

No. 08-1191

IN THE
Supreme Court of the United States

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED, RUSSELL LESLIE
OWEN, BRIAN SILVERLOCK AND GERALDINE SILVERLOCK,
Petitioners,

v.

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

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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the judicially created private right of action under Section 10(b) of the Securities Exchange Act of 1934 should extend to claims of foreign investors who purchased, on a foreign securities exchange, foreign stock issued by a foreign company.

CORPORATE DISCLOSURE STATEMENT

Respondent National Australia Bank Limited has no parent corporation, and no publicly held corporation beneficially owns 10 percent or more of its stock.

Respondent HomeSide Lending, Inc. no longer exists. It was succeeded in interest by Washington Mutual Bank (formerly Washington Mutual Bank, F.A.), which was a wholly owned subsidiary of Washington Mutual, Inc., a publicly traded company. On September 25, 2008, pursuant to Section 5(d)(2)(A) of the Home Owners' Loan Act, 12 U.S.C. § 1464(d)(2)(A), the Office of Thrift Supervision appointed the Federal Deposit Insurance Corporation to be Washington Mutual Bank's receiver. *Receivership of a Fed. Sav. Ass'n*, Order No. 2008-36, OTS No. 08551, 2008 OTS DD LEXIS 19 (Office of Thrift Supervision Sept. 25, 2008).

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BRIEF FOR RESPONDENTS

STATEMENT

“The vexing question of the extraterritorial application of the securities laws, Rule 10b-5 in particular,” Pet. App. 2a, is how the court of appeals put the issue in this case. Although the court reached the right result, getting there should not have been so difficult. For this putative class action, if certified, would present claims of hundreds of thousands of investors who have *no* connection to the United States or to United States securities markets. The

class would include everyone who purchased, *outside the United States*, the common stock of National Australia Bank, a major foreign bank, over a period of almost two and one-half years.

The Australian petitioners would have a United States District Court entertain such a massive lawsuit here, in the United States, under United States law, and under United States class action procedures, even though the bank's stock, called "ordinary shares," was issued in *Australia* by an *Australian* corporation headquartered in *Australia*; even though the ordinary shares traded exclusively on *Australian* and other *foreign* exchanges, and *not* in the United States; even though the disclosures alleged to have been false were prepared and disseminated in *Australia* by *Australians* to *Australians*, and were filed with *Australian* securities regulators and with the *Australian* Stock Exchange, pursuant to *Australian* laws and rules; even though the Australian petitioners suffered their claimed losses entirely in *Australia*, as the alleged result of their (fraud-on-the-market) reliance on prices on that *Australian* exchange; and, finally, despite the fact that Australia has its own comprehensive scheme of securities regulation that provides ample mechanisms, including opt-out class actions, for redressing securities fraud in Australia.

Merely to state these undisputed facts should have dictated the result. But the Second Circuit was vexed because, for four decades now, it and the other courts of appeals have consistently—and admittedly—disregarded two centuries of statutory construction principles pronounced by this Court. Addressing a statutory provision that "omitted any discussion of its application to transactions taking place outside of the

United States,” Pet. App. 6a-7a, these courts set forth rules of decision “based more on policy considerations than on the language of the securities statutes or the Supreme Court’s teachings on extraterritoriality,” *Robinson v. TCI/US W. Cable Commc’ns Inc.*, 117 F.3d 900, 906 (5th Cir. 1997). Undertaking a “dubious” effort to “discern[] a purely hypothetical legislative intent,” *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987), they tried to guess “what Congress would have wished” had the question of extraterritoriality “occurred to it,” *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975). The interpretations they reached wound up having nothing to do with anything in the statute itself: “*We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.*” *Ibid.* (emphasis added).

But this was exactly what judges are *not* supposed to do with statutory language that does not expressly convey extraterritorial intent. The fact that Section 10(b) is “silent on the issue of extraterritorial application” does not mean that the judiciary may serve as the “vehicle” for “defining” the provision’s extraterritorial reach. Pet. 16. It is not for “the Judiciary [to] forecast[] Congress’ likely disposition” of the question; judges must instead “leave in Congress’ court” any question of “extraterritorial thrust.” *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458-59 (2007). For in the “delicate field of international relations,” Congress “alone has the facilities necessary to make fairly such an important policy decision.” *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). Given the absence of any explicit textual command in the statute, courts must presume that Congress did not intend Section 10(b) to apply

extraterritorially, and that Congress did not intend it to supplant the sovereign authority of other nations. Those presumptions make this case straightforward, not vexing, and require that the judgment below be affirmed.

A. The Creation and Expansion of the “Conduct Test”

The federal securities laws had been on the books for more than a quarter century before a federal court first addressed their territorial reach. *Kook v. Crang*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960), applied this Court’s decisions—in particular, the presumption against extraterritoriality—to conclude that a transaction on a foreign exchange was not subject to the Securities Exchange Act of 1934. But that may well have been the last time that the controlling canons were assiduously applied to interpret that statute. By 1968, the Second Circuit had held that “the usual presumption against extraterritorial application of legislation” did not apply “when extraterritorial application of the Act is necessary to protect American investors.” *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *modified en banc*, 405 F.2d 215 (2d Cir. 1968). And by 1975, that court had fashioned what became known as the “conduct test,” whereby foreign transactions would be covered by the securities laws if they were “directly caused” by “acts (or culpable failures to act) within the United States.” *Bersch*, 519 F.2d at 993.

The idea was to fill the gap left by Congress’s silence. Congress “could hardly have been expected to foresee” issues of extraterritoriality, these courts believed, *ibid.*, so it was up to judges to “determine their jurisdiction by divining what ‘Congress would have wished’ if it had addressed the problem,”

Zoelsch, 824 F.2d at 32 (quoting *Bersch*, 519 F.2d at 993). The lower courts made a “policy decision” in favor of extraterritoriality, hoping that “[b]y finding jurisdiction” for frauds occurring abroad, “we may encourage other nations to take ... reciprocal action against fraudulent schemes aimed at the United States from foreign sources.” *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977); see also *Cont’l Grain (Austl.) Pty. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 416, 421 (8th Cir. 1979) (decision “based upon policy considerations,” including desire for “reciprocal” foreign enforcement); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (similar).

Had the matter rested with *Bersch*, the judicially invented conduct test at least would have been a rule of “absolute clarity.” Pet. App. 72a. Not just *any* domestic conduct causing foreign harm met the test; only domestic conduct constituting the *relied-upon misrepresentations* sufficed. The offshore offerings in *Bersch* were orchestrated from New York City, and the district judge found Section 10(b) to apply to the foreign plaintiffs’ claims because there had been but-for domestic causation—“conduct constituting an essential link” in the alleged fraud had taken place “in the United States.” *Bersch v. Drexel Firestone, Inc.*, 398 F. Supp. 446, 457 (S.D.N.Y. 1974), *aff’d in part and rev’d in part*, 519 F.2d 974 (2d Cir. 1975). But the Second Circuit reversed because the misstatements were made abroad and reached their victims abroad. 519 F.2d at 987. *Bersch* thus applied a bright-line rule: Section 10(b) applied only when “all the elements of a defendant’s conduct necessary to establish a violation” occurred in the United States—in other words, when misrepresentations to investors were made in the United States. *Zoelsch*, 824 F.2d at 31. With its bright line, the *Bersch* /

Zoelsch location-of-the-lies conduct test would have avoided the “counterproductive” consequences of “a balancing test ... that makes jurisdiction turn on a welter of specific facts”—namely, that of being “inherently unpredictable” and “difficult to apply,” and of creating “powerful incentives for increased litigation.” *Zoelsch*, 824 F.2d at 32 n.2.

The bright line soon faded, at least outside the D.C. Circuit. See Pet. App. 11a-12a n.6. The Second Circuit’s decisions after *Bersch* “shift[ed] ... emphasis from a test of strict causation to one of materiality of the domestic acts,” spawning “a Hydra of sorts,” *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 373 (S.D.N.Y. 2005), that caused “district courts in the Second Circuit [to] have ... difficulty understanding and applying the case law,” Pet. App. 61a. One decision even conflated the conduct test with a previously separate “effects test,” on the theory that a sliding-scale “admixture or combination of the two [tests] often gives a better picture” of whether Section 10(b) should apply abroad. Pet. App. 8a (quoting *Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995)). Adding to the confusion, other circuits “articulated a number of [other] methodologies.” *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998).

What resulted was less a body of law than a collection of conclusions—conclusions that unpredictably turned upon “very fine distinctions.” Pet. App. 32a. The only certainty was that one case could not be relied upon to decide the next: as three circuits in identical words agreed, in any given case “the presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational

securities cases is not necessarily dispositive.” *E.g.*, *Cont’l Grain*, 592 F.2d at 414, *quoted in IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980), and *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 175 (5th Cir. 1980). Even within the Second Circuit, the conduct test became not a “cohesive doctrine,” but rather a set of “potentially incompatible statements of applicable rules.” *Alstom*, 406 F. Supp. 2d at 375.

This we-know-it-when-we-see-it jurisprudence set the stage for the current wave of “f-cubed” or “foreign-cubed” litigation (referring to foreign investors, foreign issuers, and foreign exchanges, *see* Pet. App. 10a, 74a n.14) that this case typifies. Indeterminacy spawned litigation, just as *Zoelsch* had foreseen. By the turn of this century, major foreign issuers began facing f-cubed litigation from their foreign shareholders for their foreign disclosures whenever fraud allegations could be made about United States subsidiaries—on the theory that the underlying American operations sufficed under the conduct test. Given the test’s “unpredictability,” “the filing of foreign-cubed claims ... increase[d],” with “major [American] plaintiffs’ firms ... open[ing] offices in Europe,” and foreign plaintiffs “shop[ping] for a U.S. forum ... to take advantage of liberal discovery rules” and “more favorable law,” all “generat[ing] excessive levels of conflict with other countries.”¹

¹ Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14, 62, 66-67 (2007); *see also* Andrew Longstreth, *Coming to America*, AM. LAW., Nov. 2006, available at 11/2006 Am. Law. S53 (Westlaw); Mary Jacoby, *For the Tort Bar, A New Client Base: European Investors*, WALL ST. J., Sept. 2, 2005, at A1.

