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

REPLY BRIEF

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I. THERE IS NO STATUTORY BASIS FOR NOT APPLYING AMERICAN LAW TO FRAUDULENT CONDUCT CARRIED OUT IN THE UNITED STATES

The Second Circuit affirmed the dismissal of this action for lack of subject matter jurisdiction. Clearly that ruling cannot stand and no party appears before the Court to defend the jurisdictional ruling.[1]

Before the Court now is a question whether American securities fraud law applies when the predicate conduct occurs in the United States, but the fraud then has extraterritorial effects. On the critical issue of the reach of the Exchange Act, Petitioners and the Solicitor General assert that it simply defies logic and any form of statutory construction to hold that substantial and material activity in the United States is somehow insulated from American law merely because there are foreign effects. Under that framework, the differences between Petitioners and the Solicitor General are reduced to narrow questions of enforcement by private parties and the corresponding burden of pleading by private parties – as will be addressed below.

By contrast, Respondents, and every *amicus* supporting Respondents, start from the proposition that

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[1] The issue of potentially vacating the opinion below and remanding to the Second Circuit in light of intervening authority from decisions of the Court has been separately presented to the Court and will not be repeated here.

the Court should take this case as an opportunity to rewrite the Exchange Act to limit the reach of American securities laws only to transactions conducted on an American exchange. In order to sell this radical recasting of American law, Respondents attempt to portray this as a case exclusively about fraudulent conduct in Australia. If that were the case – that is, an Australian plaintiff who purchased stock of an Australian company on an Australian exchange and that company had committed securities fraud in Australia – there would indeed be no jurisdiction because none of the statutory requirements of the Exchange Act would be met.

However, as amply alleged in the pleadings below, this case reads like a guided itinerary through the investment calamities that beset the American economy. The predicate act was mortgage fraud in Florida carried out through a portfolio of two million American mortgages. JA 39a.[2] As part of the fraud, further conduct occurred *in the United States* through multi-billion dollar hedging activity at NAB's trading operation in New York City. In New York, that hedging resulted in losses of $1.4 billion in 1999, all of which was conducted through an American company owned by an Australian bank, with American and Australian executives running the fraudulent show from the United States.

Once past the improper dismissal for lack of subject matter jurisdiction, the primary question before the Court

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[2] Petitioners adopt herein the abbreviations defined in Brief For Petitioners ("Pet. Br.") at footnote 1.

is then whether fraudulent conduct carried out in Florida, which used the U.S. mails and involved U.S. commerce, is actionable under the plain language of the Exchange Act. No statutory construction would permit conduct centrally carried out in the United States, continually and openly using interstate commerce and the U.S. mails, to be free from American legal scrutiny so long as the conduct had some effect outside the United States.

As the Solicitor General points out, Section 10(b) should apply here given that significant and material securities fraud occurred in the United States. SG Br. 13-25. That test underscores the critical importance of American securities laws having full force in the United States, lest this country truly become a "'Barbary Coast,' as it were, harboring international security 'pirates,'" *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977), who use this country "as a base for manufacturing fraudulent security devices for export." *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (Friendly, J.).

At the heart of Respondents' argument, supported by a bevy of *amici*, is the curious claim that American laws cannot be presumed to reach conduct in the U.S., if the conduct also has international effects. Thus, Respondents propose a rule of statutory construction that would reject the plain language of the Exchange Act in favor of a requirement that Congress, each time it enacts a statute, reaffirm that American laws apply any time there is a potential extraterritorial impact (Resp. Br. 52-56). Otherwise, according to the Respondents, application of U.S. law would apparently damage the sovereignty of

other nations. *Id.* at 54. As well argued by the Government, this position cannot be reconciled with U.S. sovereign interests in controlling financial misbehavior in this country. As long recognized in the Restatement (Second) of Foreign Relations Law, "A state has jurisdiction to prescribe a rule of law[:] (a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory . . ." Restatement (Second) of Foreign Relations Law § 17 (1962). *See also* Restatement (First) of Conflict of Laws §377 cmt. a ("both the state in which the actor acts and the state in which the legal consequences of his act occur have legislative jurisdiction [when exercised] to impose an obligation to pay for harm caused thereby").

