

No. 08-1191

IN THE
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

**BRIEF OF *AMICUS CURIAE* NYSE EURONEXT
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*¹

NYSE Euronext owns and operates the largest and most diverse exchange group in the world. In the United States, NYSE Euronext operates the New York Stock Exchange (“NYSE”), the world’s largest cash equities exchange; NYSE Arca, a fully electronic exchange for equities, exchange traded products and options; NYSE Amex, an equities and options exchange that also lists emerging growth companies; and the NYSE Liffe U.S. futures market. In Europe, NYSE Euronext operates Euronext, a single market comprised of the combined stock exchanges of Paris, Amsterdam, Brussels and Lisbon; the NYSE Liffe derivatives markets in London, Paris, Amsterdam, Brussels and Lisbon; and NYSE Alternext, a listing market for emerging growth companies.²

The United States-based NYSE Euronext stock exchanges are registered with the U.S. Securities and Exchange Commission (“SEC”) as national securities exchanges and self-regulatory organizations (“SROs”) as defined in the Securities Exchange Act of 1934 (the

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket consents to the filing of *amicus curiae* briefs in this matter.

2. NYSE Euronext has over 8,000 listed issues, more than any other exchange group, and trading on NYSE Euronext’s equity markets represents nearly 40% of the world’s cash equities trading volume.

“Exchange Act”), 15 U.S.C. § 78c(a)(26). The Exchange Act vests SROs with the authority to enact and enforce rules governing the conduct of members and member organizations, 15 U.S.C. §§ 78f(b)(1)–(9), and further mandates that SROs “protect investors and the public interest,” 15 U.S.C. § 78f(b)(5). The SEC, in turn, oversees NYSE Euronext’s compliance with its regulatory and operational responsibilities, including compliance monitoring, enforcement of standards for issuers and regulation of broker-dealers.

NYSE Euronext has an interest in this case because the extraterritorial application of U.S. securities laws—and specifically the implied rights of action under 15 U.S.C. § 78j(b) (“Section 10(b)”) of the Exchange Act at issue here—to claims by foreign purchasers who purchased a foreign issuer’s shares on a foreign exchange (“f-cubed” plaintiffs)³ interferes with the orderly functioning of the global securities markets. By virtue of its operation of securities exchanges both within and outside of the United States, NYSE Euronext has direct involvement with foreign and

3. Many commentators and several courts have referred to such purchasers as “f-cubed” plaintiffs—a shorthand reference to this particular category of investors seeking redress in the U.S. courts. The legal standard NYSE Euronext proposes here would exclude f-cubed plaintiffs from pursuing their claims in a U.S. court. The legal standard, however, would not preclude those who purchased securities on a U.S. exchange from pursuing their claims in a U.S. court. Thus, investors who purchased National Australia Bank (“NAB”) American Depository Receipts in the U.S. would potentially have a claim under Section 10(b), while foreign NAB shareholders who purchased NAB shares on the Australian Securities Exchange would not.

domestic investors, issuers, regulators, legislatures and other exchanges. Over the past decades, NYSE Euronext has witnessed and participated in the expansion of foreign exchanges and the related development of regulatory regimes governing securities transactions on those exchanges. The regimes in the countries in which NYSE Euronext operates are designed to protect the integrity of the securities markets and provide clear guidance to market participants and investors. Although the contours of those regulatory systems differ in various ways from the U.S. system—and thus reflect national policy decisions—the regulatory systems and the bodies that enforce them are accorded recognition and deference by the SEC and U.S. Department of Justice. Extraterritorial application of the implied rights of action under Section 10(b) to f-cubed claimants fails to give proper deference to such foreign regulatory regimes and actually interferes with their operation.

Extending the implied rights of action under Section 10(b) to f-cubed claimants discourages companies from listing on NYSE's U.S. exchanges. Issuers worldwide have repeatedly expressed concern to NYSE Euronext that the risk of U.S. litigation has deterred them from raising capital in the U.S. If Petitioners' arguments were to prevail, for example, a foreign issuer that conducts limited business in the U.S. and lists only 5% of its shares on a U.S. exchange would nonetheless be exposed to potential Section 10(b) liability to 100% of its shareholders. While vigorous enforcement of the antifraud provisions of the Exchange Act is critical to the proper functioning of the U.S. securities markets, foreign market participants should be governed by the

laws and regulations of their respective countries and should not be subject to the inconsistent and unpredictable application of Section 10(b) liability under U.S. law. The parameters of Section 10(b) liability should be clear and predictable, give deference to foreign sovereigns, provide certainty to litigants and avoid deterring investment in the U.S. capital markets.

For the reasons set forth herein, NYSE Euronext respectfully urges the Court to affirm the decision of the Second Circuit below.