B. Factual Background and Procedural History

1. Founded in 1858, headquartered in Melbourne, Australia, and organized under Australian law, respondent National Australia Bank Limited (“NAB”) was Australia’s largest bank and financial institution during the period covered by the complaint. J.A. 41a, 49a; Supp. J.A. 2, 17, 57; Pet. App. 2a. Respondent Frank J. Cicutto served as the company’s Managing Director and Chief Executive Officer during that time. J.A. 42a. NAB conducted business across four continents and 15 countries, Supp. J.A. 17, and in 1999 was the third-largest company in Australia by stock-market capitalization, J.A. 49a.

NAB’s common shares were widely held—*abroad*. Called “ordinary shares” in the Australian parlance, they have traded principally on the ASX, the Australian Stock Exchange (now the Australian Securities Exchange), the country’s primary market, since at least 1974. Supp. J.A. 14, 51; J.A. 41a, 44a; <http://bit.ly/nabasx> (data sheet on ASX web site). They also traded on the London, Tokyo, and New Zealand stock exchanges. Supp. J.A. 14, 51; *accord* Pet. App. 2a. NAB’s ordinary shares *never* traded directly on any exchange in the United States, Supp. J.A. 14, 51; J.A. 41a, 44a; Pet. App. 2a; Pet. Br. 4, and during the period covered by the complaint, few persons with American addresses were registered owners of them. Supp. J.A. 15, 53. Over 98 percent of the shares were held by holders with Australian addresses. Supp. J.A. 15, 53.

A few investors in the United States—but again, not many—owned NAB’s American Depositary Receipts, which traded on the New York Stock Exchange and indirectly represented interests in the

ordinary shares. Supp. J.A. 14, 51; Pet. App. 2a, 25a; J.A. 41a, 44a. The Australian petitioners do not contend that their losses resulted from any losses suffered by holders of the ADRs, and, as this case comes to this Court, the “ADR purchasers are not encompassed within the proposed plaintiff class.” Pet. Br. 5 n.2; *accord* Pet. 6 n.2. Moreover, ADRs represented only a small fraction—only 1.1 percent—of NAB’s equity capitalization. Supp. J.A. 14; Pet. App. 33a, 57a-58a. As a result, “any effect on the United States market from the alleged fraud pales in comparison to the effect on the foreign markets.” Pet. App. 33a.

NAB’s financial disclosures must comply with Australian laws and rules. NAB must file annual and semiannual disclosures with the Australian Securities and Investment Commission (ASIC), Australia’s equivalent of the SEC, as well as with the ASX.² NAB must also prepare and file additional “continuous” disclosures with the ASX.³ NAB’s financial disclosures were required to conform to “Generally Accepted Accounting Principles applicable in Australia,” which “differ[ed] in ... material respects” from American accounting principles. *E.g.*, Supp. J.A. 18-19; C.A. App. 148-49, 814, 817. Australian law not only provides for public enforcement of these laws

² *See, e.g.*, Corporations Act, 2001, §§ 285, 292, 295, 298-306, 319-20 (Austl.), *available at* <http://tinyurl.com/2czx46>; AUSTRALIAN STOCK EXCHANGE LIMITED, ASX LISTING RULES 4.2A-4.2C (2010), *available at* <http://tinyurl.com/2tnsze>; *accord* Corporations Law, 1991, §§ 292-94, 301-10, 317 (Austl.).

³ *E.g.*, Corporations Act, 2001, § 674 (Austl.); ASX LISTING RULE 3.1; *see* Anthony B. Greenwood, *Securities Regulation in Australia*, in 1 INTERNATIONAL SECURITIES REGULATION, Australia Booklet 1, at 22-25 (Robert C. Rosen ed., 2004).

and rules, but it also permits investors to bring private litigation—including opt-out class actions—to redress securities fraud.⁴

Because it had issued ADRs, NAB was also required to file disclosures with the SEC in the United States.⁵ These disclosures duplicated NAB’s Australian disclosures. On Form 6-K, NAB filed market releases and other continuous disclosures originally issued, filed, and distributed in Australia, *see, e.g.*, C.A. App. 1261-1401,⁶ and on Form 20-F, it attached the Australian annual reports that were filed with Australian authorities and distributed to ordinary shareholders in Australia, *compare id.* at 125-289, 442-620, 804-991 (Australian annual reports) *with id.* at 290-441, 622-801, 992-1176 (Forms 20-F).⁷ The Australian petitioners “do not allege that they were even aware of the SEC filings, much less relied upon them.” Pet. App. 42a n.9. And they do not—and cannot—allege that the SEC filings, as opposed to the previously disseminated Australian disclosures upon which the SEC filings were based, affected prices on

⁴ *See* p. 48, *infra*.

⁵ *See, e.g.*, American Depositary Receipts, Securities Act Release No. 33-6894, 1991 SEC LEXIS 936, at *40-*41 (May 23, 1991).

⁶ *See also, e.g.*, Rules, Registration and Annual Report Form for Foreign Private Issuers, Exchange Act Release No. 16371, 1979 SEC LEXIS 220, at *3 (Nov. 29, 1979) (Form 6-K is an “interim reporting form” that requires foreign issuers to disclose “material press releases and information sent to foreign securityholders”).

⁷ *See, e.g.*, International Disclosure Standards, Securities Act Release No. 33-7637, 1999 SEC LEXIS 228, at *7, *20 & n.30, (Feb. 2, 1999) (Form 20-F allows foreign issuers to use their home-country disclosures “as an ‘international passport’”).

the ASX or otherwise caused the Australian petitioners harm.⁸

2. Petitioners' allegations of fraud stem entirely from disclosures NAB made in Australia about HomeSide Lending, Inc., a company that was based in Jacksonville, Florida, and no longer exists. HomeSide Lending was a fifth-level subsidiary of NAB, and was one of dozens of businesses that NAB owned and operated throughout the world. Supp. J.A. 42-43. In 2000, HomeSide accounted for roughly 4 percent of NAB's after-tax profits, *see id.* at 26, and the value of HomeSide's principal asset—mortgage servicing rights—accounted for approximately 2.4 percent of NAB's total assets, *see id.* at 36.

As the court of appeals correctly observed, respondents “do not contend that HomeSide sent any falsified numbers directly to investors”; HomeSide's results were sent to NAB's headquarters in Melbourne, where, as the court of appeals found, “those numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors.” Pet. App. 21a. Contrary to petitioners' protestations, Pet. Br. 7 n.4, 30, the record indisputably supports this conclusion—because petitioners

⁸ The SEC filings were made days or weeks *after* the substantively identical Australian disclosures were first publicly released, and thus, under the fraud-on-the-market presumption upon which the Australian petitioners rely, J.A. 96a-97a, could not have affected share prices on an efficient market, which would have already absorbed the information included in the Australian disclosures. *See, e.g.*, Supp. J.A. 47-48, 58 (2000 annual report, issued in Australia on November 2 and filed with SEC on November 16); C.A. App. 277, 290 (1999 annual report, issued in Australia on November 4 and filed with SEC on November 17); C.A. App. 1261-65, 1266-71, 1272-78 (releases filed with SEC days after original issuance in Australia).

themselves alleged it. The complaint refers repeatedly to NAB's "balance sheet management" and "risk management" personnel and "internal audit and reporting mechanisms" in Australia; it asserts that "officers and directors of NAB" in Australia were "privity to confidential proprietary information concerning ... HomeSide's operations, business, growth, and financial prospects"; and it claims that the Australian personnel "were directly involved in or responsible for ... the false and misleading public statements" made in Australia about HomeSide. J.A. 44a, 62a, 74a, 76-77a, 81a, 89a.

What is more, the annual reports cited in petitioners' complaint⁹ explain how NAB's consolidated results were based upon operating segment results that were "reviewed separately by the chief operating decision maker, the Managing Director and Chief Executive Officer, as well as other members of senior management" of NAB. Supp. J.A. 39; *accord* C.A. App. 690, 879, 1066. The reports describe how NAB's Australian board of directors was responsible for "reviewing internal controls and internal and external audit reports" and "reporting to shareholders and the market." Supp. J.A. 29; *accord* C.A. App. 184, 335, 668, 853, 1040. They explain how the board's audit committee was charged with supervising internal and external auditors and "reviewing the consolidated financial report." *Id.* at 30-31; *accord* C.A. App. 186, 337, 669-70, 855, 1042. The reports conclude with declarations from NAB's Australian board and its

⁹ These disclosures may be considered on a motion to dismiss, of course, as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Australian auditors. *Id.* at 47-48; C.A. App. 277, 428, 786-87, 970-71, 1157-58.

The petitioners are also incorrect in asserting that the “express allegations of the complaint” state that NAB “ministerially” and “mechanically incorporated the numbers provided to it by HomeSide,” and that this information was simply “reprint[ed] ... *line-by-line*,” in “an exact repetition.” Pet. Br. 6, 7 & n.4, 24, 30 (emphasis in original). The allegations petitioners cite for these assertions, C.A. App. 1455 (cited in Pet. Br. 7, 24, 30),¹⁰ say nothing of the sort; they consist of conclusory, boilerplate paragraphs about how the individual defendants were responsible for the corporation’s disclosures—general allegations found in any securities complaint.¹¹ In any event, petitioners’ newly minted “mechanical” “line-by-line” “incorporation” claim is contradicted by the fact that NAB’s financials, on their face, were *consolidated* statements, *see, e.g.*, Supp. J.A. 39; *accord* C.A. App.

¹⁰ For reasons they do not explain (*see* Pet. Br. 7 n.5), petitioners cite not the operative complaint that was dismissed, but rather a separate complaint that was filed by another plaintiff, C.A. App. 1450-1502, was immediately withdrawn, *id.* at 1503-05, and was not the subject of the appeal below, *see id.* at 1506. This is of no moment, however, because the allegations petitioners cite are identical to those in their own complaint. *Compare* J.A. 45a-46a *with* C.A. App. 1455.

¹¹ In fact, petitioners’ boilerplate allegations are an almost *word-for-word* repetition of allegations in paragraphs 26 through 28 of the complaint in *Tellabs*. Joint Appendix at 100-01, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (No. 06-484), 2007 WL 444489; *see also* Joint Appendix at 39-40, *Merck & Co. v. Reynolds*, No. 08-905 (U.S. Aug. 10, 2009), 2009 WL 2475435; Joint Appendix at 115a-116a, *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336 (2005) (No. 03-932), 2004 WL 2307122.

