No. 08-1191

IN THE
Supreme Court of the United States

ROBERT MORRISON, ET AL.,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, ET AL.,

Respondents.

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

BRIEF FOR EUROPEAN AERONAUTIC DEFENCE & SPACE CO. N.V., ALSTOM SA, LAGARDÈRE GROUPE SCA, THALES SA, TECHNIP SA AND VIVENDI SA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici are multinational corporations headquartered in Europe whose common shares are traded on European exchanges. *Amici*'s disclosures to investors are extensively regulated by the laws of the European Union ("EU") and several of its member

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* made such a monetary contribution. Letters from the parties consenting to the filing of all *amicus* briefs have been filed with the Clerk of the Court.

states, and their financial statements are prepared in accordance with the International Financial Reporting Standards endorsed by the EU, rather than the Generally Accepted Accounting Principles applied in the United States. *Amici* include European Aeronautic Defence & Space Co. N.V. ("EADS"), Alstom SA, Lagardère Groupe SCA, Technip SA, Thales SA and Vivendi SA.

EADS is Europe's premier aerospace and defense company; its subsidiaries include Airbus S.A.S., a leading manufacturer of commercial and military aircraft. EADS is organized under Dutch law and registered in the Netherlands, with executive offices in France and Germany. The Republic of France holds, directly and indirectly, approximately 15 percent of EADS' shares, while the Kingdom of Spain holds approximately five percent. EADS common stock is listed on exchanges in France, Germany, and Spain, but is not listed on any United States exchange.[2] EADS is currently defending a securities class action in the United States, brought by U.S. purchasers of EADS stock on foreign exchanges, which raises issues closely related to those presented here. *See In re European Aeronautic Defence & Space Co. Sec. Litig.*, No. 1:08-cv-05389-WHP (S.D.N.Y. filed June 12, 2008).

Alstom SA is a French company providing equipment and services for the power generation and rail transportation industries. Alstom is headquartered in Levallois-Perret, France, and its stock is listed on

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[2] American Depositary Receipts ("ADRs") for common shares of EADS stock are traded in the United States, but this ADR facility is unsponsored, meaning that it was established by depository banks without any involvement by EADS.

the Paris exchange. Alstom's stock is not listed on any U.S. exchange, and Alstom has discontinued its American Depository Shares ("ADS") program in the United States. Alstom has been sued in the United States by a class of purchasers of Alstom's securities (including purchasers in France, England and the Netherlands) for alleged violations of Section 10(b) of the Securities Exchange Act (the "Exchange Act") and Rule 10b-5. *See, e.g., In re Alstom Sec. Litig.*, 253 F.R.D. 266 (S.D.N.Y. 2008).

Lagardère Groupe SCA is a global conglomerate engaged in book publishing, print, audiovisual and digital media, travel and sporting rights. Lagardère is a public limited partnership organized under French law. Its head office is in Paris and its shares are listed on the Paris exchange. Its securities are not listed on any U.S. exchange. Lagardère was named as a defendant in a securities class action filed in the United States in 2008, *Bobin v. Lagardère SA,* No. 1:08-cv-05383-MGC (S.D.N.Y. filed June 12, 2008), although plaintiffs voluntarily dismissed that case without prejudice. Lagardère holds a 7.5% stake in EADS.

Thales SA is a leading European corporation that supplies civil and military technologies to companies in the aerospace, space, defense, security and transportation industries. Thales is organized under French law, and is headquartered and registered in France. Thales common stock is listed on the Paris exchange, and is not listed on any U.S. exchange. The Republic of France holds approximately 27 percent of Thales' shares.

Technip SA is a world leader in engineering, technological support, and project management for the oil

and gas industries. Technip is organized under French law and headquartered in Paris. Its common stock is traded on the Paris exchange, and is not listed on any U.S. exchange. ADRs in Technip stock are traded over the counter in the United States through a sponsored ADR program.

Vivendi SA is a French company engaged primarily in the communications and entertainment industries. Vivendi is headquartered in Paris, and shares of Vivendi common stock are traded on the Paris exchange. Vivendi common stock is not listed on any U.S. exchange. ADRs in Vivendi stock are traded over the counter in the United States through a sponsored ADR program. Vivendi is currently defending a securities class action brought on behalf of shareholders in the United States, France, England and the Netherlands. *See, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571 (RJH) (HBP), 2009 WL 855799 (S.D.N.Y. Mar. 31, 2009) (denying motion to reconsider certification of class including French shareholders). On January 29, 2010, a jury in that case found that Vivendi had violated Section 10(b) by issuing false or misleading public statements with reckless disregard for their truth. Although no judgment has yet been entered, plaintiffs' counsel have asserted publicly that class members could recover in excess of $9 billion. *See Court Finds Vivendi Liable for Misleading Investors*, N.Y. TIMES, Jan. 30, 2010, at B3.

As indicated above, some *amici* are currently subject to class action lawsuits in the United States that raise issues similar to those presented here, and this Court's decision will likely have a substantial impact on those lawsuits. Other *amici* face the risk of

similar lawsuits in the United States in the future. *Amici* thus have a substantial interest in the outcome of this appeal.

SUMMARY OF ARGUMENT

The Second Circuit correctly held that the anti-fraud provisions of the Exchange Act do not reach the conduct at issue in this case. The Exchange Act does not apply to the adequacy of disclosures made by foreign companies, in foreign countries, pursuant to foreign regulation, which allegedly affect the value of stock purchased on foreign exchanges. This conduct is subject to extensive regulation in foreign countries, including the EU and the individual EU member states where *amici* are based and where their securities trade. European securities regulation is different from, and in some respects inconsistent with, the U.S. regulatory and enforcement regime. To the extent that U.S. courts apply U.S. anti-fraud laws to foreign transactions, they effectively superimpose U.S. law on foreign regulatory regimes and override important policy choices made by foreign governments.

