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IN THE

Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief of *Amici Curiae* the Securities Industry and Financial Markets Association, the Association for Financial Markets in Europe, the Chamber of Commerce of the United States of America, the United States Council for International Business, the Association Française des Entreprises Privées, and GC100 In Support of Respondents

DEBORAH M. BUELL
Counsel of Record
GIOVANNI P. PREZIOSO
MEREDITH KOTLER
LAUREN L. PEACOCK
JORGE G. TENREIRO
SUZANNE B. MCMILLAN
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, N.Y. 10006
(212) 225-2000
dbuell@cgsh.com
Counsel for Amici Curiae
(continued on the reverse)

IRA D. HAMMERMAN
KEVIN CARROLL
Securities Industry and Financial Markets Association
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7300

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CHARLENE B. FLICK
United States Council for International Business
1212 Avenue of the Americas
New York, N.Y. 10036
(212) 354-4480

Counsel for Amici Curiae

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Am. Banana Co. v. United Fruit Co.,
213 U.S. 347 (1909) 30-31

Basic Inc. v. Levinson,
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Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 9, 35, 36

Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc., 592 F.2d 409
(8th Cir. 1979) 37

Cornwell v. Credit Suisse Group,
No. 08 Civ. 3758 (VM), 2009 WL 3241404
(S.D.N.Y. Oct. 5, 2009) 10

E.E.O.C. v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) ("*Aramco*") .... *passim*

F. Hoffman-La Roche Ltd. v. Empagran,
542 U.S. 155 (2004) .... *passim*

In re Alstom SA Sec. Litig.,
406 F. Supp. 2d 346 (S.D.N.Y. 2005) 37

In re Optimal Strategic U.S. Equity Fund Sec. Litig., 648 F. Supp. 2d 1388
(J.P.M.L. 2009) 10

In re Royal Ahold N.V. Sec. & ERISA Litig.,
351 F. Supp. 2d 334 (D. Md. 2004) 14

Page(s)

Itoba Ltd. v. LEP Group PLC, 54 F.3d 118 (2d Cir. 1995) 14

McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) 30

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006) 35

Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007) .... *passim*

New York Cent. R.R. Co. v. Chisholm, 268 U.S. 29 (1925) 30

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) .... *passim*

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) 7, 35

United States v. Johnson, 529 U.S. 53 (2000) 28-29

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083 (1991) 9, 35, 36

Rules and Statutes

15 U.S.C. § 78dd (2010) .... *passim*

15 U.S.C. § 78j(b) (2010) .... *passim*

Fed. R. Civ. P. 23 18

Page(s)

Foreign Rules and Statutes

Australian Securities and Investments Commission Act, 2001 § 12GD 17

Civil Procedure Rule (U.K.) 19.10-.12 (2008)................................ 21

Civil Procedure Rule (U.K.) 44.3(2) (2008).................................. 22

Class Proceedings Act, 1992, S.O. 1992....................................... 22

Corporations Act, 2001, c. 7 § 1022B(3) (Austl.) 17

Dutch Civil Code (Burgerlijk Wetboek) arts. 3:305a, 3:305b (2008) 18-19

French C. Com. arts. 225-120, 225-252 (2010), *available at* http://www.legifrance.gouv.fr/affichCode.do;jsessionid=6E3121AB386F2B0FA14F42ADCB6AAEFF.tpdjo03v_3?cidTexte=LEGITEXT000005634379&dateTexte=20100221 21

French C. Mon. & Fin. arts. L452-1, L452-2 (2010), *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=25&r=899.... 18

Spanish Law of Civil Judgment 1/2000 21

Other Authorities

78 Cong. Rec. 2264 (Feb. 9, 1934) 29

Page(s)

Bernard Black et al., *Legal Liability of Directors and Company Officials*, 2008 Colum. Bus. L. Rev. 1 (2008) 20

Brief for German and Italian Legal Scholars as *Amici Curiae*, Infineon Technologies AG v. Dolan, No. 09-15857 (9th Cir. Sept. 9, 2009)....................... 20, 21

Bundesministerium der Justiz, The German 'Capital Markets Model Case Act', *available at* http://www.bmj.bund.de/files/-/1056/EnglishInfoKapMuG.pdf...... 19, 21

Charles Arsouze & Patrick Ledoux, *L'indemnisation des victimes d'infractions boursières*, 4 Bulletin Joly Bourse 399 (2006) 17

Committee on Capital Markets Regulation, *Committee on Capital Markets Regulation Completes Survey Regarding the Use By Foreign Issuers of the Private Rule 144A Equity Market* (Feb. 2009), *available at* http://www.capmktsreg.org/pdfs/09-Feb-13_Summary_of_Rule_144A_survey.pdf 13

Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* (Nov. 30, 2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.................. 14

Page(s)

Committee on Capital Markets Regulation, *The Global Financial Crisis: A Plan for Regulatory Reform* (May 2009), *available at* http://www.capmktsreg.org/pdfs/TGFC-CCMR_Report_(5-26-09).pdf... 24

Cornerstone Research, *Securities Class Action Filings – 2009: A Year In Review* (2010), *available at* http://securities.cornerstone.com/pdfs/Cornerstone_Research_Filings_2009_YIR.pdf 10

Daw Hwan Chung, *Introduction to South Korea's New Securities-Related Class Action*, 30 J. Corp. L. 165 (2004) 19

Global Legal Group, *The International Comparative Legal Guide to: Class & Group Actions 2010* (2009)...............*passim*

Green Paper on Consumer Collective Redress – Questions and Answers, Memo/08/741 (Nov. 27, 2008)................................ 22

H.R. Rep. No. 73-1383 (Apr. 27, 1934) 29

Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14 (2007) ...10, 21, 23

Harold S. Bloomenthal & Samuel Wolff, *International Capital Markets and Securities Regulation* (2009) 20, 21

Page(s)

Henry M. Paulson, Secretary, U.S. Dep't of Treasury, Remarks at Forum on International Investment (May 10, 2007), *available at* http://www.treasury.gov/press/releases/hp398.htm.................... 11-12

Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Law*, 1743 PLI/Corp. 1243 (2009)................ 14

John C. Coffee, *Corporate Securities*, N.Y.L.J. (Sept. 18, 2008).................... 13, 15

Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action* (ABA Annual Meeting 2006)............... 21-23

Lawrence S. Liu, *Simulating Securities Class Actions: The Case in Taiwan* (2000), *available at* http://ssrn.com/abstract=251224 21

Mark L. Berenblut et al., NERA Economic Consulting, *Trends in Canadian Securities Class Actions: 1997-2008* (2009), *available at* http://www.nera.com/image/PUB_Recent_Trends_Canada_0109_Final. pdf.......... 17

McKinsey Global Institute, *Global Capital Markets: Entering a New Era* (Sept. 2009), *available at* http://www.mckinsey.com/mgi/reports/pdfs/gcm_sixth_annual_report/gcm_sixth_annual_report_full_report.pdf..................................... 12, 13

Page(s)

Michael Bloomberg & Charles Schumer, *Sustaining New York's and US' Global Financial Services Leadership* (Jan. 22, 2007), *available at* http://www.fr.com/practice/McKinsey.pdf 13-14

Michael D. Mann et al., *Developments in the Internationalization of Securities Enforcement*, 1743 PLI/Corp. 789 (2009) ... 16