690, 879, 1066, and by the fact that NAB's disclosures contained very few items setting forth information specifically about HomeSide, *see, e.g.*, C.A. App. 452, 454-79, 498-501, 509-39, 554-66, 597-99.

3. HomeSide suffered setbacks in its core business—mortgage servicing.¹² HomeSide processed homeowners' payments on mortgage loans held by others. C.A. App. 1252. The future fees it would receive for doing this were called "mortgage servicing rights" ("MSRs"), which had a present economic value and were treated as a balance-sheet asset. *See, e.g.*, J.A. 53a; Supp. J.A. 38.

The problem was that MSRs had highly volatile and uncertain values. The reason: homeowners can prepay their mortgages. More prepayments meant fewer future servicing fees and lower MSR values; fewer prepayments meant more future servicing fees and higher MSR values. *See, e.g.*, J.A. 54a. And because homeowners' decisions to refinance and thus prepay depended on interest rates, MSR values were highly sensitive to present and predicted future interest rates. *See, e.g.*, C.A. App. 1257 ("a 2 per cent drop [in interest rates] would slash [MSR values] by nearly two-fifths"). Valuing and hedging MSRs thus involved complex models and debatable predictions about interest-rate movements and their effect on

¹² Contrary to petitioners' repeated assertions (Pet. Br. 8, 16, 24, 26 n.12, 43), HomeSide's write-downs had nothing to do with the current subprime mortgage crisis. HomeSide's write-downs occurred in 2001, and they did not involve credit losses. *See, e.g.*, Pet. App. 3a-4a, 26a-27a; J.A. 70a-73a. The word "subprime" does not appear in the complaint, *see* J.A. 38a-103a, nor, for that matter, in any of petitioners' papers—until their merits brief in this Court.

prepayment speeds. Even petitioners acknowledge that different companies could—and did—make different prepayment-speed predictions.¹³

Thanks to a series of interest rate cuts, 2001 ended up being a very bad year for MSR: by year's end, rates had reached 40-year lows. *See, e.g.*, J.A. 78a; C.A. App. 815-16, 1256-57, 1263. Partly as a result, NAB twice wrote down the carrying value of HomeSide's MSR. The first write-down, in the amount of AU\$888 million (US\$450 million), took place on July 5, 2001 and reflected “[u]nprecedented refinancing activity” resulting from falling rates. C.A. App. 826, 1263, 1277. This write-down led NAB to hire a consultant “to complete a detailed review of the estimated market sale value” for HomeSide. C.A. App. 1267.

During this review, HomeSide discovered that it had been using mistaken interest rate inputs in its MSR valuation model, and that other assumptions in the model had to be changed in light of turbulent market conditions. *Ibid.* This resulted in a second, much larger write-down of AU\$3.05 billion, which NAB announced in Australia on September 3, 2001. *Ibid.*; J.A. 39a, 72a-73a. This write-down consisted of AU\$755 million for the interest-rate mistake, AU\$1.436 billion for the other changed assumptions, and AU\$858 million in goodwill that was written down in anticipation of a sale of HomeSide. C.A. App. 1267-68, 1277.

These losses provoked an uproar in Australia, where the financial press called the write-down the “biggest investment disaster in Australian corporate

¹³ *See* J.A. 84a (“Bloomberg shows each Wall Street firm’s view on prepayments”).

history.” *Id.* at 1258. On September 3, 2001, NAB’s ordinary shares dropped AU\$4.30, from AU\$33.20 to AU\$28.90, on the ASX. J.A. 73a. But the shares quickly recovered when NAB sold HomeSide’s assets. *See* C.A. App. 1259, 1394. By February 2002, they traded up to AU\$34.80—*higher* than they did just before the second write-down. *Id.* at 1258.

4. No shareholder ever sued NAB in Australia to claim that this temporary drop in NAB’s stock resulted from securities fraud. Instead, in late 2003, two putative class actions alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a), were filed in the district court against NAB, HomeSide, and the individual respondents. The actions were consolidated, and the consolidated complaint asserted claims on behalf of three Australian named plaintiffs—Russell Leslie Owen, and Brian and Geraldine Silverlock—each of whom had purchased NAB ordinary shares on the ASX. The remaining named plaintiff, Robert Morrison, was an American who had purchased ADRs. Pet. App. 4a-5a. No motion for class certification was ever made.

The complaint alleged that Australians had committed a securities fraud in Australia, upon Australians, and on Australian markets. It alleged that the misstatements and omissions that caused the Australian petitioners harm were all made in Australia. The complaint cites and quotes at length numerous financial releases issued by NAB, as well as NAB’s annual reports for 1999 and 2000. J.A. 59a-67a, 69a-71a. As the documents themselves reflect, these disclosures were prepared and issued in Australia, *e.g.*, Supp. J.A. 34, 47, 48; C.A. App. 190, 277, 341, 428, 676, 786-87, 1265, and contained

financial statements that were audited by an Australian auditor, Supp. J.A. 48; C.A. App. 277, 428, 787. The complaint also quotes statements made by NAB at an investor lunch in Sydney, J.A. 71a-72a, and statements attributed to the company in the *Australian Financial Review*, Australia's leading financial publication, *id.* at 70a. As for HomeSide and its officers, the petitioners essentially asserted that they had aided and abetted an Australian securities fraud: the American defendants were not alleged to have disseminated false information directly to the Australian investing public, but rather to have sent the information to NAB in Australia, where NAB incorporated it into disclosures prepared and publicly disseminated there. Pet. Br. 6, 24, 25 n.11; Pet. App. 21a; J.A. 59a-67a, 69a-71a.

Petitioners alleged that causation and reliance occurred in Australia as well. Relying on the fraud-on-the-market presumption of reliance, they alleged that NAB's "material misrepresentations and omissions" "directly or proximately caused" their losses by "inflating the price of NAB's securities." J.A. 95a-97a. For the Australian petitioners, of course, this loss-causing price inflation occurred in Australia, on the ASX, where they claim to have purchased their ordinary shares at inflated prices.

5. Respondents moved to dismiss the Australian petitioners' claims on the ground, among others, that they exceeded the territorial reach of Section 10(b). Pet. App. 28a; J.A. 25a-26a. Respondents conceded that Section 10(b) applied to the claims of the domestic ADR plaintiff, Morrison, but urged dismissal of his claims on other grounds. Pet. App. 28a n.6. The district court granted respondents' motions. *Id.* at 23a-45a. It held that the Australian petitioners'

claims failed both the effects test and the conduct test. *Id.* at 33a-42a. “HomeSide’s alleged conduct” was “not in itself *securities* fraud,” the court concluded, and “amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad,” *id.* at 41a (emphasis in original). The court emphasized that all of the elements of the Australian plaintiffs’ claims took place in Australia. *See id.* at 41a-42a. The court separately dismissed Morrison’s domestic ADR claim because he had failed to plead damages. *Id.* at 43a-45a.

6. The court of appeals affirmed. Pet. App. 1a-22a. The court upheld the dismissal of Morrison’s domestic ADR claims because he did not challenge it. *Id.* at 5a n.3; *see also* Pet. Br. 5 n.2 (claims of ADR holders no longer at issue); Pet. 6 n.2 (same). Although the court refused to apply the presumption against extraterritoriality, Pet. App. 15a-17a, it nonetheless held that the Australian petitioners’ claims exceeded the territorial scope of the federal securities laws. It held that the Australian petitioners’ claims failed the conduct test because the “heart” of the alleged securities fraud had been in Australia. Pet. App. 18a-19a. The actions there, the court held, were “significantly more central to the [alleged] fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida.” *Id.* at 19a.

The court held that a “particular mix” of three “significant factor[s],” *id.* at 20a, 22a, led to this conclusion: *first*, that it was NAB in Australia, not HomeSide in Florida, that was “the publicly traded company,” and that it was thus NAB’s executives and advisors who bore “primary responsibility” for NAB’s disclosures, *id.* at 19a; *second*, “the striking absence

of any allegation that the alleged fraud affected American investors or America’s capital markets,” *id.* at 20a; and *third*, “the lengthy chain of causation between the American contribution to the [alleged] misstatements and the harm to investors”—in particular, the fact that petitioners did not “contend that HomeSide sent any falsified numbers directly to investors,” *id.* at 21a. In addressing the last factor, the court noted that the alleged domestic conduct could not have supported a finding of reliance, and thus liability, under *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). Pet. App. 21a.

In reaching its decision, the court of appeals once again observed that Congress had provided no indication that Section 10(b) applies extraterritorially. Pet. App. 6a-7a. And the court again explained that the conduct test was an attempt to “discern [what] ‘Congress would have wished’” and “would have wanted.” *Id.* at 7a (citation omitted).

The court “respectfully urge[d]” that Congress address the subject. *Id.* at 7a n.4.

SUMMARY OF ARGUMENT

At issue in this case is a question of statutory interpretation: whether Section 10(b) of the Securities Exchange Act of 1934 should be construed to apply extraterritorially to extend a private right of action to foreign investors who claim to have suffered losses from their purchase, on a foreign exchange, of securities of a foreign issuer.

Answering that question implicates two separate canons of construction. The first is the presumption against extraterritoriality. That presumption is a clear-statement rule that requires courts to look for

statutory language that clearly expresses an affirmative intention of Congress to apply the statute extraterritorially. *E.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). The petitioners here have failed to identify any such clear statement of congressional intent. Instead, they rely principally on the fact that the Exchange Act’s definition of “interstate commerce” includes a reference to commerce “between any foreign country and any State.” 15 U.S.C. § 78c(a)(17). But such “boilerplate language ... can be found in any number of congressional Acts,” and does not suffice to overcome the presumption against extraterritoriality. *Aramco*, 499 U.S. at 251. Nor can the petitioners avoid the presumption by arguing that they complain of harm resulting from domestic conduct. The foreign losses they allege resulted principally from foreign conduct, and this Court has applied the extraterritoriality canon in cases having far greater domestic connections than this one.