The fundamental question presented in this case is whether Congress intended the Exchange Act to apply to such extraterritorial conduct. Whether this issue is viewed as one of subject matter jurisdiction, as the Second Circuit did, or is more properly analyzed as whether Petitioners have stated a cause of action under the Exchange Act, as the Solicitor General suggests, the result is the same. Under either approach, the Second Circuit correctly held that the Exchange Act does not apply to such extraterritorial conduct, and the decision below should therefore be affirmed.

In determining whether Congress intended to apply U.S. law to foreign conduct, the Court has relied on two canons of statutory interpretation: (1) the presumption against extraterritorial application of U.S. laws; and (2) principles of comity that bear on the reasonableness of applying U.S. law to conduct abroad. Here, both principles compel the conclusion that the Exchange Act does not apply.

First, the Exchange Act does not provide any "clear expression" of Congressional intent to apply the Act to extraterritorial conduct, as would be required to overcome the presumption against extraterritoriality. On the contrary, the statute, correctly read, states on its face that it applies only to "purchases and sales" of securities on a "national exchange" in the United States, or to purchases and sales of unregistered securities in the United States.

Second, principles of comity require that the Act should not be construed to apply here. *Amici*, as multinational corporate issuers based in the EU, are subject to extensive securities regulation both by the EU itself and by EU member states. Superimposing U.S. anti-fraud regulation – via U.S.-based class action litigation – on these carefully considered and sophisticated European regulatory regimes would effectively override important policy decisions that the EU and its member states have sought to implement. Moreover, U.S. anti-fraud enforcement procedures – particularly in class action litigation – conflict sharply with practices in the EU member states. Specifically, (1) European countries typically allow only limited discovery, and many have "blocking statutes" to protect their citizens against broad U.S. discovery; (2) European countries typically do not

allow plaintiffs' lawyers to recover contingent fees, and many apply a "loser pays" rule; (3) some European countries require individual proof of reliance and reject the fraud-on-the-market theory; and (4) some European countries consider the U.S.'s "opt-out" class action procedure inconsistent with basic concepts of due process, with the result that European multinationals which have settled or won class actions in the U.S. remain exposed to further litigation by European plaintiffs who may not be bound by the U.S. judgment.

All of these differences would result in friction between the U.S. and the EU and its member states, and would undermine the interests protected by comity, if the Exchange Act were interpreted to apply to extraterritorial conduct. Accordingly, the Court should clarify that Section 10(b) does not apply to purchases or sales of foreign securities on foreign exchanges.

ARGUMENT

The question in this case is whether plaintiffs suing in U.S. courts can assert federal securities fraud claims against foreign companies based on allegedly fraudulent disclosures made in foreign countries that have allegedly affected the value of securities purchased abroad. *Amici* assert that they cannot.

The Court of Appeals reached the same conclusion, dismissing plaintiffs' claim for lack of subject matter jurisdiction. In so doing, the Court of Appeals followed an extensive line of cases in which the federal courts have dismissed securities fraud claims bearing little or no connection to the United States on the grounds that they lacked subject matter jurisdiction.

See, *e.g.*, *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1313-17 (11th Cir. 2009); *SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987); *Grunenthal, GmbH v. Holtz*, 712 F.2d 421, 424-26 (9th Cir. 1983); *Cont'l Grain (Austl.) Pty. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979); *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977).

The Solicitor General, in her brief opposing certiorari, argued that it is more appropriate to analyze this issue in terms of whether plaintiffs have pleaded a cause of action under Section 10(b), citing the Court's recent decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 503 (2006). Brief for the United States as *Amicus Curiae* at 8-9. *See also Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813-14 (1993) (Scalia, J., dissenting).

Amici submit that the result in this case should be the same, regardless of which of these approaches the Court adopts. In either case, the issue is one of statutory interpretation: whether Congress intended the Exchange Act to apply to foreign trading. In resolving such issues, the Court has typically applied two canons of statutory construction: (1) the presumption against extraterritorial application of U.S. law, *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*"); and (2) the rule that ambiguous statutes must be interpreted to avoid unreasonable interference with the sovereign authority of other nations. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). The latter rule derives from principles of "prescriptive comity" – *i.e.*, "the respect sovereign nations afford

each other by limiting the reach of their laws." *Id.* at 164, 165; *Hartford Fire Ins.*, 509 U.S. at 817 (Scalia, J., dissenting).

Application of these canons of construction here requires affirmance of the Second Circuit's decision.

I. Congress Has Not Expressed Any "Clear Intent" To Permit Extraterritorial Application Of Section 10(b).

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.' " *Aramco*, 499 U.S. at 248 (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The Court must "assume that Congress legislates against the backdrop of [this] presumption," and that statutes apply only domestically unless a different "affirmative intention of the Congress [is] clearly expressed." *Aramco*, 499 U.S. at 248. Thus, unless a statute provides a clear expression of Congressional intent to apply its terms extraterritorially, courts must construe it to have only domestic effect. *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 455 (2007). This "presumption that United States law governs domestically but does not rule the world," *id.* at 454, is based on the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993).

In considering this presumption, courts have stated that the Exchange Act is silent regarding its extraterritorial application, *see*, *e.g.*, *Zoelsch*, 824 F.2d at 30, 33; *Cont'l Grain*, 592 F.2d at 416; *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.

1975), based on the understanding that Congress, in 1934, could not foresee the development of global securities markets. *See, e.g., Bersch*, 519 F.2d at 993. In fact, however, the legislative history of the Exchange Act shows that Congress was well aware of international securities markets and that there had been substantial international securities investment during the 1920's. *See* Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 691-94 (1990).

