No. 08-1191

In The Supreme Court of the United States

ROBERT MORRISON, ET AL.

Petitioners,

v.

NATIONAL AUSTRALIA BANK LTD., ET AL.

Respondents.

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

BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Competitive Enterprise Institute (CEI), founded in 1984, is a nonprofit organization dedicated to advancing the principles of individual liberty, limited government, and free enterprise.[1] Towards those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory, trade, and legal issues.

Attorneys on CEI's staff have represented CEI or other groups or individuals before this Court or lower federal courts as principal parties or *amici curiae* in select constitutional or statutory matters. For example, CEI attorneys currently serve as co-counsel for the petitioners in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, No. 08-861 (U.S. argued Dec. 7, 2009), now pending before this Court, and also filed an *amicus curiae* brief on behalf of climate scientists supporting the respondents in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

CEI respectfully aims to more fully inform the Court of this case's implications for a trend of increasing concern – foreign parties' use of U.S. courts to resolve disputes lacking a nexus to the United States, especially through abusive class

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

action litigation. In this case, the problem has manifested itself in the form of foreign investors suing a foreign securities issuer from whom they purchased securities trading on an exchange abroad. The lawsuit, however, was brought pursuant to fraud in connection with the purchase or sale of securities under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder. *See* 15 U.S.C. § 78j(b); 17 C.F.R. §240.10b-5.

These types of lawsuits, in which plaintiffs circumvent the legal systems of countries where their disputes arise to take advantage of what they see as the U.S. legal system's more favorable aspects, amount to nothing more than global forum shopping. The Second Circuit decision below, while reaching the correct result, allowed this much greater problem to continue festering in the securities fraud law arena. What allowed the Second Circuit to do so was an elaborate structure of judge-made law, developed over forty years, that lacked any foundation in the text of the statute at issue in its current form, legislative history of the statute in its original form, and this Court's precedents presuming against U.S. laws' extraterritorial application absent a clear expression of contrary congressional intent.

This Court now has the opportunity to restore order to a legal regime that has the potential to cause unwarranted harm to businesses with even minimal contacts in the United States, as well as the nation's economy and foreign policy as a whole. The

way to do so is to affirm the Second Circuit's decision solely on the grounds that the text of the statute at issue reflects no congressional intent to allow claims by foreign investors who purchase securities issued by a foreign entity on a foreign securities exchange. Anything less threatens to turn the United States into the world's securities law courthouse, as well as compound the economic and policy consequences that Respondents and supporting *amici* explained in their briefing below.

STATEMENT

A. Background

As opposed to lawsuits by individual plaintiffs, this case bears great significance on account of its implications for "foreign-cubed" or "f-cubed" litigation, whereby a U.S. lawsuit is "brought against a foreign issuer on behalf of a class that includes foreign investors who purchased securities on a foreign exchange."[2] Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 1, 1 (2007); *see also, e.g., In*

[2] Petitioners in this case only consist of foreign plaintiffs. The trial court dismissed the sole domestic plaintiff for lack of standing due to a failure to allege a pecuniary loss from his purchase of American Depository Receipts in Respondent National Australia Bank that traded on the New York Stock Exchange. *See In re Nat'l Austl. Bank. Sec. Litig.*, No. 03 Civ. 6537, 2006 WL 3844465, at *8-9 (S.D.N.Y. Oct. 25, 2006). This brief nonetheless contends that the presumption against extraterritoriality applies equally to foreign plaintiffs who are members of a class alongside domestic plaintiffs.

re Vivendi Universal S.A. Sec. Litig., 241 F.R.D. 213 (S.D.N.Y. 2007); *In re Royal Dutch/Shell Transp. Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005). The advent of such litigation has, according to Professor John Coffee of the Columbia University Law School, caused "sophisticated foreign issuer[s]" to "fear" that "listing on a U.S. exchange exposes [them] to bankrupting securities liabilities" if their stock prices were to fall sharply. These issuers would owe these liabilities "not simply to U.S. investors, but, more importantly, to a much larger worldwide class of foreign investors who acquired their shares outside the United States." John C. Coffee Jr., *Foreign Issuers Fear Global Class Actions*, NAT'L L.J., June 14, 2007; *see also* John C. Coffee Jr., *Securities Policeman to the World? The Cost of Global Class Actions*, N.Y.L.J., Sept. 18, 2008, at 5.

This "fear" is not a mere figment of imagination. Foreign issuers, though they might list as little as one to two percent of their outstanding shares on U.S. exchanges, have paid two of the largest U.S. securities class action settlements in history according to one American Bar Association newsletter, Steven S. Kaufhold, *International Securities Class Actions: The World's Investors Come To U.S. Courts*, CADS REPORT (Class Action and Derivative Suit Committee Newsletter of the Section of Litigation, American Bar Association), Winter 2009 Vol. 19 No. 2 ($2.2 billion, assessed against Canada's Nortel Networks and $1.1 billion assessed against the Netherlands' Royal Ahold NV); *see also In re Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334 (D. Md. 2004).