The second canon of construction is the *Charming Betsy* rule—that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.)—a rule that applies even when the presumption against extraterritoriality does not. This canon presumes that Congress seeks to follow principles of customary international law when it legislates, and thus requires courts, in the absence of a clear and contrary congressional statement, to assume that statutes incorporate international choice-of-law principles. The law of nations in 1934, the year the Securities Exchange Act was enacted, unwaveringly applied the principle of *lex loci delicti* to claims of fraud, including securities fraud. As a result, Congress must be presumed to have intended

that transactions on foreign exchanges must be governed by foreign law. But even if *lex loci* were not deemed to have been incorporated into the Exchange Act, the application of Section 10(b) to foreign transactions would constitute an unreasonable interference with the sovereign authority of other nations under this Court's decision in *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004). For such an extraterritorial application of Section 10(b) would supplant, with insufficient justification, the substantive laws and remedies that foreign countries have provided for conduct and transactions on their own soil.

Finally, these canons of construction are reinforced by the fact that the private right petitioners seek to invoke is purely of judicial creation. This Court has made clear that, because it was inferred, the Section 10(b) right of action should not be further extended, and that practical considerations warrant limitations on that right. The threat posed by extraterritorial application of Section 10(b) to the sovereign authority of other nations is a far more significant practical justification for limiting the inferred right than those noted by this Court in prior cases. The Court should accordingly limit the Section 10(b) inferred right to persons who purchased or sold securities in the United States.

ARGUMENT

Petitioners' principal submission is that the decision below must be reversed because the Second Circuit—like virtually every lower court that has addressed the territorial scope of Section 10(b) for more than four decades—mistakenly treated the question as being one of “subject matter jurisdiction.” Pet. Br. 14-18, 45.

Petitioners are right that this characterization was wrong,¹⁴ but that does not help them here. For “nothing ‘turned upon whether [the issue] was technically jurisdictional.’” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 (2006) (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 91 (1998) (emphasis in original)). There is no issue of waiver or forfeiture, for example, that hinges on whether the extraterritoriality question is deemed jurisdictional or substantive. See, e.g., *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng’rs*, 130 S. Ct. 584, 596-97 (2009); *Arbaugh*, 546 U.S. at 510-11, 514. The dispositive issue is precisely the one raised and decided below: does Section 10(b) apply extraterritorially to provide the Australian petitioners a claim for relief? This Court may properly decide that question, “ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute,” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting)—just as it has repeatedly done in other cases where lower courts treated extraterritoriality as a matter of subject-matter jurisdiction.¹⁵

Petitioners thus cannot avoid the non-jurisdictional question they phrased and presented to this Court: “Whether the antifraud provisions of the United

¹⁴ See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting); *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 359 (1959); Br. in Opp. 11 n.7; U.S. Cert. Invit. Br. 8-9.

¹⁵ See *Empagran*, 542 U.S. at 163-75, *rev’g* 315 F.3d 338, 341 (D.C. Cir. 2003); *Smith v. United States*, 507 U.S. 197, 203-04 (1993), *aff’g* 953 F.2d 1116, 1120 (9th Cir. 1991); *Aramco*, 499 U.S. at 248-59, *aff’g* 892 F.2d 1271, 1272 (5th Cir. 1990) (en banc); *Romero*, 358 U.S. at 358, 381-84.

States securities laws extend to transnational frauds” under the circumstances alleged in this case. Pet. i (Question I). The answer, under the presumption against extraterritoriality, under the *Charming Betsy* rule, and under this Court’s decisions addressing the scope of the Section 10(b) inferred right, is no.

I. THE PRESUMPTION AGAINST EXTRATERRITORIALITY BARS PETITIONERS’ “FOREIGN-CUBED” CLAIMS.

The Australian petitioners’ foreign-cubed claims are barred by “[t]he presumption that United States law governs domestically but does not rule the world.” *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007). Even apart from the fact that they are invoking a purely inferred right of action found nowhere in the text of the Securities Exchange Act, petitioners have failed to identify any language in that Act requiring that Section 10(b) be applied extraterritorially to claims of fraud on a market on the other side of the globe.

A. The presumption against extraterritoriality requires that Congress make a clear statement of its intent to apply a law extraterritorially.

“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (“*Aramco*”) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949)). This presumption against extraterritoriality requires courts to determine whether statutory language explicitly conveys “a congressional purpose to extend its coverage beyond places

over which the United States has sovereignty or has some measure of legislative control.” *Ibid.* (quoting *Foley Bros.*, 336 U.S. at 285). And “in case of doubt,” the Court must construe the statute “to be confined in its operation and effect to the territorial limits” of the United States. *N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925). Accordingly, “unless there is ‘the affirmative intention of the Congress clearly expressed,’” a federal statute cannot be applied extraterritorially. *Aramco*, 499 U.S. at 248 (citation omitted).

The presumption is “rooted in a number of considerations,” *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)—at least three. One is the “commonsense notion that Congress generally legislates with domestic concerns in mind.” *Ibid.*; accord *Foley Bros.*, 336 U.S. at 285.

A second is the “desire to avoid conflict with the laws of other nations.” *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993). Application of American laws to foreign conduct or events “not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.” *Chisholm*, 268 U.S. at 31-32 (citation omitted). The presumption thus “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” *Aramco*, 499 U.S. at 248.

Third, the presumption embodies judicial deference to Congress in the sensitive area of foreign affairs. Congress is “able to calibrate its provisions in a way that we cannot,” *Aramco*, 499 U.S. at 259, and of course “the sign of how far Congress has chosen to go can only come from Congress.” *Microsoft*, 550 U.S. at

444 (citation and internal quotation marks omitted). Accordingly, the question of whether and to what extent a statute has “extraterritorial thrust” must be left “in Congress’ court,” and the judiciary must not try to “forecast[] Congress’ likely disposition” of the issue, by trying to divine extraterritorial meaning from an equivocal text. *Id.* at 458-59. The presumption thus “leaves to Congress’ informed judgment any adjustment [of the law that] it deems necessary or proper.” *Id.* at 442.

The presumption against extraterritoriality is a powerful one. It is a “clear statement” rule of which Congress is well “aware[],” as “amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.” *Aramco*, 499 U.S. at 258. And it is the party asserting extraterritorial effect—here, the Australian petitioners—“who must make the affirmative showing” by identifying statutory “language [that] speak[s] *directly* to the question presented.” *Id.* at 250 (emphasis added). The Australian petitioners must thus identify “specific language” in the Securities Exchange Act of 1934 “reflecting congressional intent” “to apply the statute abroad.” *Id.* at 251-52 (citation omitted). They must cite actual statutory “words which definitely disclose an intention to give [the law] extraterritorial effect.” *Id.* at 251 (quoting *Chisholm*, 268 U.S. at 31). Merely “possible, or even plausible, interpretations of language” suggestive of extraterritoriality do not suffice. *Id.* at 253; *accord Microsoft*, 550 U.S. at 442 (“[p]lausible” reading rejected). If the statute’s language is “ambiguous,” *Aramco*, 499 U.S. at 250, if it leaves “any lingering doubt regarding [its] reach,” then the law applies “only within the territorial jurisdiction of the United

States,” *Smith*, 507 U.S. at 203-04 (citations and internal quotation marks omitted).

B. Congress made no clear statement that Section 10(b) should apply extraterritorially.

Retracting their earlier position that “the Exchange Act [is] silent on the issue of extraterritorial application,” and that the most that could be said was that “[t]here is no language foreclosing it,” Pet. 16, petitioners have now parsed the statute for extraterritorial intent. Their search has proven fruitless.

1. In Section 10(b) itself, all the petitioners and their *amici* point to are its reference to “any means or instrumentality of *interstate commerce*,” and to the fact that it applies to “any security,” including “any security not ... registered” “on a national securities exchange.” 15 U.S.C. § 78j(b) (emphasis added); see Pet. Br. 23, 39; Alecta Br. 10-11. The mention of “interstate commerce” demonstrates extraterritorial intent, they say, because “interstate commerce” includes some foreign commerce—commerce “between any foreign country and any State.” 15 U.S.C. § 78c(a)(17); see Pet. Br. 23, 39; Alecta Br. 8-9. As for the reference to securities not “registered on a national securities exchange,” *amici* (but not petitioners) take that to mean securities traded on exchanges outside the United States. Alecta Br. 10-11.

Even without the presumption, these arguments fail. Commerce “between any foreign country and any State” does not cover communications and transactions that occur entirely *outside* the United States, such as the Australian disclosures that allegedly inflated stock prices on the ASX, and the trades on the ASX from which the Australian petitioners claim

loss here.¹⁶ As for Section 10(b)'s statement that it regulates "any" security not "registered on a national securities exchange," all that refers to are transactions of *unlisted* securities, not to securities traded abroad. This language simply shows that Section 10(b) applies to "the purchase or sale of securities whether conducted in the organized markets or *face to face*." *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971) (emphasis added); *accord SEC v. Zandford*, 535 U.S. 813, 822 (2002).

And this Court's cases applying the presumption against extraterritoriality have repeatedly rejected the arguments petitioners and their *amici* make here. In particular, this Court has made clear that use of the word "any," as in the phrase "any security not so registered" here, does not make a law territorially illimitable. "Words having universal scope ... will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch." *Foley Bros.*, 336 U.S. at 287 n.3 (citation omitted). Laws prohibiting acts "by 'any person or persons,'" while "broad enough to comprehend every human being," must, despite their "literal universality," be "limited to cases within the jurisdiction of the state" and "to those objects to which the legislature intended to

¹⁶ This reading is confirmed by the legislative history. The language about commerce "between any foreign country and any State" was taken from the Securities Act of 1933. *See* 15 U.S.C. § 77b(a)(7). It was added there simply to ensure "statutory coverage of foreign securities trading *in the United States*." Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 700 (1990) (emphasis added). The legislative history of both statutes reflects that Congress "chose to protect only those investors whose trades occur inside the United States." *Id.* at 681.

apply them.” *Lauritzen v. Larsen*, 345 U.S. 571, 577-78 (1953) (quoting *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.)). In short, use of “broad, inclusive language” like “[e]ach” or “any” or “[e]very” “is not sufficient to overcome the presumption against the extraterritorial application of statutes.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 586-87 n.4 (1992) (Stevens, J., concurring in the judgment; citations omitted); *see, e.g., Aramco*, 499 U.S. at 249 (rejecting extraterritorial application of law applying to “any activity, business, or industry in commerce”; citation omitted); *Foley Bros.*, 336 U.S. at 282, 287-88 (rejecting extraterritorial application of law referring to “[e]very contract made to which the United States ... is a party”; citation omitted).