SUMMARY OF ARGUMENT

Congress has never stated that the Exchange Act should be applied extraterritorially to claims asserted by foreign investors who purchased a foreign issuer's shares on a foreign exchange.⁴ For over two centuries, this Court has repeatedly held that where, as here, an express Congressional directive is lacking, U.S. laws should be interpreted narrowly so as not to interfere with the laws of foreign nations. An expansionistic view of Section 10(b) liability amounts to nothing less than U.S. "legal imperialism." Moreover, the extraterritorial application of U.S. class action principles fosters

4. NYSE Euronext agrees with both Petitioners and Respondents that the discussion of the extraterritorial reach of Section 10(b) liability to f-cubed plaintiffs has been inaccurately treated as a question of subject matter jurisdiction by the lower courts. *See* Pet. Br. 15-32; Resp. Br. 22. It is likely that much of the confusion below stems from attempting to interpret what may be termed "drive by jurisdictional rulings," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998), rather than addressing the merits of such plaintiffs' claims.

unpredictability, because it is highly uncertain that a U.S. class action judgment or settlement would be enforceable under foreign law, and because U.S. courts are ill-equipped to predict how foreign courts will view such judgments.

Although the Second Circuit reached the correct result below, the “conduct and effects” tests it applied to reach that result is unsupported by the language of the Exchange Act and relevant legislative history. Indeed, when first articulating the “conduct and effects” tests in the seminal decision *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975), Judge Friendly stated: “We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond.”

This Court should apply a bright-line exchange-based test and extend the implied rights of action under Section 10(b) only to investors (whether foreign or domestic) who purchase securities on a U.S. exchange. The claims of foreign investors who purchase a foreign issuer’s shares on a foreign exchange should be resolved in the country where those securities were purchased and where the harm was suffered. Such a rule avoids interference and conflicts with foreign law and regulatory regimes and provides the greatest predictability to market participants who could choose whether, and to what extent, they are exposed to litigation in U.S. courts under the Exchange Act.

A bright-line test also fosters capital-raising activities. If it is clear that f-cubed claimants cannot seek

redress under Section 10(b), a French issuer considering raising capital in a public offering in the U.S., for example, would be able to reasonably predict the scope of potential liability in the U.S. as a result of its listing. Such liability would be limited to the universe of investors who chose to purchase the issuer's securities on the U.S. exchange. With that information, the issuer could proceed with raising capital on the U.S. exchange, adjusting the size of its issuance in proportion to its choice of risk.

By comparison, if Section 10(b) liability extends to f-cubed claimants, the same French company could face expansive liability, including exposure to litigation of its entire equity offering, as a result of even a small offering on a U.S. exchange. Faced with the unquantifiable risk of potential liability to French investors who purchased the French company's securities in Paris—or, in fact, to *any* investor who purchased that issuer's securities anywhere else in the world—the company might decide not to raise capital in the U.S. markets.

For the reasons discussed more fully in this brief, NYSE Euronext respectfully urges the Court to affirm the decision below.

ARGUMENT**I. SECTION 10(b) IMPLIED RIGHTS OF ACTION DO NOT EXTEND TO FOREIGN INVESTORS WHO SUFFERED FOREIGN HARMS**

For over two hundred years, this Court has repeatedly affirmed the “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *EEOC v. Arabian Am. Oil Co.* (“*Aramco*”), 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85 (1949)); *see generally Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (observing that “an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains”). The presumption against extraterritorial application of U.S. laws can only be overcome by a demonstration of “the affirmative intention of the Congress clearly expressed.” *Aramco*, 499 U.S. at 248 (citation and internal quotations omitted). Accordingly, if there is any question whether Congress intended a law to apply extraterritorially, it must be resolved in a manner that limits its application to domestic concerns. *Id.* Applying these settled principles, the Court should affirm the dismissal of Petitioners’ claim.

Courts have consistently held that “the Securities Exchange Act is silent as to its extraterritorial application.” *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1313 (11th Cir. 2009) (quoting *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 121 (2d Cir. 1995)); *see also*

Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 29-30 (D.C. Cir. 1987) (explaining that the securities laws “furnish no specific indications of when American federal courts have jurisdiction over securities law claims arising from extraterritorial transactions”). Likewise, the limited legislative history confirms that Congress “chose to protect only those investors whose trades occur inside the United States.” Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat’l L. 677, 681 (1990).

Moreover, because the private right of action is a judicially-created remedy, it follows that no affirmative intention of Congress can be found, let alone a clearly expressed intention, to apply Section 10(b) extraterritorially. *Cf. Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008) (“Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.”).

In their Petition for Writ of Certiorari, Petitioners candidly acknowledged that “the Exchange Act and its legislative history are silent on the issue of extraterritorial application.” Cert. Pet. 16. As Respondents set forth in their brief, Petitioners’ latest attempt to overcome this dearth of legislative intent by pointing to language contained in Section 10’s preamble prohibiting manipulative and deceptive devices in “interstate commerce” fails. Resp. Br. 26-31.