The possibility that U.S. courts may act as forums in securities class actions has also had a profound impact abroad legally, if not politically and economically. More recently, Royal Dutch Shell plc, the largest company by revenue in the Netherlands, not to mention the world, settled roughly $450 million dollars' worth of securities claims in the Netherlands and used the settlement to successfully argue against a New Jersey federal court's exercise of subject matter jurisdiction. *See In re Royal Dutch/Shell Transp. Sec. Litig.*, 522 F. Supp. 2d 712 (D.N.J. 2007); Fortune Global 500, http://money.cnn.com/magazines/fortune/global500/2009/ (last visited Feb. 25, 2010).

A jury verdict only weeks ago highlights the unprecedented financial stakes underlying f-cubed litigation that the case at bar may not make readily apparent. On January 29, 2010, a New York federal jury, after a trial that lasted nearly four months and 14 days of deliberations, concluded that French media conglomerate Vivendi S.A. misled investors about the company's financial condition on 57 different occasions in relation to a series of mergers and acquisitions between 2000 and 2002, inflating the company's stock by as much as $11 dollars per share. *Court Finds Vivendi Liable For Misleading Investors*, N.Y. TIMES, Jan. 30, 2010, at B3. Lawyers for the plaintiffs stated that the potential damages could amount to $9.3 billion dollars, the largest securities class action verdict in history. *See id.* Nonetheless, a lawyer for Vivendi stated that estimating actual damages at this stage was impossible because both the number of investors in

the class and who would seek payouts remained unclear. *See id.*

This verdict followed over seven years of litigation, during which Vivendi, in contrast to Respondents, unsuccessfully challenged the trial court's subject matter jurisdiction over the claims brought by foreign class members who had acquired the company's ordinary shares on foreign exchanges. *See In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158, 169 (S.D.N.Y. 2003) (Baer, J.). F-cubed class actions' enormous overall complexity was further demonstrated when the trial court grappled with the issue of which foreign plaintiffs to certify. *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 95-108 (S.D.N.Y. 2007) (Holwell, J.). As part of this inquiry, the trial court examined the laws of the countries of each of the plaintiffs involved and, to preclude a double recovery, dismissed those plaintiffs from countries that would not grant *res judicata* effect to a U.S. class action judgment.[3] *See*

[3] The trial court had to consider several issues before even beginning this analysis. A class action may proceed if, in addition to a numerosity of plaintiffs making joinder impractical, common legal or factual questions, claims and defenses of representative parties that are typical of the class's claims and defenses, and representative parties that will fairly and adequately protect the class's interests, the court finds that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(a),(b)(3). One matter pertinent to this finding was "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(b)(3)(C). A court must consequently, *inter alia*, "evaluate

id. American, English, French, and Dutch plaintiffs were ultimately certified, while German and Austrian plaintiffs were not. *See id*. All these factors illustrate how an f-cubed class action is potentially unlike any other class action in terms of financial stakes, global reach, and legal complexity.

The case law governing whether f-cubed litigation can proceed sets forth two tests, developed over forty years and stemming in large part from policy considerations, for determining subject matter jurisdiction over securities law claims – a "conduct" test evaluating the extent to which misconduct occurred in the United States and an "effects" test considering whether foreign activities substantially affected U.S. investors and securities markets. *See Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (securities laws apply extraterritorially when necessary to preclude conduct abroad from injuring American investors); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) (U.S. securities laws encompass extraterritorial activity if it substantially affects U.S. investors or markets); *IIT v. Vencap, Ltd. ("Vencap")*, 519 F.2d 1001, 1017 (2d Cir. 1975) ("We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."); *Securities and Exchange Commission ("SEC") v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977)

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whether allowing a [class] action to proceed will prevent the duplication of effort and the possibility of inconsistent results." 7AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1780 (3d ed.2005).

("We are reluctant to conclude that Congress intended to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.'"). Courts have applied these tests individually or jointly. *Compare Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995) ("[A]n admixture or combination of the two [tests] often gives a better picture of whether there is sufficient United States involvement to justify the exercise of jurisdiction by an American court."), *with Robinson v. TCI/U.S. West Commc'ns Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) (satisfying either test allows for subject matter jurisdiction). Yet aside from lacking a basic statutory foundation, these tests are also so fact-bound that inconsistent holdings have emerged even within circuits and district courts.

B. Case Summary And Decisions Below

The facts of the instant case are easy to distill. But this simplicity is deceptive if one really wants to get an accurate sense of how complicated f-cubed securities class actions really are. The class certified in the *Vivendi* case previously discussed contained plaintiffs from the United States and five foreign countries who owned shares in a multinational conglomerate with stock trading on two stock exchanges (i.e., the New York Stock Exchange, where shares were primarily held by U.S. investors, and the Paris Bourse, where shares were primarily held by French and other non-U.S. investors). *See In re Vivendi*, 242 F.R.D. at 81, 95-108. Royal Dutch Shell stock trades on the New York Stock Exchange, the London Stock Exchange, and the Amsterdam

Stock Exchange. Royal Dutch Shell, http://www.shell.com/home/content/investor/share_price/share_price_summary.html (last visited Feb. 25, 2010). In contrast, the instant case solely concerns Australian investors who purchased shares in Respondent National Australia Bank ("NAB") trading on the Australian Securities Exchange.[4] *See Morrison v. Nat'l Austl. Bank*, 547 F.3d 167, 168 (2d Cir. 2008). Simply put, Petitioners have alleged accounting misconduct at an NAB Florida subsidiary, HomeSide Lending, Inc., that, when announced by NAB management in Australia, led to a drop in the price of NAB's Australian shares (i.e., when NAB management announced that the accounting figures at issue were false). *See id.* at 168-70.