The Court has also expressly rejected textual arguments that, like petitioners’, rely upon “boilerplate language” about foreign commerce. *Aramco*, 499 U.S. at 251. Such contentions “find[] no support in our case law; we have repeatedly held that even statutes that contain broad language in their definitions of ‘commerce’ that expressly refer to ‘foreign commerce’ do not apply abroad.” *Ibid.* (emphasis in original). Language like that “can be found in any number of congressional Acts,” *Aramco*, 499 U.S. at 251, and thus provides an “insufficient indication to override the presumption against extraterritoriality,” *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting), because “there would be little left of the presumption” otherwise, *Aramco*, 499 U.S. at 253.

For example, the Federal Employers’ Liability Act provides remedies for employees against railroads “engaging in commerce between ... any of the several States or Territories ... and any foreign nation or nations,” 45 U.S.C. § 51—essentially the same lan-

guage invoked here. Yet this Court in *Chisholm* held that FELA “contains no words which definitely disclose an intention to give it extraterritorial effect,” and ruled that FELA did not apply to the claim of the estate of an American citizen against an American carrier on a train running from the United States into Canada—because the decedent had “suffered [his] fatal injuries at a point thirty miles north of the international line.” *Chisholm*, 268 U.S. at 30-31. Similarly, the National Labor Relations Act addressed commerce “between any foreign country and any State”¹⁷—again, essentially, as here—and yet the Court in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), “refused to find a congressional intent to apply the statute abroad because there was not ‘any specific language’ in the Act reflecting congressional intent to do so.” *Aramco*, 499 U.S. at 251-52 (quoting 372 U.S. at 19). And in *Aramco*, this Court held that Title VII’s reference to employers who “affect[] commerce” “between a State and any place outside thereof” did not render the statute applicable to discrimination by an American employer against an American employee in a foreign country. *Id.* at 249, 253 (quoting 42 U.S.C. § 2000e(b), (g)).

Petitioners’ reliance upon the text of Section 10(b) thus fails.

2. Even less availing to petitioners and their *amici* is their invocation of other sections of the Exchange Act. In particular, they identify a section of the Exchange Act that actually *does* address extraterritoriality—Section 30(b). Pet. Br. 39-40; Alecta Br. 12.

¹⁷ 29 U.S.C. § 152(6), quoted in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 15 n.3 (1963).

Entitled “Foreign Securities Exchanges,” Section 30 provides, in subsection (b), that the Exchange Act “shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.” 15 U.S.C. § 78dd(b). This provision thus specifically authorizes the SEC to promulgate regulations applicable to extraterritorial activities of people conducting a “business in securities” when necessary to accomplish domestic regulatory goals. The SEC has apparently never issued any rule or regulation under Section 30(b), and this case does not involve any “business in securities.”

Section 30(b) actually hurts petitioners’ cause, and quite badly. It “specifically restricts the Act to the transaction of business *within* the United States,” *Kook v. Crang*, 182 F. Supp. 388, 390 (S.D.N.Y. 1960) (emphasis added); *see also Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31-32 (D.C. Cir. 1987), and creates only a narrow, potential, SEC-gatekept extraterritorial application that does not apply here. What is more, the extraterritoriality language of Section 30(b) actually “buttresse[s]” the conclusion that Section 10(b), which contains no such language, does not apply extraterritorially. *Aramco*, 499 U.S. at 258. For Section 30(b) demonstrates that, “[w]hen it desires to do so,” Congress knows exactly how to affirmatively express an intent to regulate extraterritorial securities-related activity—just as it “knows how to place the high seas within the jurisdictional reach of a statute.” *Ibid.* (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989)).

The same is true of an adjacent—and even more pertinent—provision, Section 30(a). That subsection explicitly addresses *transactions on foreign exchanges*. It authorizes the SEC to adopt rules and regulations covering transactions in securities of American issuers that are “effect[ed]” by “any broker or dealer” “*on an exchange not within or subject to the jurisdiction of the United States,*” and makes it unlawful for brokers and dealers to violate those rules. 15 U.S.C. § 78dd(a) (emphasis added). Section 30(a) obviously does not apply in this case: it regulates *only* brokers and dealers, *only* trades in securities of *domestic* issuers, and *only* to the extent provided by the SEC.

But Section 30(a) is fatal to petitioners’ statutory construction argument here. It shows that Congress knew exactly how to make a clear statement of an intent to regulate transactions on foreign exchanges. Congress made just such a statement in Section 30(a); it did *not* make one in Section 10(b).¹⁸

¹⁸ The other textual arguments made by petitioners and their *amici* are frivolous. The language in Section 2—the Act’s statement of necessity—referring to “prices ... generally disseminated and quoted throughout the United States and foreign countries,” 15 U.S.C. § 78b(2); *see* Pet. Br. 39; Alecta Br. 9, refers to prices of “transactions [on] securities exchanges and over-the-counter markets,” 15 U.S.C. § 78b. Nothing in Section 2 suggests that this refers to exchanges or markets or transactions in foreign countries; to the contrary, Congress made clear it was referring to “transactions in securities [that] are affected with a *national* public interest.” *Ibid.* (emphasis added).

Section 2’s reference to trading “volume [that] in large part originate[s] outside the States in which ... exchanges and over-the-counter markets are located,” Alecta Br. 9 (quoting 15 U.S.C. § 78b(1)), merely acknowledges that trades come to domestic exchanges from customers throughout the country.

C. Petitioners seek to apply Section 10(b) extraterritorially.

Unable to tease a clear statement of extraterritorial intent from Section 10(b), petitioners seek to avoid the presumption against extraterritoriality altogether. Though they themselves have characterized this case as involving “the *extraterritorial* application of the antifraud provisions of the federal securities laws,” Pet. 16 (emphasis added), petitioners now say, in essence, that the case really does not involve extraterritoriality at all. *See, e.g.*, Pet. Br. 25, 33. This contention is meritless.

1. The claim that this case is “primar[il]y,” “central[ly],” Pet. Br. 25, and “overwhelming[ly],” Alecta Br. 14, about domestic activity simply ignores the allegations and the reality of the Australian petitioners’ class-action complaint. These *Australian* plaintiffs live and bought shares in *Australia*; they allegedly suffered their losses in *Australia*, on an *Australian* exchange; and now, on behalf of every *Australian* who suffered similar harm, they seek to recoup large sums from the *Australian* issuer who they say prepared and issued the allegedly false disclosures in *Australia* that caused these losses. If ever there was a case where parties were demanding that American law “appl[y] in foreign countries,” *Lujan*, 504 U.S. at 586 (Stevens, J., concurring in the judgment), that it govern “conduct that is ‘the

Finally, Section 27’s provision for venue either where a violation occurred or where a defendant may be found, *see* Alecta Br. 13 (citing 15 U.S.C. § 78aa), offers a meaningful venue choice even in purely domestic cases. Had Congress really intended extraterritoriality, it would have established a third venue option for cases in which the violation took place, and the violators could only be found, abroad.

primary concern of a foreign country,” *Pasquantino v. United States*, 544 U.S. 349, 378 (2005) (Ginsburg, J., dissenting; quoting *Foley Bros.*, 336 U.S. at 286), and that it *not* “be confined in its operation and effect to the territorial limits” of the United States, *Chisholm*, 268 U.S. at 32 (citation omitted), this is it.

2. That should be enough to dispose of petitioners’ argument, but there is more. This Court has repeatedly rejected, on extraterritoriality grounds, claims in cases having far greater domestic connections to the United States than this one. This Court’s decisions, indeed, refute the claim, made here, that “the presumption bars application of a federal statute” only “when the relevant conduct occurs *entirely* outside the United States.” *Alecta Br.* 17-18 (emphasis in original).

New York Central v. Chisholm provides a stark example. The American decedent had suffered fatal injuries while working for his American employer on a train traveling from Malone, New York, to Montreal, but because the accident took place thirty miles north of the border, this Court held that FELA did not apply to this barely extraterritorial event. 268 U.S. at 30-32. Similarly, in *Foley Brothers v. Filardo*, the American plaintiff had been hired in the United States by an American company that entered into a contract with the United States to do construction work abroad, and had agreed in that contract to abide by the laws of the United States. 336 U.S. at 282-83; see *Filardo v. Foley Bros.*, 297 N.Y. 217, 219-20 (1948), *rev’d*, 336 U.S. 281 (1949). This Court held that the Eight Hour Law did not apply “to work performed in foreign countries.” 336 U.S. at 284. So, too, in *EEOC v. Aramco*: an American citizen, hired by an American company pursuant to an employment

contract made in the United States, was shipped off to work overseas. 499 U.S. at 247. Title VII did not apply to the discrimination the plaintiff alleged to have suffered abroad. *Id.* at 259.

But the most analogous case is the most recent one. The invention at issue in *Microsoft v. AT&T*, a technology for encoding and compressing recorded speech, was patented by AT&T in the United States. 550 U.S. at 441. There was no question that Microsoft had induced infringement of this patent in the United States; Microsoft's Windows operating system included software code written in the United States that, when loaded onto a personal computer, enabled PCs to process speech the same way AT&T's invention did. *Id.* at 441-42, 445-46. At issue was the fact that Microsoft, in the United States, also shipped "master" copies of Windows from the United States to places abroad, where the software was then copied and installed on PCs. *Id.* at 441-42, 445-46. The question was whether Microsoft could be held liable for inducing infringement abroad—specifically, whether Microsoft had "supplie[d] ... from the United States,' for 'combination' abroad, 'components' of AT&T's patented speech processor." *Id.* at 441-42, 446-47 (quoting 35 U.S.C. § 271(f)).