Michael Duffy, *'Fraud on the Market': Judicial Approaches to Causation and Loss from Securities Nondisclosures in the United States, Canada and Australia*, 29 Melb. U. L. Rev. 621 (2005) 17, 21

Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 Comm. L. World Rev. 123 (2002)........................ 22

Pricewaterhouse Coopers LLP, *2008 Securities Litigation Study* (2009), *available at* http://10b5.pwc.com/PDF/NY090894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF................... 23

Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 Vand. L. Rev. 1 (2009).................... 22

Page(s)

Rick L. Weddle, *Supplemental Report to Testimony before the Subcommittee on Economic Policy – Funding for Invest in America to Attract Investment, Create Jobs and Stimulate Growth Industries* (submitted Dec. 18, 2009) 12-13

S. Rep. No. 73-792 (Apr. 20, 1934) 29

Samuel P. Baumgartner, *The Globalization of Class Actions: Switzerland*, 622 Annals Am. Acad. Pol. & Soc. Sci. 179 (2009) 20

Sanzhu Zhu, *Civil Litigation Arising From False Statements on China's Securities Market*, 31 N.C. J. Int'l L. & Com. Reg. 377 (2005) 20, 23

SEC Speaks in 2010, 1784 PLI/Corp. 519 (2010) 16, 24

SEC Strategic Plan for Fiscal Years 2010-2015, Draft for Comments, *available at* http://www.sec.gov/about/secstratplan1015.pdf... 24

Securities and Exchange Commission, *International Registered and Reporting Companies* (June 11, 2009), *available at* http://www.sec.gov/divisions/corpfin/internatl/companies.shtml 15

Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903 (1998).............23, 24-25

Page(s)

"Stock Exchange Practices," Hearings before the Senate Banking and Currency Committee on S. Res. 84, S. Res. 56 and S. Res. 97, 73d Cong. 6569 (1934)........................ 29

U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty* (Oct. 2008), available at http://investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iia_main_001171.pdf...11, 12, 13

Veronique Magnier, *Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters*, *available at* http://www.law.stanford.edu/display/images/dynamic/events_media/France_National_Report.pdf................ 21

Winand Emons & Nuno Garoupa, *The Economics of US-style Contingent Fees and UK-style Conditional Fees* (Bern University Discussion Paper Series 04-07, 2004), *available at* http://www.vwl.unibe.ch/papers/dp/dp0407.pdf..................... 21

WSJ Staff, *Geithner Remarks on Financial Stability Plan*, Wall St. J., Feb. 10, 2009, http://blogs.wsj.com/economics/2009/02/10/geithner-remarks-on-financial-stability-plan/tab/article/............................... 13

INTEREST OF *AMICI CURIAE*[1]

Amici are comprised of an extremely diverse group of preeminent business and financial organizations, both in the United States and abroad, and they hold a unique viewpoint unrepresented by either party.

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. As a leading advocate in financial markets, SIFMA brings a perspective that is not represented by the parties.

The Association for Financial Markets in Europe ("AFME") represents a broad array of European and global participants in the wholesale financial markets. Its 190 members comprise all pan-EU and global banks as well as key regional banks, brokers, law firms, investors, and other financial market participants. AFME aims to promote safe,

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

sound, and efficient wholesale financial markets; engage constructively with stakeholders and policymakers toward ensuring open European and global markets that benefit from well-crafted, globally consistent regulations; foster the adoption of market-led solutions, standards, and practices; and provide authoritative industry expertise and views for public officials, private individuals, and the media. As a representative of international financial market participants, AFME has a stake in this case's potential effect on foreign and global markets.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber directly represents 300,000 members and indirectly represents an underlying membership of three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Chamber members transact business throughout the United States and a large number of countries around the world. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to the nation's business community.

A driving force for American business, the United States Council for International Business ("USCIB") works to promote an open system of world trade, finance, and investment in which

business can flourish and contribute to economic growth, human welfare, and protection of the environment. Its membership includes some 300 U.S. companies, professional services firms, and associations. For USCIB, an organization with a primary goal of promoting U.S. competitiveness, this case addresses issues of fundamental importance.

Association Française des Entreprises Privées ("AFEP") is an organization that represents 90 of the largest French companies, including several with shares listed on the New York Stock Exchange and many more with unlisted American Depository Receipt trading facilities in the United States. AFEP plays a leading role in commenting on French, European, and international legal, regulatory, and financial developments, from the perspective of its member companies. The French listed companies that belong to AFEP had a market capitalization of approximately 760 billion euros as of December 31, 2008, and aggregate sales of more than 1.4 trillion euros in 2008. They employ more than 5.4 million people. As an organization of publicly traded French companies, AFEP has a distinct interest in the implications of this case.

GC100 is the Association of General Counsel and Company Secretaries of the FTSE 100, the 100 largest U.K.-listed companies. There are currently some 120 members of the group representing some 90 companies. As an organization representing publicly traded U.K. companies, the GC100 has a strong interest in this case, in particular because of

the uncertainties and costs associated with U.S. securities class actions, which have diminished the attractiveness of U.S. markets to U.K. issuers.

SUMMARY OF ARGUMENT

The rapid globalization of financial markets—volatile and turbulent in recent years—poses significant competitive challenges for the United States. These are challenges recognized not only by *Amici* and their members as market participants, but also by respected scholars in law, economics, and finance, and by leaders at all levels of government and across the political spectrum. Expanding Section 10(b) of the Securities Exchange Act of 1934 (the "Act"), 15 U.S.C. § 78j(b), to permit so-called foreign-cubed securities class actions—litigation with abusive potential long acknowledged by the courts and Congress—would further undermine the United States' competitive stance, rendering it a less attractive venue for foreign investment and capital raising, and impeding global regulatory efforts in the wake of the financial crisis.

A foreign jurisdiction need look no further than the facts of this case to demonstrate, for its competitive advantage, the perils of doing business in the United States. An Australian company, with virtually all of its shareholders outside the United States, faces the possibility of protracted litigation in U.S. courts for alleged misstatements made to its non-U.S. investors in connection with securities

transactions effected in the Australian market. Perhaps even more damaging, Petitioners principally rest this unprecedented attempt to expand Section 10(b)'s private right of action to this foreign-cubed securities action, rightly rejected by the district court and the Court of Appeals, on the Australian company's decision to invest in a U.S. subsidiary. In other words, Petitioners seek to convert the decision to acquire a U.S. business into a securities litigation risk factor for foreign companies.

The uncertainties and costs associated with securities class actions have been widely recognized as key factors diminishing the attractiveness of U.S. markets. Initial public offerings have gravitated to other jurisdictions in far greater proportions in recent years. Numerous foreign issuers, whose securities previously traded here, have chosen to exit U.S. markets, with well over forty percent of all companies from France, the United Kingdom, Germany, Italy, and Australia having deregistered their securities from the United States since 2007. Allowing a foreign-cubed securities class action to proceed in U.S. courts can only strengthen the disincentives against investment in the United States, just as it would also dangerously subvert the competing policy choices of foreign jurisdictions—at a time when global turmoil in the financial markets has made international regulatory coordination more important than ever.