The district court dismissed the case for lack of subject matter jurisdiction because "a significant, if not predominant, amount of the material conduct in this case occurred a half-world away." *In re Nat'l Austl. Bank. Sec. Litig.*, 2006 WL 3844465, at *7. In considering Petitioners' appeal, the Second Circuit invited the SEC to submit an *amicus* brief expressing its views on the case and the issue of extraterritorial application of U.S. securities laws. The SEC consequently proposed the following standard: "The antifraud provisions of the securities

[4] *But see supra* note 2 (the trial court dismissed the sole U.S. plaintiff for lack of standing and the decision was not appealed). Note also that NAB stock trades not only on the Australian Securities Exchange and the New York Stock Exchange, but also on the London Stock Exchange, Tokyo stock exchange, and the New Zealand stock exchange. *See Morrison*, 547 F.3d at 168.

laws apply to transnational frauds that result exclusively or principally in overseas losses if the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme." Brief of the Securities and Exchange Commission as *Amicus Curiae* In Response To The Court's Request in *Morrison v. Nat'l Austl. Bank*, No. 07-0583-cv (U.S. Court of Appeals for the Second Circuit) at 2. The Second Circuit then upheld the district court's dismissal because of the case's particular facts and rejected the proposed SEC standard. *Morrison*, 547 F.3d at 172-77.

But the Second Circuit also refused to establish a bright-line rule against f-cubed actions as Respondents had requested, finding that any potential conflict between U.S. antifraud laws and those of foreign nations did not require the "jettisoning" of the conducts and effects test. *Id.* at 175. The Court reasoned that (a) foreign jurisdictions would appreciate the antifraud efforts of U.S. courts, (b) that the Exchange Act meant to prevent both foreign and domestic parties from staging frauds from the United States, and (c) that exercising jurisdiction in f-cubed cases could best further this purpose. *See id.*

Views varied in regard to the decision's impact on securities class action litigation. Professor Coffee stated: "It's essentially a chill, but not a death blow to the [f]-cubed class action." Melissa Klein Aguilar, *Ruling Increases Scrutiny of F-Cubed Lawsuits*, COMPLIANCE WEEK, Nov. 11, 2008,

http://www.complianceweek.com/article/5143/ruling-increases-scrutiny-of-f-cubed-lawsuits. But the decision stated: "A much stronger case would exist, for example, for the exercise of subject matter jurisdiction in a case where the American subsidiary of a foreign corporation issued fraudulent statements or pronouncements *from the United States* impacting the value of securities trading on foreign exchanges." *Morrison*, 547 F.3d at 175 (emphasis added). In this regard, a jury has found Vivendi to be one such foreign corporation.[5]

SUMMARY OF ARGUMENT

This case concerns a very straightforward question of statutory interpretation—may foreign investors bring claims under Section 10(b) of the Exchange Act in regard to the purchase or sale of foreign securities from foreign issuers on foreign exchanges? This Court should, quite simply, answer "no" by unambiguously advancing a reading of the Exchange Act that is consistent with what the statute in its current form actually says. In support of this conclusion, the Court should acknowledge that the legislative history surrounding the Exchange Act in its original form evinces no congressional intent to grant foreign purchasers of

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[5] The complaint in the Vivendi case states that fraudulent statements were made from the United States in connection with a series of acquisitions in a wide array of industries, including Texas-based Waste Management, Inc., California-based MP3.com, Inc., Massachusetts-based Houghton Mifflin Co., and New York-based USA Networks. *See* First Amended Consolidated Class Action Complaint, *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ 5571 (S.D.N.Y.) ¶¶ 23-24.

securities trading on foreign exchanges from foreign issuers a right of redress in U.S. courts. Finally, in the context of Section 10(b) of the Exchange Act, the Court should reiterate its own precedents presuming that U.S. laws do not apply beyond U.S. territorial boundaries unless Congress has clearly expressed its intent for such extraterritorial reach.

Affirming the Second Circuit's decision with anything less simply will not do. In addition to the inconsistent case law surrounding f-cubed litigation, such precedents of this Court, rightly or wrongly decided, as *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and subsequent lower court jurisprudence concerning the scope of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, indicate that the more discretionary or fact-specific a standard for interpreting a statute a higher court establishes, the greater the opportunity for misinterpretation by lower courts. Such misinterpretation often takes the form of expanding the standard beyond what the higher court, and ultimately Congress, originally intended, thereby endangering the basic premise upon which the standard itself was based. In regard to securities class actions, as the case law following *Sosa* indicates, this type of aftermath will consist of a steady drift away from a framework of legal predictability for global companies. And not knowing what the law is at a given place of operation entails unknown risks of liability, which can compound into economic harm, as well as confrontation with the executive and legislative branches.