These facts track the allegations here: HomeSide generated allegedly false raw information in the United States (cf. the Windows code), that information was sent from the United States to a foreign country in a form that was not publicly disseminated (cf. the "master" copies), and then the information was combined with other information into consolidated financials and incorporated into NAB's public disclosures, which were disseminated abroad and caused harm abroad (cf. the creation of installation

copies and their installation into the PCs). *Cf. id.* at 445-46.

As petitioners do here, AT&T argued that the presumption against extraterritoriality did not bar its infringement claim because material conduct took place in the United States. Indeed, AT&T correctly pointed out that the Patent Act, “by its terms, applies only to domestic conduct, *i.e.*, to the supply of a patented invention’s components ‘from the United States.’” *Id.* at 456 (quoting 35 U.S.C. § 271(f)). AT&T reasoned that, accordingly, because it was only seeking damages for a domestic wrong, “the presumption holds no sway here.” *Id.*

This Court rejected AT&T’s argument: “AT&T’s reading ... ‘converts a single act of supply from the United States into a springboard for liability each time a copy of the software is subsequently made [abroad] and combined with computer hardware [abroad] for sale [abroad].’” *Ibid.* (citation omitted). Petitioners here similarly seek to convert the transmission of financial information from an American subsidiary to a foreign parent into a massive springboard for liability each time a foreign shareholder—of which here there were hundreds of thousands, *see, e.g.*, Supp. J.A. 53—purchases shares of the foreign parent on a foreign exchange.

Indeed, the presumption against extraterritoriality surely should apply even more strongly in this case, if that is possible. Not only does the Patent Act provide expressly for a private right of action (as opposed to the judicially inferred right here), but it also expressly provides for *some* degree of extraterritorial application, *see* 550 U.S. at 455; 35 U.S.C. § 271(f);

the question in *Microsoft* was how much.¹⁹ Section 10(b) does nothing of the sort.

3. Beyond this, the fact that some underlying conduct occurred in Florida is meaningless for purposes of Section 10(b), and does not render the presumption against extraterritoriality inapplicable, because that alleged domestic conduct was not “*securities* fraud.” Pet. App. 41a (emphasis in original). The elements of the Australian petitioners’ securities fraud claim—“the allegedly knowing incorporation of HomeSide’s [allegedly] false information ... in public filings and statements made abroad ... to investors abroad ... who detrimentally relied on the information in purchasing securities abroad,” *id.* at 41a-42a—all occurred in Australia.

The Australian petitioners’ contrary suggestion—that HomeSide’s domestic conduct was by itself actionable under a theory of “scheme liability,” Pet. Br. 22; *see also id.* at 25-26; Alecta Br. 15—fails under this Court’s decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008), which rejected an analogous “scheme liability” claim. Petitioners “do not contend that HomeSide sent any falsified numbers directly to investors,” Pet. App. 21a, and they do not contend that HomeSide and its officers engaged in deceptive acts that they communicated to the public. They argue instead that the allegedly false information

¹⁹ The Court observed that “the presumption is not defeated ... just because [a statute] specifically addresses [an] issue of extraterritorial application,” but rather “remains instructive in determining the *extent* of the statutory exception.” 550 U.S. at 455-56 (emphasis added; quoting *Smith*, 507 U.S. at 204, and citing *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 161-62, 164-65 (2004)).

was “communicated to the public through *NAB*’s disclosure of its consolidated financials”—and that it was thus “*NAB*’s ... conduct” that “was in the securities realm and inflated the price of *NAB*’s securities.” Pet. Br. 25 n.11 (emphasis added). HomeSide’s conduct was not in this “securities realm,” but in the realm of business operations.

This is *Stoneridge* redux. The Australian petitioners impermissibly seek to apply Section 10(b) “beyond the securities markets” and in the “realm of ordinary business operations.” *Stoneridge*, 552 U.S. at 161. For “[i]t was [*NAB* and its Australian officers], not [*HomeSide* and its American officers], [who allegedly] filed fraudulent financial statements; nothing [*HomeSide*] did made it necessary or inevitable for [*NAB*] to record the transactions as it did.” *Ibid.* As the court of appeals observed—and as the complaint and the record establish, see pp. 11-14, *supra*—*HomeSide*’s “problematic numbers ... had to pass through a number of checkpoints manned by *NAB*’s Australian personnel before reaching investors,” and “a number of significant events needed to occur before this misinformation caused losses to investors.” Pet. App. 21a; cf. *Hemi Group, LLC v. City of N.Y.*, No. 08-969, slip op. at 12 (U.S. Jan. 25, 2010) (opinion of Roberts, C.J.; proximate cause lacking because “[m]ultiple steps ... separate the alleged fraud from the asserted injury”).

As in *Stoneridge*, the *HomeSide* respondents “had no duty to disclose,” “their deceptive acts were not communicated to the public,” and “[n]o member of the investing public had knowledge, either actual or presumed, of [their] deceptive acts during the relevant times.” 552 U.S. at 159. The alleged domestic acts accordingly “do not suffice to ‘show reliance ...

except in an indirect chain that [is] too remote for liability.” Pet. App. 21a (quoting *Stoneridge*, 552 U.S. at 159). The fact that HomeSide was a subsidiary of NAB does not change this conclusion. See *Pugh v. Tribune Co.*, 521 F.3d 686, 696-97 (7th Cir. 2008) (rejecting claims against employees of newspaper subsidiary who forwarded false circulation information to corporate parent).

4. Finally, even if the link between the domestic conduct and petitioners’ foreign losses could be said to be direct, their claims would still be extraterritorial—as illustrated by this Court’s decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). There, the Court addressed the so-called “headquarters doctrine” under the “foreign country” exception to the Federal Tort Claims Act’s waiver of sovereign immunity. The DEA had approved and executed a plan to hire Mexican nationals to seize another Mexican national, Alvarez, in Mexico, and to bring him to the United States. *Id.* at 698. Alvarez sued the Government for damages, and the Government asserted sovereign immunity on the ground that his claim was a “claim arising in a foreign country.” *Id.* at 700 (quoting 28 U.S.C. § 2680(k)). The seizure itself certainly happened in a foreign country, but Alvarez argued that his claim arose in the United States under the FTCA because his “abduction in Mexico was the direct result of wrongful acts of planning and direction by DEA agents located in California.” *Id.* at 702.

This Court rejected this “headquarters doctrine” argument—even though it “assume[d] that the direction by DEA officials in California was a proximate cause of the abduction.” *Id.* at 704. “[A] given proximate cause need not be, and frequently is not,

the exclusive proximate cause of harm,” the Court explained, and “the actions of Sosa and others in Mexico” acting for the DEA “were just as surely proximate causes, as well.” *Ibid.* As a result, “recognition of additional domestic causation” did not establish that Alvarez’s claim arose in the United States. *Ibid.* So it is here as well: the Australian petitioners’ contention that “the domestic conduct was a substantial and material link in the chain of events leading to the foreign investors’ losses,” Pet. Br. 25, does not overcome the existence of proximate cause in Australia, and does not make their claims domestic in nature—particularly since “headquarters” here was in a foreign country, and not, as in *Sosa*, in the United States. *Sosa*, 542 U.S. at 701-02.

In short, the Australian petitioners’ claims arose in a foreign country. The presumption against extraterritoriality unquestionably controls.

II. THE PRESUMPTION AGAINST INTERFERENCE WITH THE SOVEREIGN AUTHORITY OF OTHER NATIONS BARS PETITIONERS’ “FOREIGN-CUBED” CLAIMS.

A second, separate canon of construction also would preclude the Australian petitioners’ claims even if the presumption against extraterritoriality did not apply: “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). “This canon is ‘wholly independent’ of the presumption against extraterritoriality,” and it applies even “if the presumption against extraterritoriality has been overcome or is otherwise inapplicable.” *Hartford Fire*, 509 U.S. at 814-15 (Scalia, J., dissenting; citation omitted).

Even apart—again—from the fact that they invoke a right of action not found in the statutory text, petitioners’ reading of Section 10(b) cannot be squared with this rule.

A. The presumption that Congress legislates consistently with customary international law is a clear-statement rule.

Charming Betsy requires that courts “must assume” that “Congress ordinarily seeks to follow” “principles of customary international law.” *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004). “By usage as old as the Nation, [American] statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.” *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953). Specifically, “‘the law of nations,’ or customary international law,” includes choice-of-law principles that place “limitations on a nation’s exercise of its jurisdiction to prescribe,” and “‘in the absence of a contrary congressional direction,’” these “choice-of-law principles ... are assumed to be incorporated into our substantive laws having extraterritorial reach.” *Hartford Fire*, 509 U.S. at 815, 817 (Scalia, J., dissenting; quoting *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 382 (1959)). This “practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence,” *id.* at 818 (Scalia, J., dissenting), and “help[s] ensure that ‘the potentially conflicting laws of different nations’ will ‘work together in harmony,’ a matter of increasing importance in an ever more interdependent world,” *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and in the judgment; quoting *Empagran*, 542 U.S. at 164).

Like the presumption against extraterritoriality, the *Charming Betsy* rule is a clear-statement rule: “for us to sanction the exercise of local sovereignty” in the “delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.” *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (quoting *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)). If “any ... possible construction” avoids violating the law of nations, *Charming Betsy*, 6 U.S. (2 Cranch) at 118, then that construction must control. If the statute is “ambiguous,” then the ambiguity must be resolved in a way that “avoid[s] unreasonable interference with the sovereign authority of other nations.” *Empagran*, 542 U.S. at 164. Even a “more natural reading of the statutory language” must be disregarded to avoid such interference, so long as the text is not so conclusive that “we *must* accept that reading.” *Id.* at 174 (emphasis in original).

Any argument that the statute should be given more expansive reach must thus “be directed to the Congress rather than to us,” because it is Congress that “alone has the facilities necessary to make ... important policy decision[s]” that could affect relations abroad. *McCulloch*, 372 U.S. at 22 (quoting *Benz*, 353 U.S. at 147).

B. International conflicts rules prevailing in 1934 required that securities fraud claims be decided by the law of the nation where the transaction occurred.

The presumption that Congress, when it legislated, intended to embrace international choice-of-law principles raises the question of what those principles were when Congress legislated. For the Securities Exchange Act of 1934, the question becomes: what

were the relevant “areas and transactions in which American law would be considered operative under prevalent doctrines of international law” in 1934? *Lauritzen*, 345 U.S. at 577. Whatever the prevalent doctrine was, the “choice-of-law principles” it reflects must be “assumed to be incorporated” into the Exchange Act. *Hartford Fire*, 509 U.S. at 817 (Scalia, J., dissenting).