First, as this Court squarely held in *Aramco*, such “boilerplate” language does not satisfy the requirement that there be a “clear” expression of Congressional intent. *Aramco*, 499 U.S. at 250-51 (“[W]e have repeatedly held that even statutes that contain broad language in their definitions of ‘commerce’ that expressly refer to ‘foreign commerce’ do not apply abroad.”). Further, as this Court has noted on several occasions, when Congress wished to create liability under the securities laws, “it had little trouble doing so.” *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994) (citation and internal quotations omitted).

Second, even if the generic reference to “interstate commerce” in the preamble to the Exchange Act created an ambiguity regarding the extraterritorial application of the Exchange Act (which it does not), *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007), preclude Petitioner’s arguments. These decisions declined to extend the extraterritorial reach of statutes that—unlike the implied rights under Section 10(b) of the Exchange Act at issue here—actually provided for some extraterritorial effect.⁵

5. The additional arguments that Petitioners and their *amici* make—contending that Congressional intent to apply Section 10(b) extraterritorially can be found in other sections of the Exchange Act—are discussed extensively by Respondent. Resp. Br. 29-31, 42-44. That discussion demonstrates that there is simply no basis for Petitioners’ alternative theories for establishing affirmative Congressional intent.

In *Empagran*, the Court interpreted the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), 15 U.S.C. § 6a, which explicitly provides for some extraterritorial application by bringing within its reach certain foreign conduct that affects American commerce, and the FTAIA’s application to claims asserted by plaintiffs who purchased vitamins *outside* the U.S. and suffered injury *outside* the U.S.—like the f-cubed plaintiffs here. *Empagran*, 542 U.S. at 162. Concluding that extraterritorial application to such claims was not reasonable, the Court reiterated its allegiance to international comity considerations, observing that if the U.S.’ “policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of *legal imperialism*, through legislative fiat.” *Id.* at 169 (emphasis added).⁶

And, just two terms ago, in *Microsoft*, this Court carefully cabined the extraterritorial application of U.S. patent laws, restating the “presumption that United States law governs domestically but does not rule the world.” *Microsoft*, 550 U.S. at 454. *Microsoft* determined that the extraterritorial reach of Section 271(f) of the Patent Act, 35 U.S.C. § 271(f), did not extend to potentially infringing conduct that took place *only* abroad. *Id.* at 454-56. Pivotal to the considerations in this case, the Court held that the presumption against extraterritoriality “is not defeated . . . just because [a statute] specifically

6. The Court also rejected the idea that courts should take comity considerations into account on a case-by-case basis as “too complex to prove workable.” *Empagran*, 542 U.S. at 168.

addresses [an] issue of extraterritorial application.” *Id.* at 455-56 (quoting *Smith v. United States*, 507 U.S. 197, 204 (1993)).

In view of the clear limitations that *Empagran* and *Microsoft* imposed on the reach of statutes that *actually* provided for some extraterritorial application, the generic preamble to which Petitioners cite cannot overcome the presumption against the extraterritorial application of the implied rights under Section 10(b). Like the claims of the plaintiffs in *Empagran* and *Microsoft* who suffered only foreign injuries, Petitioners’ claims should not be heard in the U.S. courts.

II. EXTRATERRITORIAL APPLICATION OF SECTION 10(b) LIABILITY INTERFERES WITH FOREIGN LAW

The mere “*risk* of interference with a foreign nation’s ability independently to regulate its own commercial affairs” is reason enough to reject the extraterritorial application of U.S. laws. *See Empagran*, 542 U.S. at 165 (emphasis added). That risk of interference flows automatically from the application of U.S. securities laws to foreign purchasers who acquire foreign-issued securities on a foreign exchange.

It is critical to observe that such foreign purchasers make investment decisions based on the laws and regulations in the countries where they purchase securities. Those investment decisions are predicated upon the disclosure obligations, liability protections and availability of remedies in the particular country where the transaction takes place. Allowing f-cubed purchasers

to assert implied rights of action under Section 10(b) in the U.S. courts would substitute U.S. legal and regulatory policy judgments for those of foreign jurisdictions, causing a direct negative impact on the orderly conduct of the global securities markets. Such an imposition of U.S. law over foreign transactions is directly at odds with the years of effort that the U.S. has devoted to promoting cooperation with foreign governments in the regulation of securities trading.

A. The U.S. Already Recognizes and Defers to Foreign Securities Laws

In recognition of foreign regulatory regimes, the U.S. has entered into dozens of cooperation agreements and treaties with foreign regulators and governments to facilitate the international enforcement of securities laws. Those agreements reflect the judgment of the U.S., and particularly the SEC,⁷ that foreign nations can (and do) effectively regulate their own securities markets, and that it is appropriate to cooperate with those governments in support of their systems of regulation and enforcement.⁸

7. The development of such extensive conventions and treaties undercuts Petitioners' suggestion that any conflict in laws should be resolved by addressing the matter to the State Department. Pet. Br. 40 n.17. A balance of U.S. and foreign interests has already been struck, as reflected in these treaties and conventions.

