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* THE AUSTRALIAN SHAREHOLDERS' ASSOCIATION AND THE AUSTRALIAN COUNCIL OF SUPER INVESTORS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Australian Shareholders Association

The Australian Shareholders' Association (ASA) is a not-for-profit organization founded in 1960 to protect and advance the interests of shareholders and investors in Australia. Currently, the ASA has close to 8,000 members within Australia, and is funded primarily through membership fees.

The ASA regularly consults and serves as liaison with members of government, industry groups, and individual companies, and every year monitors approximately 200 publicly-listed Australian companies with a view to reporting on their financial performance, corporate governance, and other issues of concern to shareholders. Generally speaking, the list of companies monitored by the ASA is comprised of most of the largest 200 companies listed on the Australian Stock Exchange (known as the *ASX 200*) that are considered to be of general interest to investors, as well as a group of other companies that have been identified as being of particular interest to investors (for example, those that demonstrate poor corporate governance or have a high level of retail share ownership). For each company on the ASA Company Monitoring List, an ASA Company

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of all *amici* briefs have been filed with the Clerk of the Court.

Monitor produces a yearly report for members based on the ASA's review of company annual reports, attendance at annual general meetings, discussions and interactions with company management. The ASA Company Monitor can also attend annual general meetings of the company and vote as a proxy for ASA members who are not in attendance. In 2009, over $3.5 billion worth of proxies were allocated to the ASA, and the ASA was represented at 185 annual general meetings.

In addition, the ASA performs educational work, running workshops designed to increase members' financial literacy and awareness. Regular members' meetings are also held around Australia to allow members to engage with like-minded investors and hear experienced speakers discuss issues of importance to investors.

The ASA has also produced (and regularly updates) a series of Policy Statements reflecting shareholder views on a range of issues surrounding corporate governance, practice and disclosure. The Policy Statements were produced following an extensive consultation process, and are designed to allow companies to better understand shareholders' opinions and expectations, to ensure they fulfill their obligations.

The work of the ASA is primarily supported by volunteers; the Association employs only five members of staff, and has a team of over 100 volunteers who work to coordinate meetings and events, and to continue the Association's company monitoring program.

As the purpose of the ASA is to further and protect the interests of shareholders, the ASA devotes much of its time and resources towards monitoring companies and ensuring that shareholders are being made aware of the crucial aspects of their performance. The ASA aims to ensure that shareholders are protected against fraud and other unlawful conduct by the entities its members invest in. Whenever such conduct occurs and harms investors, the ASA aims to assist its members to be aware of their rights, and to be able to seek redress where appropriate.

The Australian Council of Super Investors

The Australian Council of Super Investors (ASCI) is a not for profit organization that represents the interests of 41 superannuation funds that collectively manage more than AUD$250 billion (US$228 billion) in funds. Approximately 10 - 20% of the funds are invested in international equities of which the majority is in the United States. The membership base is comprised of 39 Australian superannuation funds and two International Associate member pension funds.

ACSI was created by 13 Australian public sector and industry superannuation funds in March 2001 to provide advice relating to individual members' investments and develop a policy of best practice by which all funds could operate. ACSI provides advice to member funds including information concerning the impact of corporate governance, as well as environmental and social issues relating to the long term performance of the companies.

Active involvement by member funds in their investments was encouraged, and in 2002 a proxy voting advice service was provided on controversial issues. This service was expanded to include a full proxy voting advice service for the top 100 Australian Stock Exchange (ASX) companies, which was further extended to the top 200 ASX companies. In 2009, ACSI created a proxy voting advice service for the top 500 listed securities across the United States, United Kingdom and European financial markets in response to a greater proportion of ACSI managed funds investing overseas.

Since its inception, ACSI has had an active role as a liaison with international governments, regulators, fund managers and investees to protect the superannuation of its member funds invested in overseas markets. ASCI representatives have served on the Board of Governors of the International Corporate Governance Network (ICGN), and ASCI is an associate member of the Council of Institutional Investors in the United States and is a signatory to the United Nations Principles of Responsible Investment. ACSI received an award for excellence on corporate governance from ICGN in 2006 for its work in organizing member funds to assist in the prosecution of the plaintiff's case in *Unisuper v. News Corp.* (Del. Ch. 2005).