The answer here is *lex loci delicti*. The “common-law roots of the securities fraud action” under Section 10(b) may be found in “common-law tort actions for deceit and misrepresentation.” *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341, 345 (2005). And “[w]hen [the Exchange Act] was passed, the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti*.” *Sosa v. Alvarez-Machain*, 542 U.S. at 705 (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 377, 379 (1934)). The law applicable to torts was “the local law of the ‘place of wrong,’” which “was described ... as ‘the state where the last event necessary to make an actor liable for an alleged tort takes place.’” *Sosa*, 542 U.S. at 705-06 n.3 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS 412 (1969)).

These rules were embodied in the 1934 *Restatement (First) of Conflict of Laws*, which, as petitioners note, was issued “[r]oughly contemporaneously with the passage of the Exchange Act.” Pet. Br. 28 n.14. The first Restatement’s treatment of torts was utterly uncontroversial at the time, as there was “zero” debate over the “all-important *lex loci delicti* rule for torts.”²⁰ The principle was this:

²⁰ Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad As Its Reputation?*, 32 S. ILL. U.L.J. 39, 70 (2007) (emphasis in original).

§ 377. THE PLACE OF WRONG.

The place of wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place.

RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) (emphasis in original). The “law of the place of wrong determines whether a person has sustained a legal injury,” *id.* § 378, and, with almost no exceptions, “whether a person is responsible for harm he has caused,” *id.* § 379.

For a fraud resulting in a transaction on a foreign securities exchange, the last event necessary to create liability is the execution of the transaction on that foreign exchange—meaning that the foreign country’s law would apply. A note to Section 377 confirms that point—

4. When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent misrepresentations are made.

Id. § 377 note 4, at 457 (emphasis omitted)—as does an illustration to the note:

6. A, in state X, owns shares in the M company. B, in state Y, fraudulently persuades A not to sell the shares. The value of the shares falls. The place of the wrong is X.

Id. § 377 illustration 6, at 457.²¹

²¹ Petitioners cite drafts of other sections for the proposition that “each state in which any event in [a] series of acts and consequences occurs may apply its law to the event.” Pet. Br. 28 n.14; see RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 65, 66. These sections do not set forth conflicts rules, but rather the underlying principles of “legislative jurisdiction” that *result* in the “[c]reation of [a] choice of law problem” when it “happen[s]

That is the choice-of-law rule that Congress must be presumed to have incorporated into the Exchange Act. And it is fatal to the Australian petitioners' claims, because it establishes that the place of wrong is *where the securities transaction occurred*, as that is where the "last event necessary" to produce liability takes place. Petitioners point to nothing in the Exchange Act—let alone an "affirmative intention ... clearly expressed," *Benz*, 353 U.S. at 147—suggesting that Congress intended otherwise.

C. The Australian petitioners' claims fail under *Empagran*.

Even if the 1934 Act is construed in light of conflicts principles more modern than the statute itself, the Australian petitioners' claims still fail. For this case is the securities-law analog of *F. Hoffmann-La Roche v. Empagran*. That case, of course, upheld the dismissal of what essentially was a foreign-cubed antitrust case—a case involving foreign plaintiffs, foreign defendants, and foreign purchases and damages. 542 U.S. at 159-60. It even involved allegations of material domestic conduct and parallel domestic injury suffered by Americans: the foreign plaintiffs had complained of a global conspiracy, one in which "some of the anticompetitive price-fixing conduct alleged here took place in *America*," and they

that more than one state has legislative jurisdiction." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 65 cmt. b, at 98. When such a conflict arises, a court must then "select the law of one of the ... states" by resorting to the choice-of-law principles "stated in Chapter 9"—including Sections 377-79. *Ibid.*; see also *Hartford Fire*, 509 U.S. at 813-14 (distinguishing between scope of "legislative jurisdiction" and "whether and to what extent Congress *has* exercised [its] legislative jurisdiction"; emphasis in original).

alleged that this global conspiracy had led to higher prices both “in the United States” and abroad, thus harming both domestic and foreign purchasers. *Id.* at 159, 165 (emphasis in original).

Indeed, the *Empagran* plaintiffs’ case for extraterritorial reach was much stronger than the petitioners’ case is here. Not only did the *Empagran* plaintiffs not have to contend with the presumption against extraterritoriality, *see id.* at 165; *Hartford Fire*, 509 U.S. at 796, and not only did they invoke an express private right, but they also invoked a statute that explicitly provided for *some* degree of extraterritorial application, *see* 542 U.S. at 162; 15 U.S.C. § 6a. What is more, the Court even noted that the *Empagran* plaintiffs’ reading of the Foreign Trade Antitrust Improvements Act—under which they could sue on the basis of domestic effects that had “give[n] rise” to Sherman Act claims of others, namely American purchasers—was arguably “the *more natural reading* of the statutory language.” 542 U.S. at 174 (emphasis added; quoting 15 U.S.C. § 6a(2)).

Yet the Court rejected that “more natural” reading of the statute—in favor of a construction that allowed claims to be brought *only* by “purchaser[s] in the United States ... based on domestic injury.” *Id.* at 159. The Court held that while it was “reasonable, and hence consistent with principles of prescriptive comity,” to apply the Sherman Act “to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused,” it was unreasonable “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.” *Id.* at 165 (emphasis added and omitted). Application of American law would create “a serious risk of inter-

ference with a foreign nation’s ability independently to regulate its own commercial affairs,” the Court explained, and insofar as foreign harm was at issue, “the justification for that interference seems insubstantial”—and hence unreasonable. *Ibid.*

Precisely this reasoning applies here. What the Australian petitioners seek is to impose upon an Australian corporation massive liability under United States law for harm suffered *in Australia* as the result of conduct and transactions regulated extensively by *Australian law*: disclosures issued and disseminated *in Australia*, and share purchases on an *Australian* exchange. In seeking such relief from a United States court, moreover, the Australian petitioners seek to evade the ample remedial procedures that their own country has provided to redress harms of the sort of which they complain.

It is no answer to contend, as petitioners do, that “the potential for conflict between ‘the anti-fraud sections of the securities laws’ and foreign laws is minimal, because ‘anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged.’” Pet. Br. 35 (quoting Pet. App. 17a). *Empagran* rejected this very argument: that because “many nations have adopted antitrust laws similar to our own, ... the practical likelihood of interference with the relevant interests of other nations is minimal.” 542 U.S. at 167. The Court responded that despite similarities in some substantive policies, there were still notable differences in others. *See ibid.* Equally important, it observed that “even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies.” *Ibid.* And “to apply our remedies would

unjustifiably permit [foreign] citizens to bypass their own [countries'] less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody." *Ibid.*

Here, the "risk of interference with a foreign nation's ability independently to regulate its own commercial affairs," *id.* at 165, is equally manifest. The design of a securities regulation and enforcement system poses a plethora of policy questions—difficult questions about which nations can and do disagree. Indeed, in the United States, as this Court is well aware, many of these questions have inspired decades of spirited debate among legislators, regulators, judges, academics, investors, and issuers. What are the duties of disclosure? What information is material? Should forward-looking statements be allowed, and, if so, with what restrictions or protections? How is fraud to be redressed? Should public enforcement be supplemented with private lawsuits at all? If so, what are the elements of a claim? What state of mind is required to establish liability? Must a plaintiff show reliance? If so, how? Should a "fraud-on-the-market" presumption of reliance be recognized?

The questions go on: Should there be issuer liability for secondary trading at all—that is, should an issuer, and by extension its current shareholders, pay damages for losses suffered by shareholders who did not buy their shares from the company, but from other shareholders on the open market? What is the test for causation? How are damages measured? Should there be a cap on class damages? Should there be a "lookback" limit on recoverable losses, limiting damages on the basis of an upswing in a security's price after it drops? Who can be sued?

Control persons? Secondary actors? Should class actions be allowed? Opt-out? Or opt-in? Should losers pay the winners' attorneys' fees? Should contingency fees be allowed? These are just some of the questions that arise.

Other sovereign nations should be free to decide—and have decided—these questions for themselves, and not necessarily the way the United States has decided them. In fact, the availability of private remedies for alleged securities fraud “differs considerably from jurisdiction to jurisdiction,”²² with the United States being “the easiest place in the world for investors to recover damages caused by fraud.”²³ For example, “Australia and Canada have been the most accommodating countries to securities class actions outside the United States,”²⁴ but even their systems differ materially from ours. Australia allows private, opt-out securities class actions; but it does not recognize the fraud-on-the-market presumption, does not allow contingency fees, and follows the English rule on attorneys' fees.²⁵ In Canada, the law of Ontario permits opt-out class actions, dispenses

²² REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION OF THE INTERNATIONAL BAR ASSOCIATION 288 (2008), available at <http://tinyurl.com/taskforce-etj-pdf>.

²³ Shelley Thompson, *The Globalization of Securities Markets: Effects on Investor Protection*, 41 INT'L LAW. 1121, 1129 (2007).

²⁴ *Id.* at 1142.

²⁵ See, e.g., Paul von Nessen, *Australian Shareholders Rejoice: Current Developments in Australian Corporate Litigation*, 31 HASTINGS INT'L & COMP. L. REV. 647, 663-68, 683 (2008); Thompson, 41 INT'L LAW. at 1142; Michael Duffy, “*Fraud on the Market*”: *Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia*, 29 MELB. U.L. REV. 621, 645-50, 655, 664 (2005).

with any scienter requirement, and recognizes a presumption that obviates proof of individual reliance. The catch: class damages are stringently capped—at the greater of CDN\$1 million, or five percent of the issuer’s market capitalization. And Canada too follows the English rule.²⁶

Other nations have taken far more restrictive approaches. Most notably, many countries object to what they perceive to be the abuses of American class actions.²⁷ As a result, in their own systems, they have either declined to allow mass litigation of claims, or have developed alternatives to the class action. For example, Germany has adopted a “model case” securities litigation system specifically designed to avoid the perceived ills of the American class action.²⁸ The Netherlands does not allow litigation of class claims, but passed a law allowing class *settlements*, a law that was used to effectively preempt at least one

²⁶ See, e.g., Thompson, 41 INT’L LAW. at 1142-43; Ontario Securities Act, R.S.O., ch. S.5 §§ 138.1, 138.7 (1990, as amended).