Petitioners argue that the text of Section 10(b) supports extraterritorial application (Pet. Br. 22-23), but a more careful reading compels the opposite conclusion. Petitioners ignore Section 10(b)'s requirement that the fraud must have been employed in connection with the purchase or sale of either (1) a security "registered on a national securities exchange" or (2) "any security not so registered." 15 U.S.C. § 78j(b).[3] Consistent with use of the term "national securities exchange" in other sections of the Act, the first clause clearly refers to transactions in securities registered on a *United States* exchange.[4] While the second clause was plainly intended to expand the scope of the statute to reach securities not registered on an organized exchange, there is no

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[3] Petitioners misquote the statute, and do not address the "purchase or sale" requirement at all. Pet. Br. 13. Section 10(b) was amended in 2000 to extend its applicability to include the purchase or sale of certain swap transactions, but that aspect of the purchase or sale requirement is not relevant here.

[4] *See*, *e.g.*, Section 6 of the Exchange Act, 15 U.S.C. § 78f, which establishes the requirements for an exchange to be registered as a "national securities exchange."

reason to believe that it was intended to expand the *geographic* scope of Section 10(b) to encompass the purchase or sale of any security anywhere in the world, including securities registered on foreign exchanges.[5] The more natural reading is that the second clause refers to transactions in unregistered securities *in the United States*. *See generally Circuit City Stores v. Adams*, 532 U.S. 105, 114-15 (2001) ("[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words").

But even if the Court finds this analysis inconclusive, there is plainly no "clear expression" of congressional intent that the provisions of the Exchange Act apply to foreign transactions. Petitioners (Pet. Br. 23) and some of their *amici* (*see*, *e.g.*, Brief for *Amici Curiae* Alecta Pensionsförsäking et al. ("Alecta Br."), at 8-9) make much of the fact that the Exchange Act – like a great many acts of Congress – defines "interstate commerce" to include commerce "between any foreign country and any State." 15 U.S.C. § 78c(a)(17). But this is precisely the sort of "boilerplate" jurisdictional language that the Court in *Aramco* held insufficient to demonstrate any clear congressional intent that the Act apply extraterritorially. 499 U.S. at 250-53. Thus, the presumption against extraterritorial application of U.S. laws

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[5] As Judge Friendly pointed out in *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336 & n.5 (2d Cir. 1972), the second clause was added in Conference Committee, without explanation.

applies, and precludes application of Section 10(b) and Rule 10b-5 here.[6]

Finally, even if there were some basis for concluding that Congress intended to permit the Securities and Exchange Commission ("SEC") to enforce Section 10(b) against foreign defendants in these circumstances, there is still no basis for concluding that Congress intended Section 10(b) to authorize damages claims by private litigants. As the Court recently noted, private rights of action pursuant to Rule 10b-5 are entirely "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). Section 10(b) is thus silent with respect to damages actions under Rule 10b-5, and there is no basis for overcoming the presumption against extraterritoriality in the context of damages actions based on foreign trading.[7]

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[6] The Alecta *amici* argue that "Congress could have, but chose not to, apply territorial limitations to Section 10(b)." Alecta Br. 10. This argument stands the presumption against extraterritorial application on its head. Congress is not required to carve out parts of statutes it wants to limit to domestic conduct; rather, it must "clearly express" when it wants a statute to apply extraterritorially.

[7] In addition, the comity issues discussed below are a lesser concern where government enforcement is involved. As the Court explained in *Empagran*, "private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." 542 U.S. at 171.

II. Applying Rule 10b-5 To Foreign Companies Based On Foreign Trading Would Unreasonably Interfere With The Securities Regulation Of Foreign Nations.

"[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. This canon of construction is based on the longstanding 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); it "is relevant to determining the substantive reach of a statute because 'the law of nations' . . . includes limitations on a nation's exercise of its jurisdiction to prescribe." *Hartford Fire Ins.*, 509 U.S. at 815 (Scalia, J., dissenting). Thus, courts should read generally-worded statutes in light of "principles of customary international law," which the courts "assume Congress ordinarily seeks to follow." *Empagran*, 542 U.S. at 164; *see also Microsoft*, 550 U.S. at 455 ("courts should 'assume that legislators take account of the legitimate sovereign interests of other nations' ") (quoting *Empagran*, 542 U.S. at 164). By precluding application of U.S. regulation to foreign conduct, these principles ensure that other sovereign nations are left to "independently . . . regulate [their] own commercial affairs," *Empagran*, 542 U.S. at 165, and that "the potentially conflicting laws of different nations [can] work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id*. at 164-65.

The concerns underlying this canon of interpretation are especially pressing in the context of extraterritorial securities regulation. The regulation of securities markets within a sovereign state inevitably involves complex policy judgments unique to the enacting state. Each nation must decide for itself how to curb fraud, how to balance investor protections against countervailing policies that promote growth and discourage unreasonable litigation costs, and how to allocate responsibility for enforcement between government agencies and private damages actions. Each nation's decisions on these fundamental issues reflect policy choices that are entitled to deference by other nations. *See Microsoft*, 550 U.S. at 455 (noting importance of comity in patent area, because "foreign law may embody different policy judgments about the relative rights of inventors, competitors, and the public") (quotation marks & citation omitted).

Petitioners argue that there is no need for concern about potential conflicts with foreign securities laws, because "anti-fraud enforcement objectives are broadly similar as governments and other regulators are generally in agreement that fraud should be discouraged." Pet. Br. 35-36. Although there is some support for this proposition in older lower court decisions, *see*, *e.g.*, *IIT v. Cornfeld*, 619 F.2d 909, 921 (2d Cir. 1980), and in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416 (1987), the Court in *Empagran* squarely rejected a similar argument: as the Court explained, "even where nations agree about primary conduct . . .

they disagree dramatically about appropriate remedies." 542 U.S. at 167.[8]

In some respects, European liability rules are more favorable to plaintiffs than U.S. law: for example, the EU and some member states enable plaintiffs to recover for certain securities law violations without proof of fraudulent intent,[9] whereas Rule 10b-5 plaintiffs must show intentional or reckless wrongdoing. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976). But to the extent that the U.S. provides a more attractive forum for plaintiffs claiming securities law violations (*see* pp. 22-29, *infra*), application of U.S. securities laws where plaintiffs purchased shares in foreign companies on foreign exchanges "would unjustifiably permit [foreign] citizens to

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[8] Plaintiffs in *Empagran* argued that "many nations have adopted antitrust laws similar to our own, to the point where the practical likelihood of interference with the relevant interests of other nations is minimal." 542 U.S. at 167. The Court, however, pointed out that even where nations agree on the undesirability of price-fixing, the availability of treble damages under U.S. law created incentives that would encourage foreigners to forum shop, discourage cooperation by foreign defendants in foreign enforcement actions, and otherwise undermine foreign law enforcement regimes. *Id.* The same is true here: as discussed below, the availability of private securities class actions and substantial contingent fees for plaintiffs' lawyers create powerful incentives for forum shopping in the United States at the expense of foreign proceedings.