SUMMARY OF ARGUMENT

Where a person or group in the United States perpetrates a securities fraud (whether partly or wholly committed in the United States) which causes loss to investors in foreign countries, it is essential that the United States legal system and regulatory regimes permit the aggrieved investors to seek redress for their economic losses under the laws to which perpetrators are subject. Without this protection, perpetrators of securities fraud within the United States are able to "export" the consequences of their misdeeds with little or no risk of being held responsible. Ensuring that the anti-fraud provisions of the securities laws are available to foreign investors furthers the interests of the United States, shareholders and investors worldwide, and foreign financial regulators.

The United States Court of Appeals for the Second Circuit's interpretation of Rule 10b-5 of the *Securities Exchange Act of 1934* in *Morrison v. National Australia Bank*, 547 F.3d 167 (2d Cir. 2008), should be reconsidered to ensure that foreign investors have the protections of the *Exchange Act's* anti-fraud provisions where they have suffered losses as a result of fraud committed in part or fully within the United States, where the United States conduct is material to the loss suffered.

ARGUMENT

I. Extra-territorial application of anti-fraud laws is an essential component in the prevention of international and intra-national fraud, and is in the interests of all investors

The problem of United States-based securities frauds afflicting foreign investors is one which, by its very nature, transcends national borders. Congress recognized the closely inter-connected nature of global financial markets in the *Exchange Act of 1934* itself. 15 U.S.C. §78b(2) ("prices established and offered in [securities] transactions are generally disseminated and quoted throughout the United States and foreign countries"). Thus, it is hardly unexpected that conduct occurring in one country may have significant effects on market participants in other countries. Congress recognized that in the *Exchange Act of 1934* too, as evidenced (for example) by its "statutory disqualification" from domestic activities of persons who have been expelled, suspended or denied trading privileges by a "foreign international securities exchange." 15 U.S.C. §78c(A)(39).

Addressing this problem necessarily requires an international perspective. Where the party committing a fraud resides in the United States, there are generally few or no legal options open to the foreign victims of that fraud to seek redress other than those provided under the United States legal system. Similar issues would surround the applicability of foreign laws to wrongdoers residing in other countries.

If the securities laws of the United States are found to be inapplicable to parties engaged in fraudulent conduct that causes loss to foreign investors, the cost or risk of the conduct involved to the perpetrators would be significantly reduced. Basic economic theory would dictate that such circumstances would make the United States a more attractive location for such conduct to occur. Conversely, ensuring that wrongdoers can be made to face the legal claims of all the parties they harm, including foreign investors, would provide a significant disincentive to such conduct taking place. *See SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) ("to deny such jurisdiction may embolden those who wish to defraud foreign securities purchasers or sellers to use the United States as a base of operations. [Denying jurisdiction] would, in effect, create a haven for such defrauders and manipulators."). Without the application of these laws, parties intending to commit securities frauds affecting foreign investors could conceivably operate with relative impunity within the United States. *See id.* (expressing reluctance "to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates'").

It is inconceivable that the United States Congress intended the *Securities Exchange Act of 1934* to permit the country to be a "safe haven" for parties intending to commit securities frauds. Not only would such a result be contrary to the express purposes of the legislation, but it would do considerable damage to the standing of the United States in investors' minds.

The inability to hold accountable the perpetrators of international securities frauds seriously impedes the efforts of many to deter such fraud, both within the United States and internationally. Such conduct is effectively deterred by ensuring that aggrieved parties have the ability to seek redress no matter where the conduct occurs; this requires as many countries as possible to ensure that their systems afford these rights to investors, in light of the unavoidably global nature of securities markets.

Regulation such as the anti-fraud provisions of the *Securities Exchange Act of 1934* is inherently costly for a country to implement. If foreign countries recognize that a country with the economic might and sophistication of the United States will not act to prevent United States-based wrongful conduct from adversely affecting foreign investors, there is a real risk that those countries will be less likely to enact a robust regulatory regime preventing securities fraud themselves. Should this situation persist for a large number of other countries, there would be a significant deterrent placed on international investments around the world.

For United States courts to hold that there is no jurisdiction where fraudulent conduct emanating from the United States harmed foreign investors, may lead to reciprocal responses by other jurisdictions, prohibiting United States investors from seeking economic damages where international fraudulent conduct harmed them. A failure of United States laws to adequately protect foreign investors from fraudulent conduct emanating within the United States may therefore lead to United States citizens lacking similar protections for their own foreign investments.