ARGUMENT

Because the resolution of the extra-territoriality issue does not depend on the question of subject matter jurisdiction, this Court can decide whether the claims at bar are even justiciable in the first place. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 (2006) ("[N]othing [depended on] 'whether [the issue] was technically jurisdictional.'") (citation omitted); *see also, e.g., F. Hoffman-La Roche, Ltd. v. Empagran, S.A.*, 542 U.S. 155, 163-75 (2004) (applying this very approach to an appellate court decision that was procedurally a matter of subject matter jurisdiction), *rev'g* 315 F.3d 338, 341 (D.C. Cir. 2003).

I. Section 10(b) Of The Exchange Act And Rule 10b-5 Do Not Permit Claims By Foreign Investors Against Foreign Securities Issuers In Connection With Securities Trading Abroad

The plain language of the Exchange Act in its current form extends no private right of action under Section 10(b) to foreign investors who purchase or sell securities from foreign issuers on exchanges abroad. Neither do Petitioners indicate any legislative history surrounding the Exchange Act's initial enactment that shows Congress even contemplated such a right. This Court should consequently reiterate its longstanding presumption against laws' extraterritorial application absent express congressional intent to the contrary.

A. The Exchange Act's plain language does not allow f-cubed litigation

Section 10(b) of the Exchange Act prohibits "any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails" from using "in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance" proscribed by the SEC. 15 U.S.C. § 78j(b); *see also* 17 C.F.R. § 240.10b-5. But the Exchange Act's preamble shows a definite focus on domestic investors and markets and discusses foreign commerce in this specific context.

Initially, the preamble states that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a *national public interest*." 15 U.S.C. § 78b (emphasis added). These "transactions in securities," the preamble thereafter continues, are "carried on in large volume by the public generally and in large part originate *outside the States in which the exchanges and over-the-counter markets are located* and/ or are *effected by means of the mails and instrumentalities of interstate commerce*." *Id.* (emphasis added). The Exchange Act defines the term "the States" as "*any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States*." *Id.* § 78c (emphasis added).

Under the phrase's plain meaning, then, transactions could commence "outside the States," or outside the United States and its territories, and be facilitated via interstate or international commerce. But the only exchanges and markets mentioned, where these transactions are finally completed, are exchanges and markets located in the United States. This wording at least implies an "exchange-based" focus – an approach "based on the country that regulates the exchange on which the transaction takes place" and that excludes "transactions on exchanges [and markets] other than [United States] exchanges [and markets]." Stephen J. Choi and Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 490 (2009) (article proposes that courts adopt an "exchange-based" presumptive rule in determining the applicable class in a Rule 10b-5 class action lawsuit and presume no jurisdiction in such a lawsuit for a foreign investor trading outside the United States).

Neither does Section 30 of the Exchange Act, which explicitly concerns foreign securities exchanges (i.e., it is entitled "Foreign Securities Exchanges"), support the private rights that f-cubed lawsuits assert. Under Section 30(a), the SEC can adopt rules and regulations covering transactions in securities of U.S. issuers that are "effect[ed]" by a broker or dealer "on an exchange *not within or subject to the jurisdiction of the United States*," rules and regulations that brokers and dealers cannot violate. 15 U.S.C. § 78dd(a) (emphasis added). This provision applies to the activities of

U.S., and not foreign issuers, on foreign exchanges. In any event, what activities this provision precludes remains unclear because the SEC has enacted no rule implementing this provision as it has done with Section 10(b).

Neither has the SEC promulgated any rule to implement Section 30(b). This provision states that the Exchange Act "shall not apply to any person insofar as he transacts a business in securities *without the jurisdiction of the United States*, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter." *Id.* § 78dd(b) (emphasis added).

Perhaps this situation contributed to the Second Circuit's observation that Congress, in enacting the Exchange Act, "omitted any discussion of its application to transactions taking place outside of the United States." *Morrison*, 547 F.3d at 170. In fact, after considering the SEC's proposed standard for extraterritorial application, the Second Circuit "respectfully urge[d] that this significant omission receive the appropriate attention of Congress and the [SEC]." *Id.* n.4.

This Court should also approach this entire analysis from the perspective that Section 10(b) explicitly authorizes no private right of action. *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) ("The § 10(b) private cause of action is a judicial construct that Congress

did not enact in the text of the relevant statutes."). As a result, only Congress has the power to expand this judge-made right.[6] *Id.* at 165.

If anything, the Exchange Act's references to foreign regulatory authorities place an even higher burden on foreign f-cubed plaintiffs to prove why their own countries' enforcement mechanisms are inadequate. A major issue in dispute throughout this litigation has been whether allowing Petitioners' lawsuit to proceed will result in "unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. This Court should consider whether the Exchange Act's acknowledgement that such authority exists lends credence to Respondents' comity concerns.