Moreover, Petitioners' effort to expand Section 10(b) to foreign-cubed class actions is not grounded in any congressional mandate or precedent of this

Court. On the contrary, the plain language of the Act and principles of comity and judicial restraint unequivocally favor resolution of these actions not in the United States, but in the courts of other countries. Recent precedent makes clear that this Court will begin with the "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). Nothing in the Act rebuts that presumption. Rather, the statute expressly provides that U.S. securities laws should not be applied to transactions on foreign exchanges or in foreign markets except in limited circumstances inapplicable in the context of foreign-cubed securities cases.

Further, there can be no question that this case involves issues for which other countries can, and do, make fundamentally and purposefully different policy decisions when adopting their own regulatory regimes. Some nations offer additional investor protections not present in the United States, while others have declined to adopt the U.S. private securities class action model, with its combination of the "fraud on the market" theory, opt-out class action procedure, tolerance of contingency fees, lack of a "loser pays" rule, expansive discovery procedures, and jury trials.

The Court has recently reaffirmed the need, in light of the potential for misuse and abuse of private securities class actions, to construe narrowly the implied right of action under Section 10(b). *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta,*

Inc., 552 U.S. 148, 164-66 (2008). This Court cautioned that, "if not adequately contained, [private securities class actions] can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007), and to "allow plaintiffs with weak claims to extort settlements from innocent companies," *Stoneridge*, 552 U.S. at 163.

For these reasons, *Amici* urge the Court to adopt a bright-line rule that Section 10(b)'s implied private right of action does not extend to claims against foreign issuers arising out of securities transactions executed on foreign exchanges or in foreign markets. A clear and unambiguous rule will avoid the ever-variant, *ad hoc* analysis currently employed under the "conduct" and "effects" tests, which undermines the fairness and predictability that is essential to encourage foreign investment in the United States and preserve the preeminence of its capital markets. Moreover, the proposed rule squares fully with the Court's long-standing presumption against extraterritoriality and its directive against expanding implied private rights of action.

ARGUMENT

I. EXTENDING SECTION 10(b)'S PRIVATE RIGHT OF ACTION TO A FOREIGN-CUBED SECURITIES CLASS ACTION WOULD DETER FOREIGN INVESTMENT AND UNDERMINE INTERNATIONAL COORDINATION OF GLOBAL MARKETS REGULATION

The dramatically increased globalization and interdependence of financial markets has greatly heightened the need to impose appropriate limits on the extraterritorial application of domestic securities laws. Application of domestic law where a private securities claim has only a remote connection to the United States threatens to undermine the attractiveness of the United States for foreign investment, and the competitiveness and effective operation of U.S. markets. This is especially true in cases such as this one, where the investors, the issuer, and the securities transactions all were located outside the United States, and where compelling precedent supports the dismissal of the claim.

Concerns about the attractiveness of foreign investment in the United States and the competitiveness of U.S. capital markets are exacerbated by the unpredictability of the "conduct" and "effects" tests as applied by the various Courts of Appeals. The absence of a clear standard leaves open the risk for non-U.S. entities that engaging in investment activity in the United States—be it direct investment, such as acquiring a

U.S. subsidiary, or raising capital in U.S. markets—will give rise to liability for claims under an expansive Section 10(b) implied right of action as applied to securities issued abroad under other regulatory regimes. American businesses and citizens, and the U.S. economy as a whole, are harmed to the extent foreign firms decline to do either. At the same time, extending the reach of Section 10(b)'s implied private right to foreign transactions made between foreign parties directly conflicts with foreign nations' own investor protection regimes and the U.S. policy objective of promoting an internationally coordinated approach to the oversight of increasingly interdependent global markets. Because the private right of action under Section 10(b) is a purely judicial construct, the Court may properly rely upon these serious market harms and comity considerations as bases for limiting its application. *See Stoneridge*, 552 U.S. at 163-64; *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105 (1991); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

A. Expanding the Implied Right of Action Under Section 10(b) to Foreign-Cubed Securities Class Actions Would Deter Foreign Investment in the United States and Decrease the Competitiveness of U.S. Capital Markets

Globalization of world markets has given rise to new challenges for the United States, including increased competition to its standing as a preeminent center for foreign investment and to the prominence of its capital markets. At the same time, U.S. private class actions alleging transnational securities fraud are on the rise. *See, e.g.*, *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758 (VM), 2009 WL 3241404 (S.D.N.Y. Oct. 5, 2009); *In re Optimal Strategic U.S. Equity Fund Sec. Litig.*, 648 F. Supp. 2d 1388 (J.P.M.L. 2009); *see also* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 40-41 n.120 (2007) (number of foreign-cubed class actions increased from two in each of 1996 and 1997, to nine in 2004, and eight in 2005).[2]

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[2] Narrowly focusing only on the last three years, *see* Petitioners' Br. at 26 n.12, Petitioners ignore that private securities class actions against foreign issuers have increased dramatically as a percentage of total securities class actions, rising from around 6% and 3% in 1996 and 1997, to 12% in 2009. *See* Cornerstone Research, *Securities Class Action Filings—2009: A Year In Review* 11 (2010), *available at* http://securities.cornerstone.com/pdfs/Cornerstone_Research_Filings_2009_YIR.pdf.

These two developments are not unrelated. The increased cost of investing in U.S.-based businesses or accessing its capital markets occasioned by use of U.S. courts to pursue private transnational securities claims poses a substantial threat to U.S. interests, at a time when foreign investment in the United States and the attractiveness of U.S. capital markets are already challenged. Indeed, one need look no further than the facts of the instant case to see that expanding Section 10(b)'s private right to foreign-cubed securities class actions could significantly discourage cross-border economic activity into the United States: an Australian company—virtually all of whose securities trade on a foreign exchange and virtually all of whose shareholders are non-U.S. persons—acquired a U.S. subsidiary, and that investment allowed it to be hauled into a U.S. court as a defendant in securities class action litigation brought by foreign plaintiffs. As this Court previously recognized, the possibility of such litigation may well deter foreign firms from conducting business in the United States. *See Stoneridge*, 552 U.S. at 163-64.[3]

[3] *See also* U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, at 2-5 (Oct. 2008), *available at* http://investamerica.gov/static/Litigation%20and%20FDI%20FINAL_Latest_iia_main_001171.pdf ("U.S. Litigation and FDI") (noting that "concerns with excessive litigation and navigating what is seen as an expensive U.S. legal system" could "affect the decision by foreign investors to invest in the United States"); Henry M. Paulson, Secretary, U.S. Dep't of Treasury,

The cost of deterring foreign investment in the United States is all the more salient in the wake of the recent global economic crisis.[4] Cross-border capital flows have significantly diminished as investors, companies, banks, and other financial institutions have increasingly turned inward, directing their resources to domestic markets. *See* McKinsey Global Institute, *Global Capital Markets: Entering a New Era*, at 8-9, 13-15 (Sept. 2009), *available at* http://www.mckinsey.com/mgi/reports/pdfs/gcm_sixth_annual_report/gcm_sixth_annual_report_full_report.pdf (describing decline in global financial assets and foreign direct investment). Additionally, the past few years have witnessed a retraction in the United States' share of overall global investment and a lag in the growth rate of such investment as compared to other nations. *See* Rick L. Weddle, *Supplemental Report to Testimony before the Subcommittee on Economic Policy—Funding for Invest in America to Attract Investment, Create Jobs and Stimulate Growth*

Remarks at Forum on International Investment (May 10, 2007), *available at* http://www.treasury.gov/press/releases/hp398.htm ("Paulson's Remarks") ("[W]e must assess the cost versus the benefits of our regulatory structure and certain aspects of our legal system that may discourage foreign investment.").