Given the broad language of the Exchange Act, the issue in transnational securities fraud conduct is whether there is some other overriding limitation on the application of American law. As set forth by Justice Scalia in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993), the Court should follow the test set out in the Restatement (Third) of Foreign Relations: "Under the Restatement, a nation having some 'basis' for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction 'with respect to a person or activity having connection within another state when

the exercise of such jurisdiction is unreasonable.' Restatement (Third) § 403(1)." *Id.* at 818.[3]

The reasonableness inquiry, in turn, looks to a number of factors set forth in the Restatement that examine the interests of various nations in the conduct in question, including, for example: "the extent to which the activity takes place within the territory [of the regulating state] . . . ." Restatement (Third) of Foreign Relations § 403(2)(a).[4] These factors clearly favor application of United States law. The activity relevant to the claims here took place primarily in Florida, and Respondents primarily are U.S. nationals, with only two of the six Respondents having their principal place of business or residence outside the United States. In addition, the

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[3] This is sometimes referred to as "a question which touche[s] the comity of nations, and . . . the comity is, and ever must be, uncertain. . . . [I]t must necessarily depend on a variety of circumstances, which cannot be reduced to any certain rule." Joseph Story, Commentaries on the Conflict of Laws 28 (1895).

[4] The causation resulting from defendants' conduct in *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983 (2010) (Resp. Br. 37), has nothing in common with the effect of the fraud by HomeSide. The conduct of the *Hemi Group* defendants did not directly cause the loss because "the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City)." *Id.* at 990 (emphasis in original). For a similar reason, *Pugh v. Tribune Co.*, 521 F.3d 686 (7th Cir. 2008) (Resp. Br. 38), has no relevance here. In *Pugh*, plaintiffs were investors in a newspaper, and defendant's scheme directly defrauded only the newspaper's advertisers, not its shareholders; defendants "were not alleged to have participated in preparation of any of the challenged statements" made to the shareholders. *Id.* at 690, 696.

economic activity of NAB alone or with HomeSide is domestic: ownership of a substantial bank in Michigan, a multi-billion dollar trading operation in New York City tied in part to the HomeSide portfolio of mortgages on over two million American homes, and operating profits of all U.S. entities of $490 million in 2000. *See* § 403(2)(b) (considerations of interjurisdictional efficiency would point to the U.S. as the locus of most of the factual information germane to this case). Accordingly, the exercise of jurisdiction here is reasonable under the Restatement factors. *See* § 403(2)(a), (b), (g) and (h).

II. RESPONDENTS ERRONEOUSLY RELY ON CASES IN WHICH THE ENTIRETY OF THE WRONGFUL CONDUCT OCCURRED ABROAD AND DID NOT INVOLVE DOMESTIC MISCONDUCT

The difference between conduct in the United States and acts unrelated to American activity is key to the disposition of this case and to the line of cases from the Court addressing the extraterritorial application of American law. Respondents and *amici* repeatedly rely on cases that involve conduct undertaken exclusively abroad to argue that the application of Section 10(b) to transnational securities fraud should be narrowly construed because Congressional legislation, "unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.,* 499 U.S. 244, 248 (1991) (citation omitted).

The Solicitor General correctly points out the errors of this argument. SG Br. 22-25. First, the presumption set forth in *Aramco* does not preclude application of Section 10(b) to securities fraud that involves significant and material conduct in the United States. As set forth by the Solicitor General: "Applying Section 10(b) to those frauds is not accurately viewed as extraterritorial because it involves regulation of essentially domestic conduct." SG Br. 22. In *Aramco*, none of the critical employment decisions occurred in the U.S.: not the hiring; not the claimed discrimination; and not the basis for the claimed damages.

Second, the Solicitor General correctly notes that "application of the substantive prohibitions of the United States securities laws to transnational frauds with a significant domestic component generally has not resulted in international conflict." SG Br. 23.

Third, none of the cases cited by Respondents and *amici* in support of the presumption against extraterritorial application of U.S. laws involved significant conduct in the United States material to the alleged violations. *See Aramco*, 499 U.S. at 247 (underlying Title VII discrimination conduct occurred in Saudi Arabia); *Foley Bros. v. Filardo*, 336 U.S. 281, 283 (1949) (underlying violation of Eight Hour Law occurred in Iraq and Iran); *New York Cent. R.R. v. Chisolm*, 268 U.S. 29, 30 (1925) (claim under Federal Employer's Liability Act based on negligent conduct in Canada); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch)

64, 65-67 (1804) (seizure in the Caribbean of a Danish ship).