[9] *See, e.g.,* French Civil Code Art. 1383 (imposing liability for negligence); *Spector Photo Group NV v. CBFA* (European Court of Justice, Dec. 23, 2009), ¶¶ 37-38, 62, *available at* http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-45/08 (intent is presumed where an individual knowingly in possession of inside information purchases or sells a security, unless it is shown that the inside information did not influence his actions).

bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic [ ] laws embody." *Empagran*, 542 U.S. at 167. In either case, the civil liability regimes in the U.S. and in the EU are significantly different, and the assertion of U.S. jurisdiction in such cases – thereby superimposing American anti-fraud rules on the independent regulatory regimes of foreign nations – would cause unnecessary friction between the U.S. and the EU. The Court in *Empagran* made clear that principles of prescriptive comity do not permit such acts of "legal imperialism." *Id.* at 169.

As we show below, these concerns are by no means imaginary. Permitting Rule 10b-5 class actions based on trading in shares in foreign companies on foreign exchanges would interfere with foreign securities regulation in a variety of important ways. With respect to the countries of the European Union, that interference would take place both at the EU level – where the EU has sought, through a variety of directives, to establish an integrated European capital market – and at the level of the individual member states, which must implement EU directives in a manner consistent with their own distinct practices, procedures and remedies.

A. EU Securities Regulation.

Beginning in 2003, the EU adopted a series of directives which have had an important impact on securities regulation in the EU. They include, *inter alia*, (1) the "Prospectus Directive,"[10] which created a

[10] Directive 2003/71/EC of the European Parliament and of the Council (Nov. 4, 2003).

unified process for public offerings; (2) the "Transparency Directive,"[11] which establishes minimum reporting obligations for companies with securities trading on regulated markets; and (3) the "Market Abuse Directive,"[12] which prohibits market manipulation and insider trading and regulates the disclosure of material information by issuers. Each of these directives regulates conduct that is frequently the subject of Rule 10b-5 litigation in the U.S.

The important policy objective underlying these directives was to create a single integrated capital market in the EU, in response to increasing international competition between financial markets.[13] While seeking to create a unified market, however, the EU left room for member states to pursue their own unique policies with respect to securities regulation in particular areas. For example, the Prospectus Directive, while harmonizing prospectus content requirements, generally leaves it to individual member states to establish enforcement mechanisms and standards of civil liability.[14]

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[11] Directive 2004/109/EC of the European Parliament and of the Council (Dec. 15, 2004).

[12] Directive 2003/6/EC of the European Parliament and of the Council (Jan. 28, 2003).

[13] EC, *Financial Services: Implementing the Framework for Financial Markets: Action Plan* (COM 1999); Speech of Baron Alexandre Lamfalussy (Feb. 15, 2001), *available at* http://ec.europa.eu/internal_market/securities/lamfalussy/index_en.htm.

[14] *See* Dorothee Fischer-Appelt & Jeffrey B. Golden, *The EU Prospectus and Transparency Directives – Towards A Unified European Capital Markets Regime*, *in* PLI's FOURTH ANNUAL INSTITUTE ON SECURITIES REGULATION IN EUROPE, at 31 (Practising Law Institute, 2004).

Similarly, under the Transparency Directive, individual EU member states can impose more stringent reporting requirements on issuers beyond the minimum required by the Directive. *See* Edward F. Greene et al., U.S REGULATION OF THE INTERNATIONAL SECURITIES AND DERIVATIVES MARKETS, § 7.03[4] (Aspen 2008). To the extent an EU member adopts such "super-equivalent" requirements, it will be a jurisdiction that is less desirable for issuers, but more desirable for investors. The choice between those alternatives, of course, is an important policy choice for each member. And, for issuers deciding which jurisdiction to select as a "home member state" (*i.e.*, the state principally responsible for regulation of the issuer), two important criteria are the civil liability regime a state has adopted and the existence of super-equivalent reporting requirements. *See id.*

If plaintiffs were permitted to sue foreign issuers under Rule 10b-5 based on foreign transactions, the exercise of U.S. jurisdiction would undermine the EU's comprehensive securities regulation regime and erode important differences between U.S. and EU disclosure requirements.[15] It would render the EU's

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[15] For example, European directives sometimes permit issuers to defer public disclosure of facts to protect a "legitimate interest" of the issuer – for example, where public disclosure might affect the outcome of pending negotiations, particularly "where the issuer's financial viability is in grave and imminent danger." *Autorité des Marchés Financiers* General Regulation, Art. 223-2. In the United States, disclosure may not be deferred; rather, material events that arise between regular periodic disclosures must be disclosed promptly pursuant to SEC Regulation 8-K. *See* 17 C.F.R. §§ 240.0 *et seq*. As another example, the Prospectus Directive imposes only limited controls on publicity surrounding public offerings. *See* Fischer-Appelt &

delegation of standards of civil liability to its member states superfluous, and eradicate carefully considered differences between EU members with respect to the civil remedies they provide and the disclosure requirements they have adopted. In their place, it would impose an overarching U.S.-based system of civil liability for securities fraud implicitly incorporating reporting and disclosure obligations established under U.S. law.