[4] Foreign investment is essential to the health of the U.S. economy. *See* U.S. Litigation and FDI, at 2 ("[Foreign direct investment] plays a major role as a key driver of the U.S. economy and as an important source of innovation, exports, and jobs."); Paulson's Remarks ("[A]ffiliates of foreign companies bring investments to our shores, creating jobs and revitalizing communities.").

Industries, at 2-3 (submitted Dec. 18, 2009); *see also* U.S. Litigation and FDI, at 2. Projections that mature markets such as the United States will fare worse than emerging markets in rebounding from the current crisis, *see, e.g.*, McKinsey Global Institute, at 8, heighten the importance of this policy consideration in analyzing a proposed expansion of the implied private right.

Separately, permitting private foreign-cubed securities claims to proceed under Section 10(b) poses a distinct threat by discouraging foreign issuers from raising capital in the U.S. market.[5] Government officials, industry leaders, and academics alike agree that one important factor that deters foreign companies from listing on U.S. exchanges is the "fear of U.S. private antifraud litigation." *See* John C. Coffee, *Corporate Securities*, N.Y.L.J. (Sept. 18, 2008); *accord* Committee on Capital Markets Regulation, *Committee on Capital Markets Regulation Completes Survey Regarding the Use By Foreign Issuers of the Private Rule 144A Equity Market*, at 3 (Feb. 2009), *available at* http://www.capmktsreg.org/pdfs/09-Feb-13_Summary_of_Rule_144A_survey.pdf.[6] Likewise, potential exposure

[5] There can be no doubt that the strength of U.S. capital markets is integral to the strength of the U.S. economy as a whole. *See* WSJ Staff, *Geithner Remarks on Financial Stability Plan*, Wall St. J., Feb. 10, 2009, http://blogs.wsj.com/economics/2009/02/10/geithner-remarks-on-financial-stability-plan/tab/article/.

[6] *Accord* Michael Bloomberg & Charles Schumer, *Sustaining New York's and US' Global Financial Services Leadership* (Jan. 22, 2007), *available at* http://www.fr.com/

to U.S. securities litigation threatens to deter foreign firms from raising capital in the U.S. private unlisted market. *See, e.g.*, Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Law*, 1743 PLI/ Corp. 1243, 1254 (2009).

The risks of listing on a U.S. exchange for foreign issuers are highlighted by *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122-23 (2d Cir. 1995). There, the Court of Appeals found that a foreign-issuer's filing of a Form 20-F in the United States for its American Depository Receipts ("ADRs") traded on a U.S. exchange was sufficient under the "conduct" test to permit foreign investors (who had not bought ADRs or read the Form 20-F) to pursue a Section 10(b) claim based on purchases of the company's ordinary shares on a foreign exchange.[7] If an issuance of ADRs—typically a small fraction of a company's total equity—subjects a foreign issuer to a U.S. securities class action relating to trading of its foreign-issued securities by foreign investors in a foreign market (or even raises the

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practice/McKinsey.pdf; Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* (Nov. 30, 2006), *available at* http:// www.capmktsreg.org/pdfs/11.30Committee_Interim_Report REV2.pdf.

[7] *See also, e.g.*, *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334, 362 (D. Md. 2004) (citing *Itoba* and relying in part on foreign company's Securities and Exchange Commission (the "Commission") filings to permit Section 10(b) claims of non-U.S. investors who purchased company's stock on foreign exchanges).

specter of such risk), foreign issuers will be discouraged from listing in the United States in the first place. *See* Coffee, *supra* (noting in such instances "the issuer may face a multi-billion dollar class action that can threaten its solvency").

The issue is not a theoretical one. Many foreign companies have left the U.S. market since the Commission amended its rules in June 2007 to remove barriers to deregistration: 15 out of 27 French companies registered in the United States at the end of 2006 had deregistered by the end of 2008, as had 19 of 44 U.K. companies, 7 of 20 German companies, 6 of 11 Italian companies, and 15 of 24 Australian companies. *See* Securities and Exchange Commission, *International Registered and Reporting Companies* (June 11, 2009), *available at* http://www.sec.gov/divisions/corpfin/internatl/companies.shtml.

In the face of these materialized risks, Petitioners raise the generalized charge that prohibiting foreign-cubed securities claims will allow the United States to become a "'Barbary Coast' safe harbor for fraud that occurred here but led to injury abroad." *See* Petitioners' Br. at 21. Petitioners, however, ignore that a decision to construe narrowly the private right of action under Section 10(b) does not affect the Commission's ability to bring enforcement actions. Petitioners also ignore that other countries have extensive private and public enforcement regimes in place to deter and punish securities fraud. *See infra* Point I.B. Other sovereigns have established their own regulatory

standards for investor protection; the United States in no way stands alone internationally in this regulatory arena. Indeed, foreign regulatory authorities and the Commission routinely work in conjunction successfully to pursue securities enforcement actions with transnational implications. *See, e.g.*, Michael D. Mann et al., *Developments in the Internationalization of Securities Enforcement*, 1743 PLI/Corp. 789, 793 (2009); *see also SEC Speaks in 2010*, 1784 PLI/Corp. 519, 541-42 (2010).

B. Applying Section 10(b) to a Foreign-Cubed Securities Class Action Would Conflict with the Policy Choices of Other Nations

The determination of whether and under what circumstances a class of private individuals may bring a securities class action involves a myriad of policy judgments about which nations can, and do, disagree. The current state of the U.S. private securities class action was born out of decisions on a number of hotly-debated policy questions in an ongoing attempt to achieve what this country believes is the correct balance between protecting investors, deterring wrongdoing, and avoiding vexatious and abusive strike suits.

Not surprisingly, then, material differences exist between the substantive and procedural laws of the United States and of foreign nations in the area of investor protection. In adopting the "fraud on the market" theory of reliance in *Basic Inc. v.*

Levinson, the Court sought to avoid placing an "unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff . . . ." 485 U.S. 224, 241-42, 245-47 (1988). Some countries have rejected the "fraud on the market" theory, making "the United States . . . unusual in recognizing presumed reliance . . . , rather than requiring investors to prove actual reliance on misleading information." Buxbaum, at 61.[8] Others do not require proof of reliance in certain securities cases. *See* Mark L. Berenblut et al., NERA Economic Consulting, *Trends in Canadian Securities Class Actions: 1997-2008*, at 1-2 (2009), *available at* http://www.nera.com/image/PUB_Recent_Trends_Canada_0109_Final.pdf (Canada). At the same time, some nations permit securities claims for conduct that is not actionable in the United States. For instance, Australia recognizes private claims against persons indirectly responsible for false or misleading statements, and allows claims for injunctive relief against aiders and abettors in certain circumstances. *See* Corporations Act, 2001, c. 7 § 1022B(3) (Austl.); Australian Securities and Investments Commission Act, 2001 § 12GD.