Indeed, despite Respondents' infatuation with *Charming Betsy,* the case is highly instructive as a maritime dispute over conduct that had nothing to do with the United States. The issue in *Charming Betsy* was whether an early American statute prohibiting trading with enemy aliens supported the seizure of a Danish vessel. The ship was seized outside the United States and the sole connections to the U.S. were that the vessel had once been registered as American, but had been sold by the time of its commerce with France, and that the individual who bought the ship happened to have been born in the United States, though he had moved to St. Thomas as an infant, became a Danish subject, and registered the vessel as Danish. Chief Justice Marshall ruled that the United States statute did not apply, as it would have violated international norms of salvage and prize and run the risk of conflict with a neutral state, Denmark. 6 U.S. at 68-69.

Thus, in *Charming Betsy*, the conduct at issue had nothing to do with the United States, was subject to a well-developed regime of maritime law, and the potential interference with the sovereignty of the seized ship's nation (Denmark) was patent. By contrast, the instant case concerns the application of American law to conduct undertaken in the U.S. – the precise question whose absence was central to this Court's ruling in *Charming Betsy*.

In a similar vein, Respondents and many of the *amici* rely heavily on *F. Hoffman LaRoche v. Empagran S.A.,* 542 U.S. 155 (2004), for the proposition that American laws should presumptively not have extraterritorial effects. But the key to *Empagran*, as with *Charming Betsy*, is the absence of a nexus between the asserted harm and any effect on the United States. In *Empagran*, the Court made the distinction clear by asking the following: "But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*" 542 U.S. at 165 (emphasis in original).[5]

By contrast, the present case begins with fraud committed in the United States, both in Florida and in New York, and carried forth through the instrumentalities of U.S. interstate commerce and the U.S. mails. For as much as Respondents and *amici* attempt to dress this case up as a global reach by American law (*see, e.g.*, Resp. Br.

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[5] Similarly, in *New York Cent. R.. R. Co. v. Chisolm*, 268 U.S. 28 (1925), plaintiff failed to allege any wrongful conduct within the United States. A claim was made under American railway law against an American employer for a death caused in a railroad accident occurring 30 miles north of the U.S.-Canadian border. The Court noted that "[l]egislation is presumptively territorial", *id*. at 32, in holding that the plaintiff could bring an action in the United States but that "[t]he carrier was subject only to such obligations as were imposed by the laws and statutes of the country where the act of negligence occurred [Canada]. . ." *Id*. Thus, the Court held that Canadian substantive law should have been applied by the district court.

2 (using the term Australia or Australian 16 times in one page alone)), saying so does not make it so. Counter to the drum beat of the repeated invocation of foreign or Australian or "f-cubed" or any other such term, the legal question before the Court is the application of American securities laws to conduct undertaken in the U.S. This is the traditional concept of the exercise of jurisdictional sovereignty over a nation's territory that is not only well established in this country, but is the sovereign prerogative of every nation.[6]

Respondents then attempt to describe *Microsoft v. AT&T*, 550 U.S. 437 (2007), as "the most analogous case." Resp. Br. 34. But, again, there simply was no domestic conduct in *Microsoft* that was actionable under the statute. *Id.* at 455. Moreover, to the extent that the Court relied on the presumption against extraterritoriality when interpreting what kind of conduct could violate the Patent Act, such reliance was justified by the fact, *not present here*, that explicit language in the Patent Act supports "a general rule that our patent law does not apply extraterritorially." *Id.* at 442, 455 ("The traditional understanding that our patent law 'operate[s] only domestically and d[oes] not extend to foreign activities' (citations omitted) is embedded in the patent Act itself.").

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[6] The Australian Securities and Investments Commission, in its *amicus* brief, sets forth the Australian regulatory scheme but: (1) has not identified any conflict with the U.S. securities regulatory scheme in this case; and (2) by its own admission did not investigate these claims of fraudulent activity or take any action. *See* Brief Of The Government Of The Commonwealth Of Australia As *Amicus Curiae* In Support Of Defendants-Appellees 14-15.

Respondents also argue that *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), involved proximate cause and, because the tort claim in that case "arose" overseas, Petitioners' claims here are not actionable. Resp. Br. 39. However, the Court in *Sosa* relied on the specific statutory provisions of the Federal Tort Claims Act, which "was designed primarily to remove the sovereign immunity of the United States from suits in tort," and which, in order to protect the United States, *made a specific exception for "[a]ny claim arising in a foreign country."* 542 U.S. at 700, 705 (emphasis added). Therefore, *Sosa* involved specific statutory interpretation like *Empagran* or *Microsoft*, and Respondents have identified no comparable language under the Exchange Act – nor could they.