The Exchange Act refers to "foreign securities authorit[ies]," or foreign governments or organizations empowered by a foreign government to administer or enforce its laws as they relate to securities matters." 15 U.S.C. § 78c. Section 15 of the Exchange Act, in turn, empowers the SEC to

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[6] Very significantly, the United States, in opposing certiorari in this case, suggested a higher standard for extraterritorial application of the Exchange Act in private actions. *See* Brief For The United States As Amicus Curiae, *Morrison v. Nat'l Austl. Bank, Ltd.*, No. 08-1191 (U.S. Supreme Court) at 10-11. "[I]n cases involving transnational fraud, the private plaintiff should be required to demonstrate a direct causal link between his injury and the component of the scheme that occurred in the United States." *Id.* at 10. But the SEC could bring an enforcement action on a fraudulent scheme bearing a "*sufficient* connection to the United States." *Id.* at 11. At least as applied to private actions, the SEC's interpretation nonetheless still contradicts the Exchange Act's plain meaning.

discipline brokers or dealers who make false or misleading statements on such authorities' applications or reports or who violate or aid and abet in any violation of foreign statutes governing securities transactions. 15 U.S.C. § 78o. And Section 21(a)(2) allows the SEC to provide assistance to a foreign securities authority in an investigation to "determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that the … authority administers or enforces." 15 U.S.C. § 78u. These provisions addressing cooperation with foreign countries' efforts to enforce *their own* securities laws would be inconsistent with allowing those countries' citizens to co-opt those same laws in a U.S. court.

In any event, this Court has examined other statutes' extraterritorial reach and acknowledged that Congress certainly knows how to regulate extraterritorial activity "when it desires to do so." *Equal Employment Opportunity Comm'n v. Arabian Am. Oil. Co. ("Aramco")*, 499 U.S. 244, 258 (1991) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). Section 30A of the Exchange Act, an amendment to the Exchange Act that was actually part of the Foreign Corrupt Practices Act ("FCPA") of 1977, has a specified extraterritorial reach in its prohibition of the bribery of foreign officials to obtain or retain business (though it provides for no private right of action. *See* 15 U.S.C. §§ 78dd-1, *et seq.* FCPA amendments in 1998 further clarified and expanded this extraterritorial reach. *See id.* These provisions referring to foreign activities and authorities further

show why this Court should not try to predict Congress's disposition in regard to Section 10(b)'s "extraterritorial thrust" for private lawsuits. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 458 (2007).

B. The legislative history surrounding the Exchange Act's initial enactment evidences no support for any private right of action under Section 10(b)

Petitioners have indicated no legislative history surrounding the Exchange Act's original enactment that indicates any congressional intent to allow the type of claim they are pursuing. And they cannot because any such intent, using the statute's text as a guide, did not become law. As this Court noted in first acknowledging the judicially created right of action under Section 10(b) back in 1975, the first court decision ever holding that such a right existed was issued in 1946. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975) (citing *Kardon v. Nat'l Gypsum Co.*, 69 F.Supp. 512 (E.D. Pa. 1946). The Exchange Act was enacted in 1934.

In any event, one detailed study by Professor Margaret Sachs of the University of Georgia Law School of the legislative history surrounding the Exchange Act's initial enactment, apparently one of very few, if not the only one, on the subject, points to legislators primarily concerned with protecting domestic, as opposed to foreign, investors. *See* Margaret Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28

COLUM. J. TRANSNAT'L L. 677, 694-99 (1990). These legislators concerned themselves with the risks born by *domestic* investors who traded in *foreign* securities domestically or abroad. *See id.* In fact, the study even indicates that the language "between any foreign country and any State" denotes no extraterritorial scope and was simply added to ensure statutory coverage of foreign securities trading in the United States. *See id.* at 700-701 (citation omitted).

C. This Court's longstanding precedents preclude Section 10(b)'s extraterritorial application for a private action

This Court's longstanding precedents regarding extraterritoriality strongly support the previous interpretations of the Exchange Act's text and legislative history. Congress has the power to enact laws applicable beyond the territorial boundaries of the United States. *Aramco*, 499 U.S. at 248 (citing *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). But whether Congress has actually exercised this authority is a matter of statutory construction. *Aramco*, 499 U.S. at 248.

"The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, is a valid approach whereby unexpressed congressional intent may be ascertained." *Foley Bros.*, 336 U.S. at 285 (citing *Blackmer v. United States*, 284 U.S. 421, 437

(1932)). Indeed, as noted in an opinion by Justice Holmes, this Court has long acknowledged that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions, rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *Id.*

To apply extraterritorially, then, a statute must indicate "a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Foley Bros.*, 336 U.S. at 285. Courts may consider "all available evidence about the meaning" of a statute to determine the extent, if any, of the statute's extraterritoriality. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993) (analysis of immigration statute's text, structure, and legislative history proved that the statute did not apply extraterritorially). To that effect, "Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute." *Aramco*, 499 U.S. at 258 (mentioning numerous statutes specifically defining extraterritorial application). The FCPA, as

discussed previously, is one such example. *See* 15 U.S.C. §§ 78dd-1, *et seq.* But absent "an affirmative intention of the Congress clearly expressed," the Court should presume that a statute solely applies domestically. *Aramco*, 499 U.S. at 248 (quoting *Benz*, 353 U.S. at 147).[7]

Words of "universal scope" such as "any," as in the application of Section 10(b) and Rule 10b-5 to the "purchase or sale of *any* security," do not constitute such an affirmative intention. 17 C.F.R. § 240.10b-5 (emphasis added); *Am. Banana Co.*, 213 U.S. at 357. Justice Holmes observed that "[a]ll legislation is *prima facie* territorial." *Am. Banana Co.*, 213 U.S. at