8. *See, e.g.*, Memorandum of Understanding Concerning Consultation, Cooperation and the Exchange of Information Related to Market Oversight, SEC-Euronext, Preamble,

The SEC has entered into bilateral enforcement cooperation memoranda (called Memoranda of Understanding, or “MOUs”) with 20 individual foreign regulatory commissions, and, further, has signed the International Organization of Securities Commissions (“IOSCO”) Multilateral Memorandum of Understanding, which has been counter-signed by 63 foreign regulatory authorities.⁹ Likewise, the United

(Cont’d)

Jan. 25, 2007 (expressing the SEC’s and Euronext’s “willingness to cooperate with each other in the interest of fulfilling their respective regulatory mandates, particularly in the areas of investor protection, fostering market integrity, and maintaining investor confidence and systematic stability”); Treaty with Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Preamble, Mar. 18, 1985, 1985 U.S.T. 230 (stating that the sovereignties “desir[ed] to improve the effectiveness of both countries in the investigation, prosecution, and suppression of crime through cooperation and mutual assistance in law enforcement matters”). In fiscal year 2008, the SEC made 594 requests for information to foreign regulatory authorities and responded to 414 requests for information from foreign authorities. *See* Office of International Affairs: International Enforcement Assistance, http://www.sec.gov/about/offices/oia/oia_crossborder.htm (last visited Feb. 24, 2010).

9. The U.S. has bilateral enforcement MOUs with regulatory authorities in Argentina, Australia, Brazil, Canada, Chile, France, Germany, Hong Kong, Israel, Italy, Japan, Jersey, Mexico, The Netherlands, Norway, Portugal, Singapore, Spain, Switzerland and the United Kingdom and Joint Statements for Enforcement with Costa Rica, South Africa and Sweden. *See* Office of International Affairs: Cooperative Arrangements with Foreign Regulators, http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml (last visited Feb. 24, 2010).

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States has entered into Mutual Legal Assistance Treaties (“MLATs”) with no fewer than 55 countries.¹⁰

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Further, the U.S. is a party to the IOSCO Multilateral Memorandum of Understanding, which is countersigned by regulatory authorities in Albania, Alberta, Australia, Austria, Bahrain, Belgium, Bermuda, Brazil, British Columbia, the British Virgin Islands, Bulgaria, the Cayman Islands, China, Croatia, Cyprus, the Czech Republic, Denmark, Dubai, Finland, France, Germany, Greece, Guernsey, Hong Kong, Hungary, India, the Isle of Man, Israel, Italy, Japan, Jersey, Jordan, Kenya, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Montenegro, Morocco, The Netherlands, New Zealand, Nigeria, Norway, Ontario, Poland, Portugal, Quebec, Romania, Serbia, Singapore, the Slovak Republic, Slovenia, South Africa, Spain, Sri Lanka, Republika Srpska, Switzerland, Thailand, Tunisia, Turkey and the United Kingdom. *See* IOSCO, List of Signatories to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, http://www.iosco.org/library/index.cfm?section=mou_siglist (last visited Feb. 24, 2010). The IOSCO Multilateral Memorandum of Understanding is credited with facilitating “a substantial number of assistance requests . . . between national regulators[,]” including in the high-profile cases related to the Ahold, Royal Dutch/Shell, Parmalat and Vivendi Universal corporations. *See* Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 *Yale J. Int’l L.* 113, 145 (2009).

10. These countries include Bulgaria, Romania, Malaysia, Germany, Japan, Liechtenstein, Belize, Sweden, Ireland, India, South Africa, Cyprus, Russia, Egypt, Greece, France, the Ukraine, Estonia, the Czech Republic, St. Vincent, the Grenadines, Brazil, Lithuania, Israel, Venezuela, St. Kitts, Nevis, Latvia, Antigua, Barbuda, Dominica, Grenada, St. Lucia, Barbados, Trinidad, Tobago, Poland, Luxembourg, Hong Kong,

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Those MOUs and MLATs provide for a broad range of cooperative mechanisms designed to secure compliance with the respective laws and regulations of the U.S. and foreign countries. These mechanisms include exchanging information, producing documents and procuring witness testimony.¹¹ The exchange of information between the U.S. and foreign regulators and agencies under the MLATs and MOUs occurs *without regard* to whether the conduct under investigation or prosecution in the foreign country would also constitute a violation of the U.S. securities laws, and vice versa—again demonstrating the deference that the U.S. accords

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Austria, Hungary, the Philippines, the United Kingdom, South Korea, Nigeria, Spain, Uruguay, Argentina, Jamaica, the Bahamas, Belgium, Canada, Mexico, the Cayman Islands, The Netherlands and Columbia. *See* The United States Library of Congress Treaties Search Page, <http://thomas.loc.gov/home/treaties/treaties.htm> (search “Word/Phrase” for “mutual legal assistance”) (last visited Feb. 24, 2010).