III. THE EXCHANGE ACT AND EACH OF ITS TERMS IS A PROPER EXERCISE OF CONGRESSIONAL POWER

A. The Government's Proposed "Significant And Material" Test Is A Proper Check On The Exercise Of Legislative Jurisdiction

The Solicitor General has proposed that for Section 10(b) to apply the test is whether "significant and material" conduct has occurred in the United States. SG Br. 16. Applying this standard to Petitioners' claims, the Solicitor General found that:

> Petitioners stated a violation of Section 10(b) because they alleged that significant conduct material to the fraud occurred in the United States. According to their

> complaint, the false information that NAB released to the public in Australia was generated by HomeSide and its officers in the United States with the expectation that it would be incorporated into NAB's financial statements. The conduct within the United States thus was not peripheral or merely preparatory but was integral to the overall fraud.

SG Br. 30-31 (citation omitted).

By contrast, Respondents and many of the *amici* argue that the Court should in effect disregard the statutory language and limit the Section 10(b) private right of action only to persons who purchased or sold securities in the United States. Their test is as follows:

> The Court should accordingly limit the Section 10(b) inferred right to persons who purchased or sold securities in the United States.

Resp. Br. 21.

Respondents cannot escape the language of the Exchange Act, which is more expansive in its scope. Initially, the preamble to the Exchange Act sets forth the Act's purpose: "To provide for the regulation of securities exchanges . . . operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges . . . ." 48 Stat. 881 (1934).

Further, as to the scope of the conduct proscribed, Section 10(b) of the Act, 15 U.S.C. § 78j, prohibits "any person" from employing, even indirectly, "any means of instrumentality of interstate commerce" in contravention of rules against "manipulative and deceptive" devices prescribed by the SEC consistent with Section 10(b). "Interstate commerce", in turn, is defined by the Exchange Act to include "trade, commerce, transportation, or communication . . . between any foreign country and any state . . . ." 15 U.S.C. § 78c(a)(17) (emphasis added).

Applied to this case, Petitioners brought suit under the Exchange Act against HomeSide and NAB, who operated using "the means and instrumentalities of interstate commerce, including . . . the United States mails . . ." to effectuate the massive accounting fraud. PA 40a. That is consistent with the provisions of the Exchange Act and its stated objectives.[7]

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[7] "In construing a statute, we are obligated to give, if possible, effect to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). *See also Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction"); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'").

B. The Solicitor General's Test And *Forum Non* Conveniens Jointly Act To Exclude Cases With Insufficient Nexus To United States Territory

The application of the Exchange Act to transnational securities fraud cases that have "substantial and material" conduct in the United States would not result in the indiscriminate adjudication of such cases in federal courts. Cases having *de minimis* contact with the United States, or cases that truly encroach upon a foreign nation's primary interest in the underlying conduct, are properly weeded out by early determinations of personal jurisdiction or *forum non conveniens*, what the Court has deemed a "less burdensome course." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007). As the Court noted in *Sinochem*:

> a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.

Id. at 425.

If the plaintiff's choice of forum is not supported by a "bona fide connection with the United States," dismissal

will ensue. Thus, if the plaintiff is a foreign securities purchaser, *Sinochem* makes clear that *forum non conveniens* may dictate dismissal of an action brought in the U.S.: "[W]hen the plaintiff's choice is not its home forum, . . . the presumption in the plaintiff's favor 'applies with less force for the assumption that the chosen forum is appropriate is in such cases 'less reasonable.'" 549 U.S. at 430 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981)). Similarly, "a court can readily determine that it lacks [personal] jurisdiction over the cause or the defendant," *Sinochem,* 549 U.S. at 436, and dismiss for lack of case specific personal jurisdiction – as opposed to the improper use of the non-case specific doctrine of subject matter jurisdiction.

IV. THE SOLICITOR GENERAL'S EFFORTS TO DISTINGUISH CLAIMS BROUGHT BY PRIVATE PARTIES AND THE SEC CANNOT BE RECONCILED WITH THE CONTROLLING STATUTES

A. The Government's "Direct Cause" Test, Properly Applied, Provides A Basis For Recovery

Despite rejecting every aspect of the Second Circuit's legal analysis, the Solicitor General nonetheless argues for affirmance on the basis of a distinct burden to be borne by private litigants under the Exchange Act. The Government argues that a "direct-injury" requirement applies to private plaintiffs but not the SEC. SG Br. 28-30. The Government asserts that "every court of appeals that had addressed the transnational application of Section 10(b) before enactment of the [Private Securities

Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) ("PSLRA")] had held that a plaintiff must establish that conduct within the United States 'directly caused' his injury." SG Br. 28-29. The significance of this argument is not apparent. To begin with, the cases cited by the Solicitor General all involved tests for finding jurisdiction, not tests for whether plaintiffs stated a cause of action. *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987) ("directly caused" element dismissed in context of "test for finding jurisdiction"); *Psimenos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041 (2d Cir. 1983) ("directly caused" element discussed in context of whether district court has "jurisdiction over suits by foreigners who have lost money through sales abroad"); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (1983) ("directly caused" element discussed in context of the court formulating "a test for subject matter jurisdiction"); *Continental Grain (Aust.) Pty. Ltd. v. Pacific Oil Seeds, Inc.*, 592 F.2d 409, 420 (8th Cir. 1979) ("directly caused" element discussed in terms of "finding subject matter jurisdiction").

The Solicitor General fails to note that the same pre-PSLRA cases defining the direct causation element for determining subject matter jurisdiction also held the SEC and a private plaintiff to the same standards. *Kasser*, 548 F.2d at 115 (applying "directly caused" element to determine jurisdiction over SEC action for injunctive relief). Accordingly, courts did not distinguish between the SEC and private litigants in applying direct cause in transnational fraud cases.

More significantly, it is unclear what would be deficient about the pleadings in this case under such a direct causation standard. The allegations concern coordinated conduct in the United States, undertaken by officers of HomeSide and NAB to inflate the book value of NAB. In its primary cases on causation, most notably the decision this Term in *Hemi*, the Court sets out the common-law foundations of proximate cause as turning on "'some direct relation between the injury asserted and the injurious conduct alleged' . . . A link that is 'too remote,' 'purely contingent' or 'indirec[t]' is insufficient." *Id.* at 989 (quoting *Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258, 271, 274 (1992)). When the Court has found the casual link to be broken, it has relied on intervening actions unrelated to the complained of conduct, and carried out by independent actors. Thus, in *Hemi,* the Court found that there could be no liability because "the City's theory of liability rests not just on separate *actions,* but separate actions carried out by separate *parties." Id.* at 990 (emphasis in original). *See also Anza v. Ideal Steel Supply Corp.,* 547 U.S. 451 (2006)(tax fraud directed at public authorities that allowed lower price margins cannot be the predicate for harm suffered by a business competitor's loss of revenue).

B. Congress Created An Express Right Of Action With The PSLRA And Did Not Limit The Reach Of Private Suits By Foreign Plaintiffs Against "Substantial And Material" Fraud Committed In The United States

Alternatively, the Solicitor General argues that this private right of action should be limited to allow only the SEC, and not private plaintiffs, to prosecute violations of Section 10(b) like those alleged here.[8] This argument, however, fails to account for the PSLRA, as recognized by this Court in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 155 (2008). As this Court has held, "[t]he [PSLRA's] express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* at 163. Moreover, the policy reasons, if any, for drawing such a distinction in certain contexts under certain other statutes are absent here.

This Court has held that the PSLRA was intended to have "Congress . . . reassert its authority in this area," and

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[8] In the Government's opposition to the Petition for Writ of Certiorari, the Solicitor General, for the first time in this suit, asserted that foreign investors seeking to bring a securities fraud claim based on acts that occurred within the United States are subject to more restrictive requirements for enforcement than the SEC. *See* Brief For United States As Amicus Curiae at 16. This position contravenes the position taken by the SEC in the court below, in which it argued that "material and substantial conduct in furtherance of the alleged fraud occurred in the United States" and Petitioners had stated a claim against Defendants for a violation of Section 10(b). PA 49a-50a (footnote omitted).

that "Congress thus ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action." *Id*. at 165 (quoting S. Rep. No. 104-98, at 4-5 (1995)). Simply put, the implied right of action analysis does not apply after express Congressional action in the PSLRA.

In passing the PSLRA, Congress comprehensively addressed what it viewed as "the evils flowing from abusive securities litigation," S. Rep. 104-98, at 8 (1995), by limiting the private right of action in various ways. Congress explicitly did this in the context of the dual enforcement possibilities provided by Government and private law suits, stating that "[t]he SEC enforcement program and the availability of private rights of actions together provide a means for defrauded investors to recover damages and a powerful deterrent against violations of the securities laws," *id.*, and that "private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action." H.R. Conf. Rep. 104-369, at 31 (1995).

