reprinted in* 5 ELLENBERGER & MAHAR, LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, Item 18]).

[47] *Id.* at 247.

[48] *Id.*; *see also id.* at 246 n.24 ("For purposes of accepting the presumption of reliance in this case, we need only believe that market professionals generally consider most publicly announced material statements about companies, thereby affecting stock market prices."); *id.* at 248 n.28 (the presumption of market reliance does not depend on "any particular theory of how quickly and completely publicly available information is reflected in market price").

In sum, Exchange Act §10(b)'s antifraud provision must be deemed to cover this case, which involves a fraud conceived and executed in Florida, generating false statements in reports filed with the SEC by a foreign issuer that chose to subject itself to the Exchange Act. Since Congress said it was concerned with manipulation of securities prices "generally disseminated and quoted throughout the United States *and foreign countries*," 15 U.S.C. §78b(2), and since this case involves transnational fraud allegedly perpetrated by a U.S. subsidiary of a company that chose to make itself subject to the Exchange Act, federal courts should exercise jurisdiction over the claims of its victims—both foreign and domestic.

CONCLUSION

For the foregoing reasons, the Second Circuit's judgment should be reversed. By listing its securities on the New York Stock Exchange and filing reports with the SEC, NAB told the world that it agreed to meet U.S. disclosure requirements and to comply with—and be bound by—U.S. law. Its HomeSide Lending subsidiary is an American company, servicing billions of dollars in U.S. mortgages. When the U.S. subsidiary committed fraud, by generating false financial data for NAB to include in its financial reports and file with the SEC, it both breached U.S. securities laws and inflated the price of NAB securities around the world. A company that so violates §10(b) should be liable to its victims, wherever they may reside.

Respectfully submitted,

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
RANDI D. BANDMAN
52 Duane Street
7th Floor
New York, NY 10007
(212) 693-1058

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
ERIC ALAN ISAACSON
Counsel of Record
MARK SOLOMON
PATRICK W. DANIELS
NATHAN W. BEAR
AMANDA M. FRAME
655 West Broadway,
Suite 1900
San Diego, CA 92101
(619) 231-1058

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Counsel for Amici Curiae Mn Services Vermogensbeheer B.V., Scottish Widows Investment Partnership Limited, and North Yorkshire Pension Fund