11. *See, e.g.*, Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information, International Organization of Securities Commissions, § 7(b), May 2002, <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf>; Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, SEC-Austl. Sec. & Inv. Comm’n, § 4(2), Oct. 20, 1993, http://www.sec.gov/about/offices/oia/oia_mutual_recognition/australia/supervisory_mou.pdf; Treaty with Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Art. II, Mar. 18, 1985, 1985 U.S.T. 230; Treaty with the Italian Republic on Mutual Assistance in Criminal Matters, U.S.-Italy, Art. I, Nov. 9, 1982, 1982 U.S.T. 225.

to the actions of its regulatory counterparts.¹² The net consequence of those agreements is that the U.S. has made a profound commitment to support the development of local regulation and enforcement of securities laws. Operating within this framework, the SEC has deferred to investigations conducted by foreign authorities in several noteworthy “global” securities cases.¹³

12. See 15 U.S.C. § 78u(a)(2); see also, e.g., Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, SEC-Austl. Sec. Comm’n, § 4(1), Oct. 20, 1993, http://www.sec.gov/about/offices/oia/oia_mutual_recognition/australia/supervisory_mou.pdf; Treaty with Canada on Mutual Legal Assistance in Criminal Matters, U.S.-Can., Art. II, Mar. 18, 1985, 1985 U.S.T. 230.

13. For example, in the *Royal Ahold* litigation, the SEC did not seek penalties in its enforcement action against Royal Ahold at the request of the Dutch public prosecutor’s office “because of potential double jeopardy issues under Dutch law.” *SEC Charges Royal Ahold and Three Former Top Executives with Fraud*, Accounting and Auditing Enforcement Act Release No. 2124, 83 SEC Docket 2976 (Oct. 13, 2004); see also Gregory Crouch, *Ahold Reaches a Settlement with the S.E.C.*, N.Y. Times, Oct. 14, 2004, at C1 (reporting that the SEC stated it was “deferring to the Dutch criminal authorities to obtain the appropriate sanctions”). Similarly, in the *Parmalat* litigation, cooperation between the SEC and the Italian authorities in investigating fraud at an Italian dairy company resulted in the SEC deferring to Italian bankruptcy proceedings. See *Parmalat Settles with S.E.C. on Accusations of Bond Sale Fraud*, N.Y. Times, July 29, 2004, at C8 (reporting that the SEC deferred to Italian bankruptcy proceedings when assessing no fines against Parmalat in settlement). Similar cooperation between the SEC and the French regulatory body occurred in the high-profile *Vivendi* litigation. See *SEC Files Settled Civil Fraud Action Against Vivendi Universal*, Accounting and Auditing Enforcement Act Release No. 1935, SEC Docket 3043 (Dec. 24, 2003).

Neither Petitioners nor the *amici* supporting their position say anything about the extensive cooperation between the U.S. and dozens of foreign nations in this precise area. Instead they suggest that foreign purchasers have no effective remedy for alleged securities law violations in their own jurisdictions. Br. for MN Servs. Vermogensbeheer V.B. et al. as *Amici Curiae* 5; Br. for Austl. Shareholders' Ass'n and the Austl. Council of Super Investors as *Amici Curiae* 6, 8. Their position is both factually incorrect and an overly parochial critique of regulatory regimes that are intentionally different in significant or subtle ways from that of the U.S.¹⁴

14. As the list of countries cited above indicates, *supra* note 9, nearly all countries that have developed exchanges also have local regulation and investor protection laws. See Glenn Boyle & Richard Meade, *Intra-Country Regulation of Share Markets: Does One Size Fit All?*, 25 Eur. J. Law & Econ. 151, 153 (2008) (“All major stock markets are subject to regulations that, among other things, specify required information disclosure by firms, define restrictions on insider trading, and impose constraints on corporate governance choices.”). In this case, it is particularly significant to recognize that Australia has a regulated exchange, investor protection laws, and a class action scheme. See Michael Duffy, *'Fraud on the Market': Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia*, 29 Melb. U. L. Rev. 621, 645-55 (2005) (describing public and private actions for securities fraud in Australia); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DePaul L. Rev. 401, 424-29 (2002) (detailing Australian federal class actions).