Moreover, Congress addressed this subject with specific regard to foreign relations, stating that "*private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors,*

lawyers and others properly perform their jobs." *Id.* (emphasis added).[9]

As part of the PSLRA, "Congress amended the securities laws to provide for limited coverage of aiders and abettors. Aiding and abetting liability is authorized in actions brought by the SEC but not by private parties." *Stoneridge*, 552 U.S. at 162 (citing 15 U.S.C. § 78t(e)). By contrast, the PSLRA does not draw any distinction between SEC enforcement and the private right of action regarding any matter other than aiding and abetting, and certainly not regarding claims that have transnational aspects.

The comprehensive nature of the PSLRA's reform of the private right of action under Section 10(b), the

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[9] None of the *amici* has contradicted the following: recent scholarship has determined that stricter securities enforcement in the United States has led to lower capital costs for companies listed here, as well as a market premium rewarding good corporate governance and transparency, thus making the United States markets *more* attractive than foreign markets with less enforcement. *See, e.g.*, John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 U. Va. L. Rev. 707, 714-15, 727-41 (2009) (lack of securities enforcement causes instabilities in the market, raising capital costs); John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229 (2007) (active U.S. securities enforcement explains significant market premium for listing foreign stocks on U.S. exchanges); George Andrew Karolyi, *The World of Cross-Listing and Cross-Listings of the World: Challenging Conventional Wisdom*, 10 Rev. Fin. 99, 118 (2006) (investors willing to pay cross-listing premium when foreign companies list in U.S., possibly reflecting investors' willingness to reward greater transparency and investor protection).

attention paid by Congress when drafting the statute to the availability of SEC enforcement, and the statute's specific provision of a distinction between SEC enforcement powers and the private right of action as regards aiding and abetting, supports a presumption that the omission by Congress to make any similar distinction regarding claims with a transnational aspect was intentional. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); 2A Norman J. Singer, *Sutherland Stat. Const*. § 47.23 (7th ed. 2009) (inference that omission is intentional is strengthened "where a thing is provided in one part of the statute and omitted in another").[10]

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[10] The Solicitor General also argues that the SEC's enforcement activities are "not limited by the additional constraints that apply to private suits" because, under the civil penalty provisions of the Exchange Act, 15 U.S.C. § 78u, the SEC also has authority to bring an action for injunctive relief or a monetary penalty without needing to prove "that any investor actually relied on the misrepresentations or that the misrepresentations caused any investors to lose money." S.G. Br. at 12.

However, the argument glosses over the fact that, in order to recover a monetary penalty with a deterrent effect even remotely equivalent to the effect of damages, the SEC still has to prove a species of causation. *See* 15 U.S.C. § 78u(d)(3)(B); *SEC v. Huff*, No. 08-6315-CIV, 2010 WL 148232, at *3 (S.D. Fla. Jan. 12, 2010) ("[T]he SEC must demonstrate not loss causation, but, for lack of a better descriptive term, gain causation.") (footnote omitted)).

V. UNDER THE FACTS ALLEGED IN THE COMPLAINT, THIS CASE MUST PROCEED

A. The Fraud Alleged Was Predicated On Conduct In Florida

Respondents seek to downplay systematically the critical fact that the core conduct constituting the securities fraud took place in Florida. As the Second Circuit correctly noted:

> Appellants assert that the alleged manipulation of the [mortgage servicing rights] by HomeSide in Florida made up the main part of the fraud since those false numbers constituted the misleading information passed on to investors through NAB's public statements. According to Appellants, if HomeSide had not created and sent artificially inflated numbers up to its parent company, there would have been no fraud, no harm to purchasers, and no claims under Rule 10b-5. Appellants insist that NAB's creation and dissemination of the public statements in question consisted solely of the mechanical insertion of HomeSide's numbers into the statements and public filings and that the locus of the improper conduct (Florida) and not the place of compilation (Australia) should determine jurisdiction.

PA 18a. Because this is an appeal from a dismissal, these facts must be taken as true for purposes of the Court's review. *Leatherman v. Tarrent City Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

Nonetheless, the Second Circuit rejected the clear import of these allegations by invoking the idea, unsupported by the record, that there were "a number of checkpoints manned by NAB's Australian personnel before reaching investors" and that, accordingly, the causal chain was broken. For the Second Circuit, this holding was a predicate for determining whether or not the court had subject matter jurisdiction. PA 21a.

Respondents use this holding to argue that proximate cause is lacking here. Resp. Br. 37. Similarly, the Solicitor General argues that "the component of the alleged fraud that occurred in the United States was not a *direct cause* of petitioners' alleged injury" because HomeSide's fraudulent financials "had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors." SG Br. 31 (quoting PA 21a).