[7] Petitioners refer to the Court's 2005 decision in *Spector v. Norwegian Cruise Line Ltd.*, which held that some, if not all, requirements set forth by Title III of the Americans with Disabilities Act potentially applied to foreign-flagged vessels in United States waters, as a basis for presuming "that Congress intends to legislate for all conduct within the United States regardless of the potential interest of other nations in such conduct." Brief For Petitioners at 34 (citing *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125-27, 131-32 (2005)). *Spector*, however, distinguished between "matters that affect only the internal order of the ship when there is no effect on United States interests" and matters that affect, in whole or in part, "the welfare of United States residents or territory." *Spector*, 545 U.S. at 133. "The relevant category for which the Court demands a clear congressional statement, then, consists not of all applications of a statute to foreign-flag vessels *but only those applications that would interfere with the foreign vessel's internal affairs*." *Id.* at 132 (emphasis added). *Spector* consequently supports the use of the traditional framework for determining extraterritoriality on account of how this case, and, by their nature, f-cubed actions implicate interests other than those of the United States.

357 (1909). He continued immediately thereafter: "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." *Id.*

This Court has adhered to this very approach. *See Small v. United States*, 544 U.S. 385, 387 (2005) (framing the issue in the case as whether the prohibition on possessing a firearm by any person "who has been convicted in *any court*" applied only to domestic convictions or to foreign convictions as well). Referring to "the commonsense notion that Congress generally legislates with domestic concerns in mind," the Court did not deviate from the longstanding presumption that Congress ordinarily intends its statutes to have solely domestic application. *Id.* at 388 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993) (holding that the Federal Tort Claims Act's waiver of sovereign immunity does not apply to tort claims arising in Antarctica); *see also United States v. Palmer*, 16 U.S. 610, 631 (1818) (Marshall, C.J.) ("The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them."). Nor should the Court do so here.

II. Only The Presumption Against Extraterritoriality Will Sufficiently Guide Lower Courts

In its decision below, the Second Circuit concluded that "the potential conflict between our anti-fraud laws and those of foreign nations does not require the jettisoning of our conducts and effects tests for 'foreign-cubed' securities fraud actions and their replacement with [a] bright-line ban." *Morrison*, 547 F.3d at 175. The decision consequently paid little attention to the "parade of horribles that [Respondents and *amici*] claim would result if American courts exercised subject matter jurisdiction over such actions." *Id.* at 174 (referring to briefing discussing the potential for bringing U.S. "securities laws into conflict with those of other jurisdictions," "undermin[ing] the competitiveness and effective operation of American securities markets, discourag[ing] cross-border economic activity, and … duplicative litigation").

Why was the Second Circuit's decision lacking if it reached the correct result? When misused, the class action lawsuit is likely one of the most destructive forces a company can face. One previous comment by this Court as to private securities fraud actions is especially illustrative in regard to securities class actions: "Private securities fraud actions … if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 313 (2007). And yet securities class

actions seem to keep morphing into different forms. In sanctioning private Rule 10b-5 litigation partially on account of its widespread judicial acceptance and congressional inaction to the contrary over thirty years, this Court rightly acknowledged that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739.

This Court now has a chance to stop a form of class action litigation that is unprecedented in such vexatiousness. And only a decision clearly precluding all foreign investors from suing foreign defendants under Section 10(b) in relation to foreign securities transactions - a clear and unambiguous standard, rather than a fact-specific one that is "inherently unpredictable" - will succeed in doing that and pressuring Congress and the SEC to consider these issues, as it is their duty to do. *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987) (citations omitted). Anything less will risk misinterpretations by lower courts, misinterpretations of the sort that expand, rather than restrict, discretionary standards. And such expansion can be so great that the standards themselves become meaningless.

That this consequence will occur in terms of f-cubed litigation is by no means a certainty. But this Court should be mindful of how the situation it faces in regard to the instant case – the chance to set forth an unambiguous standard that could bring clarity to unsupported case law in a subject area – resembles

the circumstances of the lower court decisions concerning the ATS when the *Sosa* case was considered.

As this Court mentioned, Judge Henry Friendly called the ATS a "legal Lohengrin … no one seems to know whence it came." *Sosa*, 542 U.S. at 712 (citing *Vencap*, 519 F.2d at 1015). This law was passed by the first Congress as part of the Judiciary Act of 1789 and confers original jurisdiction on federal courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Yet until 1980, the ATS was very rarely a subject of litigation.

In considering *Sosa*, the Court had to decide whether the ATS allowed for private rights of action at all. *See Sosa*, 542 U.S. at 712-738. That situation mirrored the situation here, where the Court must also to decide whether to extend a private right of action, albeit one that it has already accepted exists for domestic investors. *See id.* Ruling that the statute was jurisdictional, as the government argued, would have, as here, invalidated a whole category of arguably unfounded case law that lower courts had developed without this Court's guidance, as well as precluded more such cases. The Court was faced with making a decision on the ATS's plain meaning or looking to other sources of interpretation. *See id.* The case also raised questions of the extent to which the Court should defer to the political branches. *See id.*

We submit that the Court, rightly or wrongly, tried to have it both ways. It concluded that the ATS was a jurisdictional statute, but used a number of historical sources to hold that the ATS could also serve as the basis for a limited class of private lawsuits under international law. *See id.* Then the Court imposed what appeared to be restrictive guidelines instructing lower courts to exercise "great caution" in entertaining ATS lawsuits. *See id.* at 728. There too, the Court was concerned about how these types of lawsuits involved extraterritorial conduct and a potential impact on U.S. foreign relations. *See id.* at 727-28.