²⁷ See, e.g., Edward F. Sherman, *Group Litigation Under Foreign Legal Systems*, 52 DEPAUL L. REV. 401, 403 (2002); Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT’L L. 321, 343, 346-47 (2001); Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants To Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1579-1580 (2005).

²⁸ See, e.g., German Ministry of Justice, The German “Capital Markets Model Case Act,” available at <http://bit.ly/KapMuG>; see also Mark C. Hilgard & Jan Kraayvanger, *Class actions and mass actions in Germany*, LEGAL PRACTICE DIV. LITIG. COMM. NEWSLETTER (Int’l Bar Ass’n, London), Sept. 2007, at 40, available at [http:// bit.ly/KapMuG2](http://bit.ly/KapMuG2).

major f-cubed securities class action in the United States.²⁹

And some foreign nations are so hostile to American opt-out class actions that they deny preclusive effect to judgments and settlements in those actions.³⁰ This hostility, indeed, has even raised the specter of outright judicial conflict: in one recent case involving a French company, lawsuits were brought in France to enjoin French investors from participating as named plaintiffs in the American action, as well as to enjoin the dissemination of class notice in France; and a United States district judge was, in turn, asked to enjoin the French actions.³¹ This sort of conflict is the inevitable result of “permitting [foreign] citizens to bypass their own [countries’] less generous remedial schemes” in favor of litigation under Section 10(b). *Empagran*, 542 U.S. at 167; cf. *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 950, 953 (1st Cir. 1991) (Breyer, C.J.) (“international forum-shopping” in securities cases “increase[s] the likelihood that decisions made in one country will cause ... adverse effects in another”).

²⁹ See, e.g., Michael D. Goldhaber, *Shell Games: Amsterdam Could Become the Class Action Capital of Europe if the U.S. Declines the Honor*, AM. LAW., Dec. 2007, available at 12/2007 Am. Law. S22 (Westlaw); *In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712, 714 (D.N.J. 2007).

³⁰ See, e.g., Buschkin, 90 CORNELL L. REV. at 1579; *In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 282-87 (S.D.N.Y. 2008); *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 103-05 (S.D.N.Y. 2007).

³¹ See *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH), 2009 WL 3859066, at *1 & n.2 (S.D.N.Y. Nov. 19, 2009).

Finally, there is no merit to the suggestion made by *amici*—but not petitioners—that global, foreign-cubed securities class actions should be allowed whenever a foreign issuer has issued ADRs and made SEC filings in connection with those ADRs. MN Servs. Br. 4-5; Alecta Br. 25. This argument, which has consistently failed even under the generous conduct and effects tests,³² cannot be reconciled with *Empagran*. For there the Court—despite a plausible textual argument—refused to construe the FTAIA to allow foreign vitamin purchasers similarly to piggy-back their claims onto those of Americans who purchased in the United States. Here, as in *Empagran*, the “foreign conduct [has allegedly] cause[d] independent foreign harm and that foreign harm alone gives rise to the [foreign] plaintiff’s claim.” 542 U.S. at 165 (emphasis omitted). The fact that there were ADR holders and SEC filings, at most, supports a right of action in favor of the ADR holders, who purchased their shares in the United States. It does not support the extension of the Section 10(b) inferred right to transactions that occurred abroad.³³

³² See, e.g., *In re Novagold Res. Inc. Sec. Litig.*, 629 F. Supp. 2d 272, 306 (S.D.N.Y. 2009) (SEC filings insufficient to support claims of foreign plaintiffs); *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 568 (S.D.N.Y. 2008) (same); *Tri-Star Farms Ltd. v. Marconi, PLC*, 225 F. Supp. 2d 567, 573 n.7 (W.D. Pa. 2002) (foreign plaintiffs may not “bootstrap their losses to [the] independent American losses” of ADR holders).

³³ The *Restatement (Third) of Foreign Relations Law of the United States*, upon which petitioners rely (Br. 27-28), does not help petitioners. It does not purport to apply anything Congress enacted. In any event, its version of the conduct test requires a showing of “conduct occurring *predominantly* in the United States that is related to a [foreign] transaction in securities.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416(1)(d) (1987) (emphasis added). Moreover,

In short, given that “litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and kind from that which accompanies litigation in general,” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975)), it is hardly surprising that its principal features “could not win their own way in the international marketplace for [policy] ideas,” *Empagran*, 542 U.S. at 169. To nonetheless impose that system on the world through foreign-cubed litigation would constitute “an act of legal imperialism” of precisely the sort that the Court “must assume” Congress did not intend to commit. *Ibid.*

III. THE PURCHASER-SELLER REQUIREMENT OF THE JUDICIALLY CREATED SECTION 10(b) PRIVATE RIGHT SHOULD BE CONSTRUED TO REQUIRE PLAINTIFFS TO HAVE PURCHASED OR SOLD SECURITIES IN THE UNITED STATES.

A. There is one additional reason why the Australian petitioners’ claims must fail—an even more fundamental one. Not only is Section 10(b) “silent on the issue of extraterritorial application,” Pet. 16; *accord* Pet. App. 7a, but it also may be said to be *doubly* silent. For “[t]he § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes,” *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008), and this Court has “made no

the Restatement forecloses the exercise of jurisdiction to prescribe when that would be “unreasonable,” in light of, among other things, “the extent to which another state may have an interest in regulating the activity.” *Id.* § 403(1), (2), (2)(g); *cf.* *Empagran*, 542 U.S. at 164-65.

pretense that it was Congress's design to provide the remedy afforded," *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 359 (1991).

The Section 10(b) private right is thus, in reality, vestigial. Federal judges created it under an "*ancien regime*" of law "that held sway [over] 40 years ago," a regime under which they indulged "the habit of venturing beyond Congress's intent" to invent unexpressed rights of action in order to better effectuate, in their own policy calculations, "the congressional purpose' expressed by a statute." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted). But this Court has long since "abandoned that understanding" and "sworn off [that] habit," "ha[s] not returned to it since," and has repeatedly refused to accept "invitation[s] to have one last drink." *Id.* "Statutory intent" to create a private right is "determinative." *Id.* at 286. Accordingly, any doubt about the general scope of the Section 10(b) private right must now be resolved "against its expansion," and any "decision to extend the cause of action" must be left "for Congress." *Stoneridge*, 552 U.S. at 165; *see Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994); *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *Blue Chip Stamps*, 421 U.S. at 737.

For similar reasons, the Court has also consistently found it proper to consider "[t]he practical consequences of an expansion" of the Section 10(b) private right. *Stoneridge*, 552 U.S. at 163; *see also Cent. Bank*, 511 U.S. at 189; *Va. Bankshares*, 501 U.S. at 1105; *Blue Chip Stamps*, 421 U.S. at 723. In *Blue Chip Stamps*, for example, to minimize the "ill effects" of potentially abusive litigation under Section 10(b), the Court "[c]abin[ed] the private cause of

action by means of the purchaser-seller limitation,” by which “the plaintiff class for purposes of § 10(b) and Rule 10b-5 private damages actions is limited to purchasers and sellers” of securities. *Dabit*, 547 U.S. at 80-81 (quoting *Blue Chip Stamps*, 421 U.S. at 731-32).

The practical considerations in favor of cabining the Section 10(b) private right here are far more compelling. For at issue in this case is not simply whether economic costs should be inflicted on domestic, or even foreign, parties, but whether a price should be exacted from foreign *nations* in the form of their sovereignty—damage that, for more than two centuries, this Court has said must not be inflicted by an American statute unless no “other possible construction remains.” *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

B. The fact that there is no textual basis for the Section 10(b) private right thus reinforces the application of the canons of construction that control here. If the text of a right of action that Congress expressly created must be construed to avoid harm to foreign sovereignty, *e.g.*, *Microsoft*, 550 U.S. at 454-55; *Empagran*, 542 U.S. at 155, then it is all the more imperative so to construe the judicial formulation of a right that Congress did not create. That may be done through the straightforward application of the presumption against extraterritoriality, or of the *Charming Betsy* rule—both of which make it impossible to say that purchasers on foreign exchanges are part of “the class for whose *especial* benefit the statute was enacted.” *Cort v. Ash*, 422 U.S. 66, 78 (1975) (citation omitted; emphasis in original).

The Section 10(b) private right may also be confined to its proper domestic scope merely by applying an

“ordinary assumption” that applies to legislation generally—namely, that words in “domestically oriented statutes” refer to people, things, and events in the United States. *Small v. United States*, 544 U.S. 385, 390 (2005). That assumption applies even when the presumption against extraterritoriality does not, and rests upon the “commonsense notion that Congress generally legislates with domestic concerns in mind.” *Id.* at 388 (quoting *Smith*, 507 U.S. at 204 n.5). The Court “consequently assume[s] a congressional intent that [a] phrase” in a law’s text “applies domestically, not extraterritorially.” *Id.* at 390-91.

If this ordinary assumption applies to statutory text, it should apply equally as well to the judicially prescribed elements of an inferred right of action. Doing that here provides a straightforward answer to the question presented in this case—and would fully conform the Section 10(b) inferred right to the extraterritoriality canon and the *Charming Betsy* rule. Thus, at the very least, the *Blue Chip Stamps* purchaser-seller rule (*see* pp. 53-54, *supra*)—a rule established so that Section 10(b) would not “provide a cause of action ... to the world at large,” 421 U.S. at 733 n.5—should be understood to limit standing to investors who purchased and sold securities *in the United States*. The fact that the Australian petitioners indisputably did not do so provides yet another reason why they have not stated a claim for relief under Section 10(b).

* * *

To paraphrase a question this Court asked in *Empagran*:

Why should American law supplant Australia’s own determination about how best to protect

Australian investors from allegedly fraudulent conduct engaged in significant part by an Australian company?

Cf. 542 U.S. at 165. The answer, as in *Empagran*, is that there is “no good answer to the question.” *Id.* at 166.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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