Conversely, ensuring that United States securities laws can be enforced against the perpetrators of frauds harming foreign investors would have a decidedly positive effect on United States-based investors as well. Foreign investors would be considerably more likely to invest in United States-based entities with the knowledge that they can avail themselves of the United States anti-fraud laws should they be needed. In this way, a broader interpretation of the *Securities Exchange Act of 1934* encourages foreign investment and increases the flow of foreign capital into the United States.

The *Amici* act to encourage high standards of corporate conduct and disclosure, which protect Australian as well as international investors. Protecting foreign investors from fraudulent conduct occurring overseas is one important way of ensuring that these aims can be met. In 2010, when the economy is global, and truly "international" companies trade their stock over securities exchanges throughout the world, it is essential for the optimal functioning of national and international securities markets that foreign investors are afforded the protection of laws such as the anti-fraud provisions of the *Securities Exchange Act of 1934*.

II. The securities laws are intended to regulate the United States-based conduct of United States companies

Where fraudulent or otherwise unlawful conduct occurs within the United States, and is committed by a United States citizen or entity registered to do business in the United States, or an entity required to make financial reports to United States regulators, the default position for law enforcement purposes must be that the conduct is to be subject to the laws of the United States, and ought to be judged by and according to them. Where such conduct victimizes a foreign party, the presumption that United States law applies should be no different than if the conduct harms a United States citizen. That presumption must remain in the absence of a compelling argument to the contrary.

Practical factors, such as the availability of factual and expert evidence, the cost and convenience of United States-based litigation to interested parties, and the expertise of United States courts, all strongly suggest that the most appropriate place for litigation concerning United States-based securities fraud with international effects is the United States. A defendant that disagrees may seek to have claims brought against it dismissed on the ground of *forum non conveniens*. *See generally Sinochem International Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). This is the appropriate basis on which a court ought to consider the most correct venue for such a claim; a restrictive interpretation of the *Securities Exchange Act of 1934* and its jurisdictional provisions ought not be used to supplant that ground as the initial consideration.

Shareholders such as those receiving the advice and benefits of the *Amici* require certainty as to the rights and protections afforded to investors in order to make investment decisions. If United States securities laws are found to be unavailable to foreign investors who have suffered losses as a result of a United States-based fraud, this would be a significant factor weighing against further or continued foreign investment in the United States.

III. The United States ought not "export" wrongful conduct occurring within its borders or by its citizens without providing a means for victimized parties to seek redress

The *Amicis'* purposes and programs within Australia encourage high standards of corporate behavior, which protects investors both domestic and foreign. As a part of this, the *Amici* encourage governments to ensure that adequate systems are in place to ensure that corporations and other entitles that fall short of the standards required of them can be held accountable by the parties they have harmed. The *Amici* encourage such accountability from all entities involved in investment transactions around the world.

If the anti-fraud provisions of the *Securities Exchange Act of 1934* are found to be unavailable to foreign plaintiffs, the foreign victims of frauds perpetrated in the United States would often be left without any means of recovering from the parties responsible. In this sense, the failure of the United States' legal and regulatory systems to provide adequate opportunity for redress would amount to the

United States exporting the adverse effects of wrongful conduct occurring on its territory to other innocent parties – certainly as innocent as those United States victims of the same fraud.

It is the *Amicis'* belief that such a situation cannot be justified. Investors, such as those likely to be most affected by such circumstances, are the cornerstone of financial systems in all developed nations, and foreign investors in particular play a significant and growing role in national economies, while placing a great deal of trust in foreign nations to adequately protect their investments. Putting foreign investors at such a disadvantage is a substantial disincentive to the injection of foreign capital into financial markets, would operate contrary to the development of increasingly open and internationally-connected financial markets, and is inequitable, to say the least.

The *Amici* therefore encourage governments and corporations to take responsibility for dealing with securities frauds, and to ensure that the burden of such wrongdoing is not automatically transferred to voiceless innocent foreign parties.

CONCLUSION

Based upon the forgoing and the arguments made by Petitioners, the *Amici* submit that this Court should determine that the anti-fraud provisions of the securities laws of the United States are available to foreign plaintiffs where they have been the victims of a fraud that has a material connection to conduct occurring in the United States.

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Respectfully submitted,

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