B. EU Member State Securities Regulation.

U.S. procedures, remedies and standards of civil liability in securities litigation are different from – and in many cases inconsistent with, or even offensive to – the procedures, remedies and standards that EU member states have adopted.

As prescribed by the EU, each member state has its own securities regulators that police securities fraud and insider trading, and investigate and prosecute violations. In France, for example, securities regulation is entrusted to the *Autorité des Marchés Financiers* ("AMF") (*i.e.*, the "Financial Markets Authority") – the French equivalent of the SEC – which is responsible for safeguarding investments, ensuring that issuers disclose material information, and supervising financial markets. The AMF has established rules for transactions in securities of publicly-traded companies, and monitors disclosures by issuers to ensure they provide adequate information

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Golden, *supra* note 14, at 23-24. By contrast, U.S. securities regulation emphasizes the manner of sale (*i.e.*, via prospectuses filed with the SEC), and prohibits conditioning of the market through research reports and other means. *Id.*

to market participants. The AMF also has enforcement powers that enable it, *inter alia,* to investigate suspected securities fraud and impose sanctions for violations of its regulations.[16]

As in many other European countries, such government enforcement actions provide France's primary vehicle for remedying securities law violations. French shareholders have the right to bring private securities actions in French civil courts. In addition, as "parties civiles," shareholders may initiate or join in criminal prosecutions involving securities law violations, and the final judgment, if the case proceeds to trial, will include a determination of both criminal and civil liability.[17] But there is no mecha-

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[16] The AMF recently concluded an extensive, three-year investigation into EADS' disclosures regarding the production delays affecting Airbus' A380 aircraft, which are the subject of the pending securities class action against EADS in the U.S. In December 2009, the AMF's Sanctions Committee determined that EADS' disclosures were not misleading and that the company had complied with all applicable market information duties. A criminal investigation in France relating to the same issues remains pending. In Germany, the *Bundesanstalt fur Finanzdienstleistungsaufsicht* ("BaFin") – *i.e.*, the "Federal Financial Supervisory Authority" – opened an investigation in 2006 into EADS' disclosures about the A380, but discontinued the investigation the following year, without finding any misconduct. A related action has been filed in the Netherlands which, if allowed to proceed, would initiate an inquiry into whether EADS management acted appropriately in connection with the A380 disclosures, and could, through subsequent liability proceedings, result in civil liability to a class of EADS shareholders.

[17] Once an investigation is initiated, the "partie civile" has access to the investigative file and is permitted to make suggestions regarding the conduct of the investigation. If the investigation determines that the facts warrant, the matter is referred

nism in French law comparable to the U.S. "opt-out" class action through which private parties can litigate securities claims on an aggregate basis, and other French policy choices – with respect to discovery, the requirements for establishing reliance, and the payment of legal fees – make it more difficult for private plaintiffs to proceed independently, and create incentives for plaintiffs to allow public authorities, in the first instance, to establish a violation of the securities laws as a predicate for private claims. *See* Véronique Magnier, *Information Boursière et Préjudice des Investisseurs*, ¶ II.A (Recueil Dalloz 2008), at 558.[18]

Thus, transactions involving foreign securities on foreign exchanges are already extensively regulated by foreign regulatory regimes.[19] Any U.S. attempt to

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for trial, in which counsel for the partie civile is entitled to participate.

[18] *Amici* would be pleased to provide the Court, upon request, with English translations of any of the foreign language materials cited in this brief.

[19] Other European countries have their own securities enforcement regimes. In Germany, BaFin is a single, integrated regulator of Germany's banking, insurance, and securities markets. Swethaa Ballakrishnen et al., *An Overview of Securities Enforcement in Germany*, at 9 (May 11, 2008). BaFin is responsible for ensuring the stability and integrity of the German financial system, and has wide-ranging powers of investigation and intervention. *Id.* at 12. In the securities arena, BaFin regulates, among other things, information disclosure, insider trading, and market manipulation. *Id.* at 16-17. In the Netherlands, the primary securities regulator is the *Autoriteit Financiële Markten* ("Authority for the Financial Markets," or "AFM"). The AFM is an independent authority that regulates insider trading, market manipulation, issuer disclosures and reporting, and offerings. The AFM can impose

extend application of the Exchange Act to such transactions would unreasonably interfere with the sovereign authority of these foreign nations.[20]

C. Specific Areas Of Conflict Between U.S. Securities Litigation And EU Policies.

We discuss below several specific areas where U.S. securities litigation can and has interfered with European practices and policies.

1. U.S. Discovery Practices Offend The Policies Of France And Other EU Member States.

Subjecting foreign defendants to the burdensome discovery common to American securities litigation – particularly when the discovery relates to conduct that has little or no connection to the United States – would undermine the policy choices made by foreign governments and exacerbate frictions created by broad U.S. discovery demands.

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fines and penalties, and may refer violations for public prosecution.

[20] European nations have bristled at the idea that investors purchasing stocks on foreign exchanges will not be adequately protected from corporate fraud unless U.S. courts extend jurisdiction over their claims. *See* John D. Kelly, *Let There Be Fraud (Abroad): A Proposal for a New U.S. Jurisprudence with Regard to the Extraterritorial Application of the Anti-Fraud Provisions of the 1933 and 1934 Securities Acts*, 28 LAW & POL'Y INT'L BUS. 477, 495 (1997). There is no reason to believe that France, Germany, the Netherlands, or other members of the EU are unable to effectively regulate securities markets within their jurisdictions, or that they want U.S. assistance in prosecuting fraudulent activity. *Id.*

The French legal system, like other civil law systems, has a markedly different approach to litigation and discovery than the United States. American discovery is extremely broad and tends to be controlled primarily by the parties in pre-trial proceedings. In France, discovery is much narrower and some aspects, particularly the taking of oral testimony, are controlled by the court. The parties in France are generally required to produce only documents that are explicitly or implicitly referred to in their briefs. Further discovery is restricted: the court may, upon request, order the production of additional documents, but only if they are identified with the precision required to verify that they are relevant to the case. Broad requests for "all documents referring or relating to" a general subject matter – while typical in the U.S. – would not be permitted in France absent a specific showing of the relevance of all such documents. Moreover, "relevance" in French terms means evidence that will in fact be admissible at trial,[21] whereas U.S. rules expressly permit discovery of information that need not be "admissible at trial" if it is "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1). Oral testimony is rarely permitted in French civil litigation, but when it is permitted, the judge personally conducts the taking of testimony and determines what questions will be asked.