Subsequent ATS litigation, however, did not bear out the optimistic view that these lawsuits would be limited. The lower courts continued to hear the same sorts of cases as they had before based on very speculative theories. Often, the events at the heart of a dispute were not connected to the United States. In sum, the Court set a discretionary standard. And that standard was misinterpreted, expanded, and abused.

This brief does not seek to convince this Court to extend its focus in this case to the ATS, nor even to question the *Sosa* decision.[8] But subsequent lower court jurisprudence has misconstrued *Sosa* to such a degree that it provides good reason for this Court to avoid a Second Circuit-like discretionary approach in this case. *Sosa*'s aftermath, right or wrong, quite simply shows such an approach's shortcomings and

[8] To the extent the Court may construe this brief as questioning or disagreeing with *Sosa*, we note that we do so with respect.

how lower court jurisprudence may consequently evolve in a way the Court never intended.

A. Pre-*Sosa* ATS case law resembles past f-cubed litigation in its lack of a statutory foundation

The ATS was, in a sense, brought back to life by the Second Circuit's decision in *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). In that case, a federal court found that the ATS allowed jurisdiction over a claim by Paraguayan plaintiffs against a Paraguayan government official for the torture-killing of a family member in Paraguay. *Filartiga*, 630 F.2d at 878-80. The Second Circuit found that torture conducted under "color of law" violated the "law of nations," even when conducted by a government agent against that government's own nationals. *Id.* at 887.

Thereafter, as lower courts developed "tests" without Supreme Court guidance, to determine Section 10(b)'s extraterritorial scope, ATS jurisprudence also morphed into more generalized class actions. In the ATS's case, these class actions were also massive, global, and targeted at major multinational corporations. The criteria for being targeted, however, was not a decline in company share price, but the fact that a company did business in a country governed by leaders with shoddy human rights records. ATS lawsuits primarily focused on suing these companies for somehow aiding and abetting these human rights violations.

An example of such a lawsuit concerns the military government of Myanmar (Burma). In 1996, a class of Myanmar villagers filed suit in California federal court against Unocal Corporation and other defendants involved in a natural gas extraction joint venture with the Myanmar regime. *See Doe v. Unocal Corp.*, 395 F.3d 932, 937-42 (9th Cir, 2002). (C.D. Cal. 1997). These plaintiffs alleged that Unocal and the other defendants were complicit in forced labor to complete the project's pipeline directed by the Myanmar military. *See id.* The district court found that ATS jurisdiction encompassed corporations that aided government human rights violations. *See id.* But the court later granted summary judgment in Unocal's favor because, as a matter of fact, Unocal was not sufficiently connected to the pipeline's actual construction for a claim to proceed. *See id.* at 942-44. Reversing in part, a Ninth Circuit panel held that the district court had erred in holding that the plaintiffs had to prove Unocal's control over the Myanmar military's actions. *See id.* at 949-57. The plaintiffs, instead, had to show that Unocal "knowingly assisted" the military. Under that standard, the Ninth Circuit held, sufficient evidence had been produced for the case to proceed. *See id.* The case ultimately settled.

By the end of the decade, ATS complaints had greatly departed from the factual scenario *Filartiga* had presented. No longer restricting themselves to claims concerning political persecution, plaintiffs were now alleging claims based on environmental damage. *See Beanal v. Freeport-McMoran, Inc.*, 197

F.3d 161 (5th Cir. 1999) (citing how defendants' mining operations resulted in "environmental abuses"); *Sarei v. Rio Tinto*, 221 F.Supp.2d 1116 (C.D. Cal. 2002) (complaint alleged the alteration of the climate in the Papua New Guinean rain forest). And all these developments occurred in the unfounded context of private citizens suing for enforcement of treaties and international law, when, as with plaintiffs in private Section 10(b) actions, they had no statutory right to do so. *See Foster v. Neilson*, 27 U.S. 253, 314 (1829); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984).

B. This Court failed to stem ATS litigation with its discretionary standard

Sosa concerned a lawsuit against Drug Enforcement Agency officials for forcibly rendering to the United States a Mexican physician suspected of having aided in an agent's torture in Mexico. *Sosa*, 542 U.S. at 697-99. The U.S. government argued that the ATS was merely a jurisdictional statute that created no private rights of action. *See id.* at 712-20. This Court held, in accordance with the government's position, that the ATS was jurisdictional and dismissed the lawsuit. *See id.* at 724. But the Court also held that, in extremely rare instances, federal common law might supply a cause of action for violations of the law of nations. *See id.* at 724-25. Then again, there was "no basis to suspect" that Congress had, according to the Court's research, anything in mind beyond "violation of safe conducts, infringements of the rights of ambassadors, and piracy." *Id.* at 724.