As Petitioners noted in their opening brief, this holding by the Second Circuit of a reverse-engineered "intervening" or superseding cause is not supported legally (Pet. Br. 29-31) or, as set forth below, by the factual record. Indeed, Petitioners alleged that NAB "issued or *adopted*" the positive representations made by

HomeSide that were materially false and misleading. JA 45a at ¶ 23 (emphasis added).[11]

None of these claims are reconcilable with the allegations of record. The citations to the Joint Appendix proffered by Respondents simply do not support this argument. The citations to the Complaint simply refer to:

- the individual defendants' general participation in the management of HomeSide in an introductory paragraph describing the parties (JA 44a at ¶ 21);

- a newspaper article that refers to unnamed NAB executives who discussed the hedging debacle at NAB (JA 76-77a at ¶ 112);

- the notification of NAB executives by the Florida whistleblowers of the accounting fraud

[11] The record is replete with allegations that NAB was fully involved in the wrongful conduct at HomeSide. For example, NAB installed one of its senior officers at HomeSide who monitored HomeSide's daily business activities and reported back to NAB (JA 5a; Second Circuit Joint Appendix at 1484); HomeSide employees acted as "whistleblowers" and advised NAB senior officers of the fraud (JA 90a); and NAB maintained offices in New York City where it engaged in complex financial transactions to hedge HomeSide's outstanding mortgage exposure (JA 76a-80b). As alleged in the Complaint, an analyst report adopted by Petitioners generally described NAB as "asleep at the wheel" with respect to both the fraud at HomeSide and the multi-billion dollar hedging activities in New York. JA 81a at ¶114.

> at HomeSide and their resulting knowledge (JA 62a at ¶ 74; JA 89a at ¶ 174).[12]

The Solicitor General and Respondents also attempt to justify the Second Circuit's overreaching by citing to NAB's Annual Reports and Form 20-F filings, which indicate that NAB's operating *segment* results were "reviewed separately by the chief operating decision maker, the Managing Director and Chief Executive Officer, as well as other members of senior [NAB] management." Resp. Br. 12 (emphasis added). This argument is unavailing for several reasons.

First, the language quoted by Respondents did *not* appear in NAB's 1999 Annual Report or Form 20-F; however, NAB's adoption of HomeSide's fraudulent valuation of the MSR asset was reported. SA 6.

Second, in May 2000, NAB announced changes to its corporate structure, which led to the insertion of the language cited by Respondents in NAB's 2000 Annual Report. SA 39. NAB created "six major operating segments," one of which was "HomeSide and National Shared Services." *Id.*[13] It is ambiguous, at best, if

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[12] The final citation proffered by Respondents – JA 74 – simply has no bearing on the issues. The paragraphs on this page of the Complaint discuss the "resignation" of the HomeSide officers and the reaction of certain NAB officers or directors to the writedown.

[13] National Shares Services was an amalgamation of a variety of firm-wide business segments including "operational services, Financial Shared Services, Human Resources Shares Services and Information Technology". SA-39. Thus, under their argument, this checkpoint would have "checked" financial figures already

HomeSide's fraudulent financial data was "evaluated regularly by the chief operating decision maker . . .", *id.,* or whether the combined Home Side *and* National Shared Services were subject to such "evaluation."

Third, neither the Annual Reports nor Forms 20-F provide that the balance sheets containing the MSR entry were ever evaluated or reviewed by anyone at NAB before publication. *See, e.g.,* SA-11; JA 5a (Second Circuit Joint Appendix) at A-344 and A-499; SA-36.

Finally, and most significantly, *this argument was never presented to or considered by the lower courts*. It is nothing more than a futile attempt by Respondents to reverse-engineer a foundation for the Second Circuit's erroneous holding. The Second Circuit *never* cited to these reports.

B. The Conduct of Respondents In Florida Is Actionable

Under Section 10(b), there are two ways of making a false statement, either one of which can serve as a basis for liability: (1) creating the statement, or (2) communicating it to investors.[14] The liability of the

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consolidated with HomeSide's figures as part of their Operating Segment. More importantly, there is no indication the MSR figure in the consolidated balance sheet – the key number in the case – passed through any such "check point."