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[21] *See* French Code of Civil Procedure, Arts. 9-11, *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=39&r=7079; *id.* Book I, Title VII, Sub-Title I, Chapters I-III, *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=39&r=7115. *See generally* S. Guinchard, *Droit et Pratique de la Procédure Civile*, at 803-06 (2009/2010).

Imposing U.S. discovery rules on foreign defendants when the action relates to conduct that has little or no connection to the United States would undermine the sovereignty of foreign nations by eliminating the role of their judiciaries in the discovery process and subjecting foreign companies to requirements inconsistent with the policy choices made by their own governments.[22] At least fifteen foreign countries – including France, the Netherlands, Germany, Great Britain, Italy, and Belgium – have enacted blocking legislation in an effort to ensure that their sovereign policy choices regarding the conduct of civil litigation are not overridden by U.S. courts. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 442, reporters' notes 1, 4; *see also Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 526 & n.6 (1987) (discussing French statute).[23] Such blocking statutes do "not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate the statute." *Aérospatiale*, 482 U.S. at 544 n.29. But the existence of a blocking statute is

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[22] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra*, § 442, reporters' note 1 ("The common theme of foreign responses to United States requests for discovery is that, whatever pretrial or investigative techniques the United States adopts for itself, they may be applied to persons or documents located in another state only with permission of that state.").

[23] *See also In re Avocat "Christopher X,"* Cass. Crim. (Dec. 12, 2007, Pourvoi no. 07-83.228, Bulletin Criminel 2007, no. 309) (a recent decision of the French *Cour de Cassation* – the French Supreme Court – upholding a fine imposed on a French lawyer who tried to obtain information from a witness in France, in violation of the blocking statute, in connection with litigation in California).

nevertheless relevant to a court's comity analysis, in that "its terms and its enforcement identify the nature of the sovereign interests in nondisclosure of specific kinds of material." *Id.* Accordingly, the federal courts, in the interest of comity, are required to give "due respect" to "any sovereign interest expressed by a foreign state" when responding to foreign litigants' objections to U.S. discovery demands. *Id.* at 546.

Thus, the friction between broad U.S. discovery requirements and important policies underlying foreign judicial systems, particularly in the EU, is very real. This friction is not unique to securities litigation, but it would be exacerbated if plaintiffs who purchased shares in foreign companies in foreign markets were permitted to bring securities claims in the United States. To the extent that foreign companies are unreasonably compelled to participate in litigation in the United States, "expensive, time-consuming battles about discovery [will] proliferate . . . [and] can promote disharmony among national and international authorities." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 268-69 (2004) (Breyer, J., dissenting).

2. U.S. Fee Arrangements Conflict With The Policies Of Many European Countries.

U.S. rules regarding responsibility for attorneys' fees differ significantly from the policies prevalent in Europe. In the United States, each party bears its own legal costs, unless a statute specifically provides for cost-shifting. By contrast, France, Germany, the Netherlands, and other members of the EU generally require the losing party to pay the legal fees of both

litigants.[24] In addition, contingency fee arrangements, which are routine in U.S. securities litigation, are prohibited or severely limited in most countries in Europe. *See* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 198 (2009).[25] These rules reflect the policies of the EU member states, which typically rely upon government enforcement of securities laws. Europeans recognize that their fee rules may reduce the incentives for plaintiffs to bring civil securities litigation, but consider that outcome preferable to giving plaintiffs' lawyers incentives to bring speculative claims in hopes of obtaining windfall settlements and fees. *See* Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the* Acquis Communautaire, 15 J. TRANSNAT'L L. & POL'Y 281, 287-88 (2006).[26] More-

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[24] *See* French Code of Civil Procedure, Arts. 696, 700 (requiring losing party to pay legal fees in amount set by the court and subject to court's discretion); Dutch Code of Civil Procedure Arts. 237, 241, and Dutch Civil Code Book 6 Art. 96(2) (legal fees in standardized amounts awarded to winning party, subject to court's discretion); German Code of Civil Procedure § 91 *et seq*. (losing party pays legal fees set by court subject to statutory rules on lawyer remuneration).

[25] German and Dutch law generally prohibit contingent fee arrangements. *See* Ballakrishnen et al., *supra* note 19, at 56 n.124; Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the* Acquis Communautaire, 15 J. TRANSNAT'L L. & POL'Y 281, 287 (2006). France allows only very limited forms of contingent fees. *See id.*; Magnier, *supra*, at n.37.

[26] For example, although Germany has a process for litigating securities claims through "model proceedings," making litigation of common issues more efficient, German law *prohibits* attorneys acting on behalf of model plaintiffs from being compensated for work done for anyone other than their own

over, European countries believe that their fee rules avoid conflicts of interest between plaintiffs and their attorneys – for example, the conflicts that could arise if attorneys compensated on a contingency basis press to settle claims for less than is in the client's interest (or decline settlements that might be in the client's interest) to ensure a recovery that will cover their investment in the litigation. *Id.* at 288. Permitting plaintiffs who are discouraged from litigating in Europe by European fee structures to take advantage of U.S. courts where contingency arrangements are permitted clearly undermines these significant European policy choices.

More broadly, the availability of contingent fees in the United States constitutes a powerful incentive for lawyers to bring securities cases – and especially class actions – in the United States, regardless of where the underlying conduct occurred or where the securities were traded. If plaintiffs were permitted to bring securities lawsuits in the United States against foreign issuers based on foreign trading, this strong incentive to shop for a U.S. forum, regardless of its appropriateness, would exacerbate the tensions between U.S. and foreign securities regulation.