In addition to having different substantive standards for establishing securities fraud, nations

[8] *See, e.g.*, Charles Arsouze & Patrick Ledoux, *L'indemnisation des victimes d'infractions boursières*, 4 Bulletin Joly Bourse 399, ¶¶ 14-15 (2006) (France); Michael Duffy, *'Fraud on the Market': Judicial Approaches to Causation and Loss from Securities Nondisclosures in the United States, Canada and Australia*, 29 Melb. U. L. Rev. 621, 640, 655 (2005) (Australia).

also use vastly different procedural mechanisms to govern the assertion of collective private securities claims. Some foreign nations have legislated with the express intent of diverging from the U.S. model for securities class action litigation and the policy choices it embodies. Indeed, some jurisdictions do not allow individuals to bring collective securities fraud claims. In France, for example, securities fraud claims may only be brought on a collective basis by associations that represent investors who opt-in to the procedure. *See* French C. Mon. & Fin. arts. L452-1, L452-2 (2010), *available at* http://195.83.177.9/code/liste.phtml?lang=uk&c=25&r=899.[9]

Those nations that have adopted some form of class action have requirements distinct from those under Federal Rule of Civil Procedure 23. The Netherlands permits use of its class action mechanism where a group of plaintiffs has negotiated a settlement on the question of liability or damages that it wishes to submit for court of approval; alternatively, associations representing the interests of injured parties may seek a judicial declaration of a defendant's liability—collective litigation of damages is prohibited. *See* Dutch Civil

[9] Similarly, Argentinean federal law allows collective actions only by associations, and only in the context of environmental, civil rights, and consumer goods litigation. *See* Global Legal Group, *The International Comparative Legal Guide to: Class & Group Actions 2010*, at 19 (2009) ("C&G 2010"). Mexican federal law gives the power to bring a suit on behalf of consumer rights only to a specified governmental entity. *See id.* at 119.

Code (Burgerlijk Wetboek) arts. 3:305a, 3:305b (2008). Germany recently adopted a "representative action" statute for securities lawsuits that allows courts to consolidate cases that raise common questions into a "model case" and rule on these issues, but requires individual litigation of each unique element and of individual damages. *See* Bundesministerium der Justiz, *The German 'Capital Markets Model Case Act,'* at 2, *available at* http://www.bmj.bund.de/files/-/1056/EnglishInfoKapMuG.pdf ("German Minister of Justice Statement"). The German Minister of Justice called their recently-enacted law "a way to handle capital market mass proceedings without transferring existing models from foreign jurisdictions, such as the American class action, into German law." *See id.* at 1.

Even in countries where securities class actions are permitted, the class action systems reflect different policy choices. For example, Israel permits class actions where investors can meet the threshold requirement that their claims have a likelihood of prevailing, and South Korea allows them where the class is comprised of at least fifty members who hold at least .01% of a corporation's securities. C&G 2010, at 91 (Israel); Daw Hwan Chung, *Introduction to South Korea's New Securities-Related Class Action*, 30 J. Comp. L. 165, 175 (2004) (South Korea).[10]

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[10] Some nations further diverge from the United States by recognizing a private right of action for only limited types of securities violations. For example, while certain private

The Swiss Parliament has "decided to refrain from introducing a U.S.-style class action practice into its draft code, noting that such a device is foreign to Swiss traditions." Samuel P. Baumgartner, *The Globalization of Class Actions: Switzerland*, 622 Annals Am. Acad. Pol. & Soc. Sci. 179, 180-81 (2009). Italy and Belgium have also recently declined to adopt U.S.-style class action mechanisms, *see* Brief for German and Italian Legal Scholars as *Amici Curiae* at 27-30, Infineon Technologies AG v. Dolan, No. 09-15857 (9th Cir. Sept. 9, 2009) ("German & Italian Scholars' Br.") (Italy); C&G 2010, at 32 (Belgium), and neither Japan, Russia, nor South Africa has developed a class action mechanism. Harold S. Bloomenthal & Samuel Wolff, *International Capital Markets and Securities Regulation* § 54:59 (2009) (Japan); Bernard Black et al., *Legal Liability of Directors and Company Officials*, 2008 Colum. Bus. L. Rev. 1, 13 (2008) (Russia); C&G 2010, at 145 (South Africa).

Also different from the United States, most nations that have enacted collective action regimes require plaintiffs to affirmatively opt-in to a case,

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fraud claims are actionable, the Supreme People's Court of China has ruled that private actions based on claims of insider trading or market manipulation are not. *See* Sanzhu Zhu, *Civil Litigation Arising From False Statements on China's Securities Market*, 31 N.C. J. Int'l L. & Com. Reg. 377, 381 (2005). China has also "ruled out class action suits . . . as an acceptable form of action for civil compensation cases arising from securities-related false statements." *Id.* at 400.

declining to adopt the "opt-out" mechanism of Rule 23(c)(2), which they view as "contrary to public policy." Buxbaum, at 63.[11] Additionally, most civil legal regimes forbid or limit the use of contingency fees,[12] and utilize the "loser pays" rule where the losing party is normally responsible for the other party's costs and fees.[13]

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[11] Countries that have adopted "opt-in" procedures for representative proceedings (in the securities fraud context or otherwise) include: England, Estonia, Finland, France, Germany, Italy, Spain, and Taiwan. *See* Civil Procedure Rule (U.K.) 19.10-.12 (2008); C&G 2010, at 66; *id.* at 74; French C. Com. arts. 225-120, 225-252 (2010), *available at* http://www.legifrance.gouv.fr/affichCode.do;jsessionid=6E3121AB386F2B0FA14F42ADCB6AAEFF.tpdjo03v_3?cidTexte=LEGITEXT000005634379&dateTexte=20100221 & C&G 2010, at 80-81; German Minister of Justice Statement, at 2; German & Italian Scholars' Br., at 27-30; Spanish Law of Civil Judgment 1/2000; Lawrence S. Liu, *Simulating Securities Class Actions: The Case in Taiwan*, at 4 (2000), *available at* http://ssrn.com/abstract=251224.

[12] Countries that limit or prohibit the use of contingency fees include: Australia, England, France, Japan, and Switzerland. *See* Duffy, at 652 & C&G 2010, at 30; Winand Emons & Nuno Garoupa, *The Economics of US-style Contingent Fees and UK-style Conditional Fees*, at 2 (Bern University Discussion Paper Series 04-07, 2004), *available at* http://130.92.195.20/publikationen/download/dp0407.pdf; Veronique Magnier, *Class Actions, Group Litigation & Other Forms of Collective Litigation Protocol for National Reporters*, at 24, *available at* http://www.law.stanford.edu/display/images/dynamic/events_media/France_National_Report.pdf (prohibiting arrangements that include only contingency fees or a symbolic non-contingency fee); Bloomenthal & Wolff, § 54:59; C&G 2010, at 150; *see generally* Buxbaum, at 63.