B. Mass Action Mechanisms Exist Outside the U.S.

Extraterritorial application of the implied rights of action under Section 10(b) also interferes with the application of private mass or group action enforcement mechanisms that have been, or are in the process of being, adopted in Europe and other jurisdictions. Foreign jurisdictions are well-equipped to fairly and reasonably adjudicate claims arising from securities transactions in those jurisdictions.¹⁵ The adoption of mass or group mechanisms is advancing in the EU, and has already taken effect in numerous countries, including Sweden (as opt-in actions), the Netherlands (as opt-out actions), the United Kingdom (as opt-in actions wherein the court may issue a Group Litigation Order binding all class members), Canada (specifically in certain provinces), Italy (as opt-in consumer actions for damages) and, most important to the case at bar, Australia.¹⁶

15. See Mark A. Behrens et al., *Global Litigation Trends*, 17 Mich. St. J. Int'l L. 165, 167 (2008 2009) (“More recently, the number of countries with class action or other aggregative litigation procedures has mushroomed.”)

16. See Stephen J. Choi & Linda J. Silberman, *The Continuing Evolution of Securities Class Actions*, 2009 Wis. L. Rev. 465, 487-88 (2009); Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the Acquis Communautaire*, 15 Transnat'l L. & Pol'y 281, 292 (2005-2006); see also Behrens et al., *supra* note 15, at 173-181 (summarizing recent foreign group litigation advancements); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 60 (2007) (“Some countries already recognize securities class actions, and more are in the process of developing group litigation procedures.”).

Not surprisingly, mass actions in other countries are not identical to class actions in the United States. In France, legislators have indicated that they would never adopt an opt-out procedure that would allow U.S. class action judgments to deprive their citizens of their right to decide whether or not to join in an action.¹⁷ As an opinion from the European Economic and Social Committee regarding collective-action systems in the E.U. makes clear, there is a deep distrust and rejection of U.S.-style opt-out class actions.¹⁸ Thus, what is developing in the many countries that have adopted or are considering group action laws is decidedly *not* a move toward accepting opt-out representative actions or other elements of U.S. contingency practice, but a

17. See Leslie Schulman, *France Parliament Puts Off Class Actions Legislation Debate*, *Jurist*, Feb. 1, 2007, <http://jurist.law.pitt.edu/paperchase/2007/02/france-parliament-puts-off-class.php>; Law.com, *France's Parliament Cancels Debate on Bill Allowing Class Actions*, Jan. 31, 2007, <http://www.law.com/jsp/article.jsp?id=1170151356425>. The reaction by the French legislature was in direct response to a ruling from a U.S. court that concluded that France would probably recognize and enforce a U.S. class action judgment. See *In re Vivendi Universal, S.A., Sec. Litig.*, 242 F.R.D. 76, 102 (S.D.N.Y. 2007). There, the Court pointed to proposed French legislation that would have provided for *opt-in* group actions as evidence that France would recognize and enforce a U.S. class judgment. *Id.* at 100-01.

18. Opinion of the European Economic and Social Committee on Defining the Collective Actions System and its Role in the Context of Community Consumer Law, 2008 O.J. (C 12/1) 1.6 (hereinafter “E.U. EESC Opinion”) (“[t]he EESC has therefore rejected the features of US style ‘class actions’, which are incompatible with the abovementioned traditions and principles”).

collision between U.S.-style class actions and group opt-in claims.¹⁹

The most important lesson to be drawn from the adoption of group actions outside the U.S., therefore, is not that they provide remedies identical to U.S. remedies that could provide a basis for their recognition abroad, but rather that they provide foreign purchasers with a local remedy, similar to a class action, which another sovereign has determined to be adequate. While the group actions adopted by various nations differ in many particular respects, all of them provide a mechanism for a large number of purchasers to seek recovery on claims that would not otherwise be justified by the amount of their losses. As a consequence, there is simply no reason to force the application of Section 10(b) liability and U.S. class action mechanisms on all purchasers in the world.

III. A U.S. CLASS ACTION JUDGMENT OR SETTLEMENT MAY NOT BE ENFORCEABLE UNDER FOREIGN LAW

In addition to the mischief that follows from ignoring the policy judgments other nations have made to address securities claims, there is a substantial risk that a U.S. class action judgment or settlement will not be enforced outside the U.S.²⁰ When an f-cubed action that

19. *See, e.g., id.* at 7.1.2 (“Collective actions must not take the form of the ‘class actions’ employed in the U.S.A.”)

20. *See* Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign* (Cont’d)

is brought in the U.S. is resolved through settlement or trial, the issuer actually buys no peace, and the plaintiff no security. The issuer faces the prospect of two lawsuits—one in the U.S. and one overseas—because a U.S. class action settlement or judgment may not bind absent foreign class members. For similar reasons, putative class members may be unable to enforce such judgments overseas, raising the fundamental question whether a U.S. class action vindicates their rights in the first place.