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client. This rule was established to avoid creating a financial incentive for attorneys to bring cases likely to develop into model proceedings. Dietmar Baetge, *Class Actions, Group Litigation & Other Forms of Collective Litigation (Germany)* 27 (2007), *available at* http://www.law.stanford.edu/library/globalclassaction/PDF/Germany_National_Report.pdf.

3. The U.S. Fraud-On–The-Market Theory Is Inconsistent With European Rules Requiring Proof Of Individual Reliance, And Creates A Substantial Inducement For International Forum Shopping.

In the United States, plaintiffs in securities fraud cases need not prove individualized reliance on the alleged misstatements or omissions at issue. Instead, courts may presume, under the fraud-on-the-market theory, that plaintiffs relied on the integrity of the stock price when they purchased their shares. *Basic Inc. v. Levinson*, 485 U.S. 224, 241-42 (1988).

By contrast, private plaintiffs seeking damages for securities law violations in Europe are generally not entitled to any such presumption and must establish individualized reliance. *See*, *e.g.*, *Société Eurodirect Marketing v. Pfeiffer*, no. 03-20600 (Cass. Com. Nov. 22, 2005) (French law requires each individual plaintiff to prove reliance); Judgment of the Bundesgerichtshof (the German Federal Supreme Court), dated 28 November 2005 – II ZR 80/04 (rejecting fraud-on-the-market theory as developed in *Basic Inc. v. Levinson*); *Warlop v. Lernout*, 473 F. Supp. 2d 260, 264 (D. Mass. 2007) (stating that Belgian law does not recognize fraud-on-the-market theory).

If Section 10(b) were interpreted to apply to foreign trading in the shares of foreign issuers, the availability of the fraud-on-the-market presumption in the United States would enable many plaintiffs who would be unable to establish a claim for damages in Europe to recover on the same claim in the U.S. courts. This would undermine the policies underlying European rules requiring proof of reliance, and

create a powerful incentive for international forum shopping.

Petitioners' *amici* glory in this result, arguing that in a "globally efficient market, 'reliance' does not exist in any single country, but is instead a result of information that is generally available worldwide." Alecta Br. 25. In effect, Petitioners' *amici* urge the Court to recognize a fraud-on-the-market theory that would apply on a global basis, overriding all jurisdictional boundaries and establishing the federal district courts as a sort of "world court" of plaintiffs' securities litigation. This argument, if accepted, would permit U.S. damages actions based on alleged misrepresentations made anywhere in the world, brought by plaintiffs of any and all nationalities, regardless of any limitations that their local law might seek to impose. There is no reason to believe that Congress in enacting Section 10(b) intended any such result. *Cf. Empagran*, 542 U.S. at 166-67 (rejecting similarly broad claim under the antitrust laws).[27]

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[27] The dangers posed by indiscriminate imposition of the fraud-on-the-market theory to transactions beyond U.S. territorial boundaries – and the real risk of conflict with the policies and sovereignty of foreign nations – is illustrated by the recent jury verdict in the *Vivendi* case. In *Vivendi*, 37% of the company's ordinary shares were held by French shareholders who had purchased their shares on the Paris stock exchange; only 25% were held by U.S. investors, with the rest held mostly by other Europeans. *See In re Vivendi Universal, SA Sec. Litig.*, 242 F.R.D. 76, 81 (S.D.N.Y. 2007). But the district court certified a class that included French, British and Dutch, as well as American, shareholders, and a jury recently found Vivendi liable under Section 10(b). Plaintiffs' counsel have asserted publicly that class members could recover in excess of $9 billion, following completion of a claims process. *See* p. 4, *supra*. If upheld on appeal, the result would be imposition of a

4. These Comity Concerns Are Exacerbated By U.S. Class Action Procedures.

Securities class actions raise additional conflicts with the policies of France and other European nations, particularly with respect to the question whether absent class members will be bound by U.S. judgments.

French constitutional principles place great emphasis on individual notice, consent, and party autonomy in its legal system. These values are reflected in rulings of the Constitutional Council, the highest constitutional authority in France, holding that the French Constitution requires individual class members be provided with actual personal notice of class proceedings, and that each individual retains the rights to determine how his interests will be represented and to terminate his involvement at any point prior to judgment. *See Alstom*, 253 F.R.D. at 286 (citing Decision 89-257 of July 25, 1989, at 9503). The Constitutional Council recently reaffirmed the importance of this aspect of "personal freedom" in French public policy. As the Council explained, "[i]n the absence of the observance of this individualized consent [to sue], which does not exist, for example, in the Anglo-Saxon mechanisms of 'opt-out' class actions, the individual would, abusively, be deprived of a right in violation of the Constitution." Commentary on Decision No. 2007-556 DC, pub-

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staggering judgment on an important French company, purportedly for the benefit principally of French and other European shareholders, based on a theory of liability that is flatly inconsistent with the policy choices made by France, where Vivendi and most of its shareholders are located.

lished in *Les Cahiers du Conseil Constitutionnel*, No. 23, Aug. 6, 2007.