[13] "[T]he general rule in Europe is 'the loser pays[.]'" Laurel J. Harbour & Marc E. Shelley, *The Emerging European*

Underscoring the different policy judgments reached abroad, European Union officials view the United States' use of contingency fees, failure to adopt a "loser pays" rule, and embrace of the "opt-out" mechanism as a "'toxic cocktail' [that] should *not* be introduced in Europe." *Green Paper on Consumer Collective Redress—Questions and Answers*, Memo/08/741, at 4 (Nov. 27, 2008). In other nations' views, contingency fees incentivize "lawyers to take the risk of pursuing claims or to push for new theories of recovery," while the absence of a "loser pays" rule—a rule which imposes discipline on the decision of whether, and how aggressively, to pursue claims—removes an impediment to "filing weak or problematic cases." *See* Harbour & Shelly, at 1. Some countries also believe that the "opt-out" mechanism provides plaintiffs' counsel with a comparatively low-cost method to recruit class members and increase their fee award in the event of success. *See* Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 Vand. L. Rev. 1, 28-29 (2009). Such jurisdictions have found that, combined, these features have the significant effect of "'enabl[ing]' [private] litigation." *See id.*[14]

Class Action, at 11 (ABA Annual Meeting 2006); *see also* C&G 2010, at 22, 46, 69, 77, 94, 122, 128, 138, 142, 149; Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 Comm. L. World Rev. 123, 144 (2002); Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 31 & C&G 2010, at 53; Civil Procedure Rule 44.3(2) (U.K.) (2008).

[14] *See*, *e.g.*, Harbour & Shelley, at 1 (noting that "Europe has had little litigation compared to the United States" in part due to lack of contingency fees, opt-out system and jury

In addition, some sovereigns have limited the availability of private securities actions because they have chosen to rely more heavily (or even primarily) on government enforcement to protect investors. *See* Buxbaum, at 16; Zhu, at 381-85 (discussing China); Pricewaterhouse Coopers LLP, *2008 Securities Litigation Study* 53 (2009), *available at* http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF (discussing U.K.).

This Court should not subvert these nations' deliberate policy choices—interfering with legal incentives created intentionally to differ from the U.S. legal system—by applying U.S. law to foreign-cubed securities class actions. Such cases effectively circumvent the careful balancing by other nations, when it is their investors, their issuers, and their exchanges or markets that are implicated. "Until the United States is ready to contemplate a system in which even the claims of U.S. investors, based on U.S. trading, are subject to the laws of another country, it is inappropriate to solve the problem of multiple proceedings by suggesting that they all take place in U.S. courts." Buxbaum, at 61; *see also* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903, 914 (1998) (noting that extraterritorial application of U.S. securities law may cause other countries to retaliate).

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trials, limits on available damages, "loser pays" rule, and rules limiting discovery).

C. Permitting Foreign-Cubed Securities Class Actions Under Section 10(b) Would Undermine Global Coordination of Market Regulatory Efforts

One outgrowth of the financial crisis is that policy-makers, government officials, commentators, and academics agree that global regulatory cooperation is pivotal to ensuring the future stability of financial systems worldwide: "No longer can the United States regulate in a vacuum. Coordination with other national regulators and cooperation with regional and international authorities is required." *See* Committee on Capital Markets Regulation, *The Global Financial Crisis: A Plan for Regulatory Reform*, at i (May 2009), *available at* http://www.capmktsreg.org/pdfs/TGFC-CCMR_Report_(5-26-09).pdf. Indeed, due to the global financial crisis, the Commission and other "national governments and international organizations have taken significant steps both to stem further economic deterioration and to prevent a recurrence of the factors that helped cause it," SEC Strategic Plan for Fiscal Years 2010-2015, Draft for Comments, at 24, *available at* http://www.sec.gov/about/secstratplan1015.pdf, by advancing "international and Commission initiatives aimed to improve investor protection in the wake of the market turmoil," *SEC Speaks in 2010*, at 523.

Extraterritorial application of U.S. securities laws by implied private right of action to the fundamentally foreign activity at issue in foreign-cubed securities claims "cannot help but

interfere with regulatory systems of other countries" and is "likely to generate tensions between the United States and other countries." *See* Choi & Guzman, at 914. Expansion of Section 10(b)'s reach in this current climate would be particularly damaging to international cooperative endeavors.

Any effort at global regulatory cooperation is most appropriately left to a legitimate and centralized government body such as the Commission, and not to individual plaintiffs (or, more accurately, the plaintiffs' bar). As opposed to the Commission, tasked with protecting U.S. investors and the U.S. market, private plaintiffs make claims to remedy their own individual damages. A rule prohibiting the expansion of Section 10(b)'s implied right to foreign-cubed securities class actions will thus keep private plaintiffs from interfering with any cooperative international regulatory efforts.

II. THE PRESUMPTIONS AGAINST EXTRA-TERRITORIALITY AND EXPANSION OF SECTION 10(b)'S IMPLIED PRIVATE RIGHT BAR FOREIGN-CUBED SECURITIES CLAIMS

A. The Presumption Against Extra-territoriality, Designed to Avoid Conflict with Other Nations' Laws, Precludes Petitioners' Private Securities Claims

The Court has repeatedly affirmed that "United States law governs domestically but does not rule

the world." *See Microsoft*, 550 U.S. at 454. The Court applies the well-established presumption against extraterritoriality "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *See E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*"). "This rule of statutory construction . . . helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffman-La Roche Ltd. v. Empagran*, 542 U.S. 155, 164-65 (2004).

As described *supra* in Point I.B, expanding Section 10(b)'s private right of action to foreign-cubed cases would conflict with the careful policy judgments made by other nations, many of whom have considered the U.S. securities class action model and rejected it in adopting their own investment protection regimes. Expansion would also hamper efforts of international coordination for regulating global markets. Given the very real potential for conflict with foreign law that embodies "different policy judgments," *see Microsoft*, 550 U.S. at 455, and the risk of interference with "a foreign nation's ability independently to regulate its own commercial affairs," *Empagran*, 542 U.S. at 165, the presumption against extraterritoriality applies with particular force to preclude foreign-cubed securities cases.

1. Congress did not express any intent indicating that Section 10(b) should apply extraterritorially to permit foreign-cubed claims

Nothing in the text of the Act offers any support for permitting this putative class of foreign plaintiffs to assert a Section 10(b) claim arising from transactions involving the securities of a foreign issuer offered on a foreign exchange or in a foreign market.

In determining whether a statute applies extraterritorially, the Court examines the "'language in the [relevant Act]'" to determine if there is "'any indication of a congressional purpose to extend its coverage'" beyond the territorial limits of the United States. *Aramco*, 499 U.S. at 248 (alteration in original) (citation omitted). Such "indication" must be "clearly expressed"—ambiguous language that "does not speak directly to the question presented" is insufficient to apply the statute to actors or entities abroad. *Id.* at 248, 250-51 (quotation marks and citations omitted); *see also Microsoft*, 550 U.S. at 455-58 ("'[T]he presumption is not defeated . . . just because [a statute] specifically addresses [one] issue of extraterritorial application'" where Congress did not "home in" on specific issue at hand to "'plainly mark[ ]'" Court's course) (citations omitted).

Given the Act's silence as to private rights of action, it is unsurprising that the Act nowhere specifically addresses the question of extraterritorial application to foreign-cubed securities claims. The

language of the Act, however, does confirm the *lack* of congressional intent to apply the statute extraterritorially except in specifically-articulated circumstances inapplicable to a foreign-cubed securities class action.