As this Court explained in *Stoneridge*, it is entirely appropriate to consider the “practical consequences of an expansion” of the Section 10(b) private right. *Stoneridge*, 552 U.S. at 163. The clear conflicts between the U.S. and other nations that have arisen where U.S. courts have attempted to determine whether a class action judgment would be recognized by other nations demonstrate most dramatically the “practical consequences” of expanding the Section 10(b) private right of action extraterritorially.

These are not simply theoretical concerns. As the Second Circuit first warned in *Bersch*, adjudicating f-cubed claims as part of a class exposes foreign issuers to double recoveries in countries that would not recognize or enforce a U.S. class action settlement or judgment. *Bersch*, 519 F.2d at 986 (recognizing the

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Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts, 90 Cornell L. Rev. 1563, 1566 (2005) (“Many foreign courts routinely refuse to enforce U.S. judgments, particularly those arising from class litigation . . .”).

“dubious binding effect of a defendants’ judgment (or a possibly inadequate plaintiff’s judgment) on absent foreign plaintiffs or the propriety of purporting to bind such plaintiffs by a settlement”); *see also, e.g., Morrison v. Nat’l Austl. Bank, Ltd.*, 547 F.3d 167, 174 (2d Cir. 2008) (“In various other countries, class actions are either not available or the ability of class actions to preclude further litigation is problematic.”).²¹

A. Lower Courts Have Issued Inconsistent and Contradictory Rulings

Contradictory opinions on the enforceability of U.S. judgments further undermine predictability and demonstrate how poorly equipped U.S. courts are to interpret the law of other nations.²² For example, in

21. This double exposure has been widely recognized. *See Choi & Silberman, supra* note 16, at 480 (An opt-out class action’s “binding effect’ is not known or generally accepted by many countries, supporting the argument that the judgment will not have any preclusive effect outside the United States.”); *Buxbaum, supra* note 16, at 60 (Jurisdictional overlap created by f-cubed plaintiffs “presents the possibility of duplicate recovery, as a court in one country cannot enforce in other jurisdictions an order to release all future claims as a condition of settlement or judgment.”)

22. These inconsistencies are perhaps not surprising, given that when determining whether a U.S. class action judgment would be enforceable in a foreign country, courts rely on the predictive opinions of experts proffered by each party as to whether the country would in fact recognize the U.S. class judgment. Moreover, lower courts have not been consistent in their articulation of the test used to determine whether foreign

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Vivendi and *Alstom*, two decisions from the Southern District of New York that were decided only fifteen months apart, the court came to opposite conclusions regarding the preclusive effect of a U.S. class action judgment in the same country. In *Vivendi*, the court certified a class that included French, English and Dutch shareholders after concluding that courts in their respective countries would “more likely than not” recognize and grant preclusive effect to a U.S. class action judgment. *Vivendi*, 242 F.R.D. at 105. Conversely, in *In re Alstom SA Securities Litigation*, 253 F.R.D. 266, 282 (S.D.N.Y. 2008), the court determined that the plaintiffs failed to sufficiently demonstrate that the French courts would “more likely than not” recognize a class judgment rendered by a U.S. court or, furthermore, that Dutch and English courts would “more likely than not” recognize a judgment against one of the defendants.²³

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claimants should be included in a class. For example, in the seminal case of *Bersch*, the court articulated the issue as whether it was a “near certainty” that a foreign court will not recognize an American judgment. *Bersch*, 519 F.2d at 996. Later, in *Vivendi*, the same court rejected *Bersch*’s articulation of the standard and asked whether it was “more likely than not” that a foreign court would recognize a U.S. class judgment including foreign investors. *Vivendi*, 242 F.R.D. at 95.

23. The *Alstom* court concluded that English and Dutch courts would dismiss claims against defendant Alstom in deference to litigation in the French courts under a provision in Alstom’s articles of association. *Alstom*, 253 F.R.D. at 288-89. As the court previously determined, the French courts would probably not recognize a U.S. class judgment. *Id.* However, the court determined that English and Dutch courts would more likely than not recognize judgments against the other defendants. *Id.*

The likelihood that a U.S. class judgment will not be given effect outside the U.S. is quite real and rests principally on the rejection, by many nations, of the binding effect of representative actions.²⁴ Those nations reserve to individual citizens the constitutional right to join or not join in an action affecting their rights. Not surprisingly, those nations take offense at the notion that “representative” shareholders—not authorized or selected by their co-shareholders—could preclude their countrymen from bringing their own claims in their own courts.²⁵ At best, those nations would accord recognition only to *opt-in* judgments or settlements, where their citizens affirmatively joined in a foreign proceeding, and

24. E.U. EESC Opinion, *supra* note 18, at 7.2.2.3.1 (opt-out mechanisms may be regarded as “at variance with the constitutional principles of a number of states and with the European Convention on Human Rights and, in particular, with the principle of the freedom to take legal proceedings”).