In light of these constitutional principles, several reports recently issued by French government commissions have emphasized that opt-out class actions violate French public policy. *See* Report of the *Commision pour la Libération de la Croissance Française* ("Commission to Promote Growth in France" or "Attali Commission," appointed by President Nicolas Sarkozy), Decision No. 191, at 144 (Jan. 2008) (concluding that any class action procedure in France could only bind plaintiffs who opt in); Report of the Coulon Commission to the French Minister of Justice, at 96 (Jan. 2008) (stating that "the opt-out model . . . is constitutionally uncertain" in France, and recommending that any class action procedure in France be based on an opt-in model); *Alstom*, 253 F.R.D. at 286 (discussing report of 2005 working group established by former French President Jacques Chirac, which concluded that the Constitutional Council's ruling prohibited the opt-out class action procedure).[28]

Other European countries have adopted similar policies to ensure that individuals should not be bound by litigation in which they are not direct participants. For example, Germany's Capital Investors' Model Proceeding Law established a judicial process for securities fraud claims in which common issues affecting multiple individual suits

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[28] *See also Alstom*, 253 F.R.D. at 286-87 (discussing 2007 letter prepared by French Ministry of Justice, which advised court that "[t]he opt out mechanism … does not comply with the constitutional rules established" by the Constitutional Council); *Vivendi*, 2009 WL 855799, at *4 (same).

can be litigated together and applied uniformly to the pending cases.[29] However, the judicial determinations made in a model proceeding only apply to pending cases brought by individual litigants, and have no effect on unasserted claims. *See* Mark C. Hilgard & Jan Kraayvanger, *Class Actions and Mass Actions in Germany*, Litigation Committee Newsletter (IBA Legal Practice Division), Sept. 2007, at 40.

These policies create a very real risk that the courts in France and other European countries would not enforce or grant preclusive effect to U.S. class action judgments in securities cases. Most European countries – including France – reserve the right to refuse to enforce judgments that violate local public policy. Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 33 (2007). Many foreign countries do not have procedures like the U.S. class action, and even those that do rarely permit courts to bind plaintiffs who have not affirmatively opted into the litigation. *Id.* Thus, when a judgment is entered against a foreign defendant in a "foreign-cubed" class action, there is a

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[29] Under the German law, any party in a pending securities case can petition the court to open a case in which common issues of fact and/or law are determined in one set of proceedings ("model case proceedings"), with binding effect on all plaintiffs who have filed similar actions. Such model case proceedings may proceed in the Higher Regional Court if at least ten such petitions are filed in similar cases. The Higher Regional Court decides the common legal issues, and its decision binds the courts where the individual cases are pending. *Id.*

significant risk that a foreign court – particularly in the EU – will refuse to enforce it.[30]

The potential refusal of foreign courts to enforce U.S. class action judgments has at least two negative effects. First, it can lead to costly litigation in the foreign state on the ancillary issue of whether the judgment should be enforced. Second, it could enable foreign class members to relitigate issues that have already been adjudicated in the U.S., providing plaintiffs with at least two "bites at the apple" should they not be satisfied with the outcome of the U.S. proceeding. Thus, defendants in U.S. class actions may be unable to benefit from obtaining a favorable judgment against foreign nationals; equally important, defendants are also unable to "buy peace" with a settlement, because the settlement will not prevent new litigation by foreign plaintiffs in jurisdictions where the resulting judgment of dismissal would not be given preclusive effect.

III. The Anti-Fraud Provisions Of The Exchange Act Do Not Reach Transactions In Foreign Securities Purchased On Foreign Exchanges.

Although plaintiffs propose that the Court adopt a test based on the "materiality" and "substantiality" of U.S. contacts (Pet. Br. 26, 31), there is no statu-

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[30] Indeed, U.S. judges have reached different conclusions on the question whether a U.S. judgment in an opt-out securities class action against a French issuer would be recognized in France. *Compare Vivendi*, 242 F.R.D. at 95-103 (concluding that an American judgment would "more likely than not" be recognized in France), *with Alstom*, 253 F.R.D. at 282-87 (holding that a judgment in a U.S. opt-out class action would probably not be recognized by French courts).

tory basis for such a test. The type of fact-intensive analysis that such a test implies would also result in *ad hoc*, unpredictable determinations of whether the Exchange Act applies in particular cases, and could require extensive litigation, making it difficult for a district court to promptly dismiss cases that are not covered by the Exchange Act and improperly subjecting foreign issuers to extensive litigation before that issue can be determined. Moreover, as Justice Blackmun noted in *Aérospatiale*, "courts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own," and have "little competence in determining precisely when foreign nations will be offended by particular acts." 482 U.S. at 552-53 (separate opinion). A test based on such subjective factors would impose extensive costs on defendants whose conduct is not within the reach of the Exchange Act, and cause precisely the kind of interference with the policies of foreign nations that the comity doctrine is intended to prevent. *See Empagran*, 542 U.S. at 168-69 (rejecting argument that courts could address comity concerns on a case-by-case basis because a case-by-case approach would be "too complex to prove workable").[31]

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[31] Petitioners argue that the Court need not concern itself with comity issues, since the district courts can always dismiss predominantly foreign cases pursuant to the doctrine of *forum non conveniens*. Pet. Br. 41-42. However, this argument simply evades the question at hand – *i.e.*, whether Congress intended to provide a cause of action under the Exchange Act in such cases. The fact that *forum non conveniens* also permits dismissal in proper cases (a determination which involves many considerations other than comity) does not mean that the demands of comity can be ignored in interpreting the scope of the Exchange Act. And, as discussed above, leaving the issue for resolution on *forum non conveniens* grounds would improperly subject foreign defendants who are not subject to the

Instead, the Court should interpret the Exchange Act to establish a bright-line rule that Section 10(b) does not apply to purchases of foreign securities on foreign exchanges. *See* Kelly, *supra* note 20, at 478; Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 465 (2009); *accord* Buxbaum, *supra*, at 68 (anti-fraud provisions should be limited to claims arising out of transactions on U.S. markets). As discussed above, this simple rule is supported by the text of the Exchange Act. It also makes sense for other reasons. From a comity perspective, it would require U.S. courts to defer to other countries which have a greater interest in regulating the conduct, *i.e.*, the countries in which the issuer is located and the securities transactions occurred. And it would "provide[ ] an easily understandable and, importantly, intuitively appealing rule for investors" that "is likely to comport with most investors' a priori views on when the U.S. laws apply." Choi & Silberman, *supra*, at 500.

Exchange Act to extensive and burdensome litigation in the United States before that issue could be determined.

CONCLUSION

For the foregoing reasons, and those in Respondents' brief, the Court should affirm the decision below.

Respectfully submitted,

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