In particular, Section 30(a) of the Act renders it unlawful for brokers and dealers to use the *U.S.* means of commerce to effect an otherwise prohibited transaction in securities of a *U.S.* issuer on a foreign exchange—creating a clear inference that the Act would not otherwise apply extraterritorially and, in any event, would not extend to transactions effected on a foreign exchange involving a *foreign* issuer. *See* 15 U.S.C. § 78dd (2010). The statute further underscores this point in Section 30(b), which expressly renders the Act inapplicable to "any person insofar as he transacts a business in securities without the jurisdiction of the United States," absent the adoption by the Commission of applicable anti-evasion rules (which it has not done). *Id.*

By specifically articulating this limited area of extraterritorial application in Section 30—which indisputably does not apply here—Congress intended that the Act would otherwise apply only domestically. "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of [creating other] exceptions"—here extraterritorial application—"and, in the end, limited the statute

to the [exceptions] set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000).[15]

Petitioners attempt in vain to discern the requisite "clear expression" of intent to reach foreign-cubed claims from the general language in Section 10(b). That section prohibits "any person" from engaging in "any" fraudulent or deceitful act in connection with the purchase or sale of "any security." Petitioners' Br. at 22-24. Such general

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[15] This reading of the Act is consistent with its scant legislative history. The Senate Report on current Section 30(a), *see* 78 Cong. Rec. 2264, 2270 (Feb. 9, 1934), confirms that Section 30(a) is limited to certain broker and dealer "transactions *in American securities* in contravention of the rules and regulations of the Commission." S. Rep. No. 73-792, at 23 (Apr. 20, 1934) (emphasis added). In addition, Thomas Corcoran, one of the key drafters of the Bill, stated during a committee hearing that current Section 30(a) was included to prevent evasion of the Act through the listing of securities of *U.S. issuers* on foreign exchanges. *See* "Stock Exchange Practices," Hearings before the Senate Banking and Currency Committee on S. Res. 84, S. Res. 56 and S. Res. 97, 73d Cong. 6569 (1934). Corcoran also confirmed the Act's domestic reach by stating that now-Section 30(a) was included only to prevent regulation of "the American public's dealing *in their own securities* [from] get[ting] out of [the Act's] jurisdiction." *Id.* (emphasis added). Section 30(b)'s legislative history likewise confirms that the extraterritorial reach of the Act is narrow. The Senate Report describes current Section 30(b) as "provid[ing] that *nothing* in the act or rules and regulations shall apply to business in securities outside the jurisdiction of the United States *unless* such rules and regulations expressly so provide in order to prevent evasion." S. Rep. No. 73-792, at 23 (Apr. 20, 1934) (emphasis added) (discussing precursor to Section 30(b)); *see also* H.R. Rep. No. 73-1383, at 28 (Apr. 27, 1934) (same).

language—along with similar language in the Act's jurisdictional provision, preamble, and certain definitional provisions, *id.* at 13, 20, 22-24—does not constitute the type of pointed language necessary to overcome the presumption and "clearly express" congressional intent for Section 10(b) to have extraterritorial reach to this private action.

Indeed, the Court has held repeatedly that reliance on similarly broad language—none of which "speak[s] directly to the question presented," *Aramco*, 499 U.S. at 250—is too diffuse to overcome the presumption. *See, e.g.*, *id.* at 249-52 (finding that statute's broad definitions of "employer" and "commerce" are mere "boilerplate language" that "falls short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963) (refusing to find congressional intent to apply National Labor Relations Act abroad even though statute contained broad language that referred to foreign commerce because the act lacked "specific" extraterritorial language); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 30-31 (1925) (finding act declaring "every common carrier by railroad, while engaging in interstate or foreign commerce, shall be liable to its employees" for injury or death "contains no words which definitely disclose an intention to give it extraterritorial effect"); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) ("Words having universal scope, such as

'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch."). As this Court observed in *Aramco*, if courts were "to permit possible, or even plausible, interpretations" of broad statutory language "to override the presumption against extraterritorial application, there would be little left of the presumption." 499 U.S. at 248, 253.[16]

2. A stronger case for applying the presumption against extraterritoriality exists here than in *Empagran* or *Microsoft*

The Court recently reaffirmed that Congress legislates "against the backdrop of the presumption against extraterritoriality," *Aramco*, 499 U.S. at 248, when it held in two cases that the antitrust and patent laws did not apply extraterritorially. *See Empagran*, 542 U.S. at 164; *Microsoft*, 550 U.S. at 441-42.

Indeed, *Empagran* and *Microsoft* involved much stronger cases for extraterritorial application of U.S. law. The antitrust and patent statutes reviewed

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[16] Petitioners' error in relying on such broad, diffuse language infects their reading of Section 30. *See* Petitioners' Br. at 39-40. Sections 30(a) and (b) are not narrow *exceptions* to the general "extraterritorial ramifications of the statute," *see id*. at 39, 40 & n.16, but rather the sole circumstances for which Congress expressly communicated its intent for the Act to apply extraterritorially.

expressly provide for a significant degree of extraterritorial application, and the plaintiffs proffered reasonable arguments that the facts of their cases fell within those categories. Yet in both cases, the Court invoked the presumption to reject plausible statutory interpretations that would have given the statutes extraterritorial effect. *See Empagran*, 542 U.S. at 164-67, 174 (declining to permit foreign plaintiffs to sue under Sherman Act despite their "more natural reading" of text); *Microsoft*, 550 U.S. at 442, 454-55 (relying on presumption to find Patent Act's extraterritorial component exception inapplicable, even though "[p]lausible arguments [could] be made" for its application). Because the statutes did not clearly speak to extraterritorial application for the circumstances at hand, the Court applied the presumption.[17]

Unlike either the Patent Act or the Sherman Act, the Act is devoid of language indicating intent to apply the operative provision extraterritorially. To the contrary, the Act's sole, narrow carve-out for extraterritorial application in Section 30

[17] Without citation to authority, Petitioners posit "an equally fundamental presumption that, without a clear statement to the contrary, Congress intends to legislate for" *all* conduct within the United States territory. Petitioners' Br. at 33. That is not the law; if it were, the presumption against extraterritorial application would surely never apply. Indeed, both *Empagran* and *Microsoft* involved some, albeit limited, conduct within the United States. *See Empagran*, 542 U.S. at 159; *Microsoft*, 550 U.S. at 441.

indisputably does not apply with respect to foreign-cubed claims under Section 10(b).[18]

Petitioners also attempt to undercut the rationale underlying the presumption against extraterritoriality by stating that "anti-fraud enforcement objectives are broadly similar" and governments "are generally in agreement that fraud should be discouraged." *See* Petitioners' Br. at 35. The Court already rejected this argument in *Empagran*, explaining: "even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies." 542 U.S. at 167. That is no less true in the securities fraud context, where there are myriad substantive and procedural differences between the United States' private securities fraud regime and those of other nations. *See supra* Point I.B.[19]

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[18] Petitioners inappositely highlight that the antitrust and patent statutes contain language limiting certain application to violations where both conduct and injury occurred in the United States. *See* Petitioners' Br. at 36-37. The salient point is that both statutes also contain language expressly providing for extraterritorial application under relatively broad circumstances—and that language was still found insufficient to overcome the presumption against extraterritoriality for purposes of the plaintiffs' claims. Indeed, Petitioners have turned the presumption on its head by starting from the proposition that statutes apply extraterritorially *unless they state otherwise*, and then asserting that any specific expression of extraterritoriality is a *limit* on a statute's general extraterritorial reach. That is not the law.