[14] Webster's New International Dictionary (1934) defines "make" as either "to construct, fabricate" or, alternatively, "to cause" *See*, *e.g.*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n.20 and 21 (1976) (citing 1934 edition of Webster's International Dictionary to

person who the statement may attach under either of two legal theories).[15]

Here, the key false statement that appeared in NAB's annual reports and caused plaintiffs' injuries was the MSR line item on the balance sheet. Pet. Br. at 6. This annual number was an "exact repetition of the false financial information that HomeSide concocted in Florida

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define words in the Exchange Act). Thus, both HomeSide and NAB, using these definitions, made the MSR entry misrepresentations. Courts have upheld misrepresentation claims against a party who "fabricated" or "caused", but did not utter, the misrepresentation. *See*, *e.g.*, *In re Mutual Funds Inv. Litig*., 566 F.3d 111, 124, 127 (4th Cir. 2009) (claim stated against mutual fund's investment adviser and adviser's corporate parent for misstatements made in mutual fund prospectus, because "investors would have inferred that either or both defendants played a substantial role in *drafting or approving* the allegedly misleading prospectuses") (emphasis added); *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 686 n.29 (6th Cir. 2005) ("If the [plaintiff] can show that *Firestone* was the *originator* of Bridgestone's misrepresentations regarding Firestone and that Firestone knew or should have known that its misrepresentation would be communicated to investors, primary liability should attach [to Firestone].").

[15] In *SEC v. Tambone*, No. 07-1384, 2010 WL 796996 (1st Cir. Mar. 10, 2010), allegedly false statements were made in the prospectus of a mutual fund. The First Circuit rejected the SEC's argument that underwriters who merely "used" the prospectuses to sell shares in the fund could be "makers" of the statements "without regard to the authorship." *Id.* at *1. The court specifically noted that the SEC had dropped its prior assertion that the underwriters "participated in the drafting process," and a person other than the underwriters had "direct responsibility" for issuing the prospectuses. *Id at* *1, 3-4, 9 n.10*; see id. at* *13 (Boudin, J., concurring) ("[t]he word 'make,' in reference to a statement, ordinarily refers to one [1] authoring the statement or [2] repeating it as his own").

for the very purpose of misleading NAB's shareholders." *Id.* at 7.

Moreover, investors had every reason to attribute the original fabrication of these statements to HomeSide and its officers. As the notes to the financial statements specifically stated, "[f]ollowing the acquisition of HomeSide in February 1998, [NAB] derives fees from mortgage servicing," SA-21 and "investors knew that all mortgage servicing income of NAB was derived from HomeSide." *Id.* at 8 n.7.[16] Therefore, actionable conduct occurred in the United States, whether false statements and/or acts in furtherance of a fraudulent scheme, and Section 10(b) should be applied regardless of the fact that the effects and damages from that actionable conduct occurred extraterritorially.[17]

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[16] *See In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333, 351 (S.D.N.Y. 2005) (where parent corporation's earnings releases and SEC filings misstated profits from specialist operations on the NYSE, and all such operations were conducted through company's subsidiary, misstatements "could have come only from [subsidiary]," and investors may be found to have relied on subsidiary "as if the statement[s] had been publicly attributed to [it]").

[17] Should the Court vacate and remand, the lower courts will need to address several issues that were not previously addressed by the courts. For example:

• whether the Second Circuit properly found that Petitioners' waived their scheme liability claims pursuant to Section 10(b) and Rule 10b-5(a) and (c). PA 20a n. 7. Petitioners believe this finding was incorrect and Respondents apparently concur given their response before this Court. Resp. Br. 36-37.

CONCLUSION

For the foregoing reasons, and in the manner described in the Brief For Petitioners, the judgment of the court of appeals should be reversed.

• whether Petitioners may pursue a Section 20(a) "control person" vicarious liability claim, 15 U.S.C. §78t(a), against NAB based on U.S. conduct alone if necessary.

• whether the argument raised by Respondents for the first time in their opposition brief – that the rule of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 725 (1975), limiting the private cause of action for money damages under Section 10(b) to purchasers and sellers of the security, should be "construed" to require that the purchase or sale have been in the United States (Resp. Br. 52-56) – has any basis in the statute. As the Solicitor General correctly noted, the Court, in *Blue Chip Stamps*, held that the purchaser-seller requirement "limits only the private right of action and is not required by Section 10(b)'s 'in connection with' requirement." SG Br. 21.

• whether the Court below, in treating HomeSide and NAB as primary violators, took into account, under § 402(b) of the Restatement, (Third) of Foreign Relations the current status of multinational enterprises like NAB under customary international law. *See* § 414, cmt. a ("…multinational enterprises do not fit neatly into the traditional bases of jurisdiction); § 402 ("such enterprises may not be nationals of one state only and their activities are not limited to one state's territory.").

Respectfully submitted,

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