As a result, courts' power to allow private claims under the law of nations should be subject to "vigilant doorkeeping" and great caution was to be exercised when "adapting the law of nations to private rights." *Id.* at 728-29. *Sosa*, then, understood the potential for misuse of such private claims and how they might interfere with the political government branches' management of economic and foreign affairs. *See id.* at 724-28.

C. Lower courts have abused the discretion granted them in *Sosa*

Though the door for ATS claims was subject to "vigilant doorkeeping" and "great caution," the door has since been ripped off from its hinges. *Id.* at 728-29. Claimants continued to file the same sorts of ATS claims. And the lower courts differed in how to approach them.

Recently, for example, the Second Circuit has ruled in a case concerning a Canadian energy company with operations in Sudan, whereby, *inter alia*, the country's infrastructural development projects allegedly assisted the Sudanese military in committing human rights violations (i.e., building roads and airstrips knowing the Sudanese military would use them in attacking civilians). *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244, 244-56 (2d Cir. 2009). The court held that the ATS, pursuant to international law, encompassed accessorial liability where (1) a defendant assisted a principal in a manner that substantially effected the

perpetration of a human rights violation and (2) did so with the purpose of facilitating that violation. *See id.* at 259.

But other courts have disagreed with this theory of accessorial liability. Another Second Circuit panel stated that such liability was feasible, but had to be defined by domestic standards. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (2d cir. 2007. The Eleventh Circuit has set the bar lower – accessorial liability theories were permissible only if defendants were aware that their conduct would facilitate a harm; plaintiffs did not need a purpose or intent. *Barrueto v. Fernandez Larios*, 205 F. Supp.2d 1325, 1333 (S.D. Fla. 2002), *aff'd*, 402 F.3d 1148, 1161 (11th Cir. 2005).

Of all these appellate rulings, one characteristic stands out. They all sanctioned a theory of ATS liability – accessorial liability – that was extensively advocated before *Sosa*. *Sosa* cautioned against an extensive ATS scope and mentioned nothing about accessorial liability. Yet the appellate courts still followed their own path.

These courts were able to do so because this Court, rightly or wrongly, had not said no (i.e., restricting its ruling to whether the ATS was jurisdictional or not). If post-*Sosa* jurisprudence demonstrates anything, it is the huge risk that a higher court takes when it allows the use of a discretionary standard.

D. A mere affirmance of the Second Circuit without a bright-line standard concerning Section 10(b)'s extraterritoriality will create the same confusion that has occurred in post-*Sosa* ATS litigation.

The appellate case law the Court confronts in the instant case contains the seeds of similar confusion. One only needs to examine the trial court's opinion for an excellent example – mention of two other f-cubed cases with fact patterns practically identical to the case at bar where the other judges chose to exercise subject matter jurisdiction. In one case, jurisdiction existed over a class of foreign plaintiffs, who alleged that: (i) "accounting improprieties" at a United States subsidiary led to significant errors in its financial statements and (ii) that such statements were incorporated into the financial statements of the foreign parent, which were distributed and relied upon by investors abroad. *In re Nat'l Austl. Bank. Sec. Litig.*, 2006 WL 3844465, at *7 n.8 (citing *In re Alstom S.A. Sec. Litig.*, 406 F.Supp.2d 346, 362-63, 387 (S.D.N.Y. 2005).

And in another case, the court found that jurisdiction existed over a class of foreign plaintiffs who alleged that: (i) the Canadian based Gaming Lottery Corporation ("GLC") had acquired a United States subsidiary, Specialty Manufacturing Inc. ("SM"), without obtaining state regulatory approval; (ii) falsely represented to the investing public that this acquisition was completed when it had not been; (iii) consolidated SM's financial results with those of

GLC; and (iv) misled the plaintiffs by making announcements of other United States acquisitions that were certain to fail once those state regulators learned of GLC's deception concerning SM. *See id.* (citing *In re Gaming Lottery Sec. Litig.*, 58 F.Supp.2d 62, 65 (S.D.N.Y.1999). The trial judge had only one explanation for why she ruled differently in the instant case than her two colleagues: "Regardless of the jurisdictional decisions in *Alstom* and *Gaming Lottery,* I believe that the allegations before me in this case warrant a different result." *See id.* This was a rather subjective approach. Perhaps one of the other two trial judges spoke accurately, then, when he said that "any notion that a single precedent or cohesive doctrine may be found which 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*, 406 F. Supp. 2d at 375.

What standard for f-cubed lawsuits should this Court adopt if not for the presumption against extraterritoriality? As with the ATS, the plethora of policy questions the Court will wade into should it not expressly adopt such a standard are really the business of Congress.

Indeed, given the recent economic turmoil and shocking financial scandals, perhaps the timing of this case is ideal. If the Court defers to Congress by validating this presumption, then f-cubed class actions will receive the congressional attention, if any, that they merit.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed on the basis of one expressly stated reason: this case and f-cubed suits based on Section 10(b) cannot be pursued because of the presumption against extra-territoriality embodied in the Exchange Act and this Court's precedents.

Respectfully submitted,

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