[19] Petitioners' proposed use of the *forum non conveniens* doctrine to alleviate comity concerns, *see* Petitioners' Br. at

B. The Presumption Against Expanding Section 10(b)'s Implied Private Right of Action Precludes Petitioners' Claims, Avoiding Harm to U.S. Economic Interests

Section 10(b)'s silence as to extraterritorial application is compounded in the context of foreign-cubed securities class actions by the absence of an express private right. That is, the private cause of action under Section 10(b) is "doubly silent," both as to its extraterritorial scope and as to the source of the private right, because it is "a judicial construct that Congress did not enact in the text of the relevant statute[ ]." *See Stoneridge*, 552 U.S. at 164. The Court thus has broad discretion to limit the reach of this judicially-created remedy where appropriate.

The Court has repeatedly "sworn off the habit of venturing beyond Congress's intent" to create rights of action in order to better effectuate judicial notions of "the 'congressional purpose' expressed by a statute." *See Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted). This applies equally to the private right under Section 10(b): "[t]hough it remains the law, the § 10(b) private right should not be extended beyond its present

41-42, ignores the presumption against extraterritoriality. Additionally, such a case-by-case determination, which would "turn on its facts," *id.* at 41, only further magnifies the uncertainty inherent in the "conduct" and "effects" tests. *See infra* Point III; *see also Empagran*, 542 U.S. at 168-69 (rejecting case-by-case comity analysis as "too complex to prove workable").

boundaries." *Stoneridge*, 552 U.S. at 164-65; *see also Virginia Bankshares*, 501 U.S. at 1102.

When invited to expand the reach of Section 10(b)'s implied right, the Court must consider the negative practical consequences of doing so. *See Virginia Bankshares*, 501 U.S. at 1104-06; *Stoneridge*, 552 U.S. at 163-64. Where expansion would cause deleterious results, the Court may rely on such considerations to limit its scope. *See Blue Chip Stamps*, 421 U.S. at 737 (stating that because Congress did not expressly create Section 10(b) private right, it is proper to rely on "policy considerations" when determining its scope); *Stoneridge*, 552 U.S. at 163-64 (finding that negative practical consequences supported narrow reading of Section 10(b)'s private right).

There can be no serious question that a private securities class action may present a unique potential for vexatious litigation, including "strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process," *Virginia Bankshares*, 501 U.S. at 1105, such that "if not adequately contained, [it] can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law," *Tellabs*, 551 U.S. at 313. *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006) (acknowledging "[e]ven weak cases brought under [Section 10(b)] may have substantial settlement value"); *Blue Chip Stamps*, 421 U.S. at 737, 740.

These negative practical consequences are amplified in the international context of foreign-cubed securities claims. As described *supra* at Point I, foreign-cubed securities cases threaten to impair the attractiveness and competitiveness of the United States and its capital markets, create conflict with the laws of other nations, and undermine global coordination for market regulation. Cognizant of these very real risks, the Court in *Stoneridge* observed:

> [o]verseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.

See 552 U.S. at 164 (citation omitted). Such negative ramifications of expanding the Section 10(b) private right here are "good reasons to deny recognition to such claims in the absence of any apparent contrary congressional intent." *See Virginia Bankshares*, 501 U.S. at 1105; *Stoneridge*, 522 U.S. at 163-64; *Blue Chip Stamps*, 421 U.S. at 737.

III. SECTION 10(b)'S IMPLIED PRIVATE RIGHT OF ACTION SHOULD NOT APPLY TO FOREIGN SECURITIES CLAIMS

To encourage foreign investment in the United States, ensure the competitiveness and effective operation of U.S. capital markets, and avoid conflicts

with foreign nations, the Court must adopt a fair rule that provides certainty to foreign securities issuers.

The "conduct" and "effects" tests, with their *ad hoc* analyses that vary from application to application, provide neither fairness nor certainty. Indeed, the "presence or absence of [a] factor which was considered significant" in one case "is not necessarily dispositive" in the next. *Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 414 (8th Cir. 1979). Applying the tests, one court observed that "any notion that a single precedent or cohesive doctrine . . . may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe." *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005). Further, the "conduct" and "effects" tests—themselves judicial constructions—override the language of the Act and the presumption against extraterritorial interpretation of U.S. statutes, and contradict the Court's directive against expanding the Section 10(b) implied right of action.

Instead, the Court should adopt a bright-line rule that the implied right of action under Section 10(b) does not reach the purchase or sale of a security of a foreign issuer on a foreign exchange or in a foreign market. Such a case is filed by a plaintiff whose injury flows directly and immediately from the foreign defendant's offering of securities in a foreign country. Although such

cases may involve some connection to the United States (here, the foreign defendant invested in the United States by purchasing a subsidiary that is alleged to have engaged in fraudulent accounting), any such connection is insufficient to warrant the application of the U.S. *securities* laws. Section 10(b) provides liability for the inaccuracy of statements made to potential investors *"in connection with the purchase or sale" of a security*, and those statements are necessarily tethered to the foreign country and foreign market in which the purchase or sale occurs. What makes this a *securities* fraud case is the review and publishing of financial metrics outside the United States by a foreign company in connection with securities that sell in a foreign market. Thus, as with any private securities action against a foreign issuer arising out of securities transactions executed in a foreign market, any U.S. connection provides "an indirect chain" that is simply "too remote for liability" for securities fraud under Section 10(b). *See Stoneridge*, 552 U.S. at 149.[20]

[20] According to Petitioners, the fact that the Australian issuer allegedly printed the information furnished by the U.S. subsidiary without modification somehow makes the connection to the United States less remote. The applicability of Section 10(b) should not depend on such a cosmetic issue. In any event, this argument ignores the fact that the Australian company, not the U.S. subsidiary, decided to present the information to its foreign investors.

In addition, this bright-line rule would afford several advantages:

- avoid a fact-intensive analysis of a foreign defendant's conduct in the United States, when ultimately the plaintiff was injured as a result of a securities transaction in a foreign market;
- provide the clarity and predictability that foreign companies need in order to make investments—facilitating the free flow of investment and capital into the United States;
- eliminate the risk of deterring foreign companies from acquiring U.S. subsidiaries for fear of becoming subject to U.S. securities laws even if their securities are not traded in the United States;
- result in jurisprudence that respects the sovereignty of foreign nations by allowing them to establish liability rules best-suited to their markets for transactions that take place there;
- avoid potential interference with global coordination efforts that are essential in the aftermath of the worldwide financial crisis;
- eliminate a reciprocal retaliatory risk to U.S. companies; and
- decrease a risk of duplicative litigation.

Stated simply, investors who buy securities of foreign companies on foreign exchanges or in foreign markets should bring their securities claims exactly where they should expect to have to

bring them—in foreign courts, under foreign law. The bright-line rule proposed by *Amici* provides both certainty and fairness, and comports with the Court's well-established precedent concerning extraterritorial application and implied rights of action.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

DEBORAH M. BUELL
(*Counsel of Record*)
GIOVANNI P. PREZIOSO
MEREDITH KOTLER
LAUREN L. PEACOCK
JORGE G. TENREIRO
SUZANNE B. MCMILLAN
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, N.Y. 10006
(212) 225-2000

IRA D. HAMMERMAN
KEVIN CARROLL
Securities Industry and Financial Markets Association
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 962-7300

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CHARLENE B. FLICK
United States Council for International Business
1212 Avenue of the Americas
New York, N.Y. 10036
(212) 354-4480

Counsel for Amici Curiae