25. See Buschkin, *supra* note 20, at 1579-81; see also Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural “Due Process” Requirements*, 10 Tul. J. Int’l. & Comp. L. 5, 14, 34-36 (2002) (noting that an Italian court might find a U.S.-style class action “fundamentally unfair to the absent members of the class because, even though they knew nothing of the lawsuit, they are fully bound by the res judicata effect of the judgment”); Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 Temp. Int’l & Comp. L. J. 217, 233-34 (1992) (“In the ‘worst case’ scenario, the American class action permits an absentee to be fully bound by the res judicata effect of an adverse judgment even though the absentee knew nothing of the lawsuit”).

not to U.S.-style *opt-out* judgments or settlements.²⁶ That conflict of principles is only a part of the global distaste for what many nations perceive as U.S. arrogance, and of the global distrust of the other hallmarks of U.S.-style class action litigation, including the contingency fee arrangements that bestow windfalls on plaintiffs' attorneys.²⁷

As mentioned above in the context of the *Vivendi* case, some countries have enacted laws specifically

26. See Buxbaum, *supra* note 16, at 32-33 (opt-out features of U.S. class action make it “possible that courts in one or more foreign systems would refuse to recognize a U.S. class action settlement or judgment”); see also Dreyfuss, *supra* note 25, at 34-36 (questioning whether Italy would recognize an “opt-out” representative action).

27. See E.U. EESC Opinion, *supra* note 18 at 1.6 (“the EESC has therefore rejected the features of US-style ‘class actions’, which are incompatible with the [EU] traditions and principles”); Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 Vand. L. Rev. 179, 180 (2009) (noting that even as European countries adopt group action regimes, these regimes resist “the dreaded world of American entrepreneurial lawyering”); Behrens et al., *supra* note 15, at 165 (recognizing that foreign regimes “generally seek to permit mass resolution of claims while trying to avoid U.S.-style entrepreneurial litigation”); Buxbaum, *supra* note 16, at 63 (“U.S. entrepreneurial-style lawyering is viewed with hostility in many other countries. . . . When coupled with class actions—whose opt-out mechanism is seen as contrary to public policy in most countries—it triggers particularly adverse reactions.”); Grace, *supra* note 16, at 285, 287-88, 289 (noting concerns, including that “certain mechanisms of the U.S. model encourage ‘legal blackmail’ and conflicts of interests for attorneys litigating such claims”).

designed to preclude the enforcement of class judgments in non-E.U. states. *See supra* note 17 and accompanying text. For example, Germany has enacted the “KapMuG” (the Capital Investor’s Model Proceeding Act), which “expressly rejects upholding judgments against German issuers issued by non-EU member state jurisdictions.” Grace, *supra* note 16, at 299. This legislation seems to have been designed as “an effort to expressly limit U.S. class action litigation against German issuers.” *Id.* There can be little argument that the extension of Section 10(b) and related class judgments extraterritorially squarely contradicts with the “desire to avoid conflicts with the laws of other nations” that this Court reaffirmed in *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 174 (1993). Nor can it be seriously questioned that a clash between foreign and U.S. principles of representative actions constitutes “an interference with the authority of another sovereign . . . which the other state concerned justly might resent.” *N.Y. Cent. R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925).

B. The *Forum Non Conveniens* Doctrine Does Not Provide an Adequate Solution

Petitioners’ only solution to the problems associated with litigating f-cubed claims in the U.S. is a general suggestion that courts use the discretionary doctrine of *forum non conveniens* as a “gatekeeper” for addressing the structural and practical problems that their interpretation of the reach of Section 10(b) liability creates. Pet. Br. 41-42. Their suggestion, however, provides no genuine relief, and treats the problem as if it were merely a question of convenience rather than differences of constitutional dimensions and interference with sovereign regimes.

In a *forum non conveniens* analysis, courts look to the adequacy and availability of an alternative forum, the location of evidence and witnesses, the availability of compulsory process and various public and private interest factors to determine whether to transfer an action for the convenience of the parties and witnesses. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (listing factors in *forum non conveniens* analysis). Utilizing the *forum non conveniens* doctrine as a gatekeeper not only fails to apply the presumption clearly set forth in *Empagran* and *Microsoft*, it also leads to precisely the type of unpredictability that should be avoided.

Thus, in *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 953 (1st Cir. 1991), the court acknowledged comity concerns when upholding the District Court's dismissal of a securities law action on *forum non conveniens* grounds, determining that the matter was better adjudicated in Canada, where the issuer was located and where the issuer's stock was traded. While the *Howe* court's conclusion was correct, that reasoning has not been consistently applied. This inconsistency is demonstrated in several decisions involving the Lernout & Hauspie litigation. In *Warlop v. Lernout*, 473 F. Supp. 2d 260, 264 (D. Mass. 2007), cited by Petitioners, the court dismissed a securities class action on *forum non conveniens* grounds after determining that Belgium's lack of a class action mechanism or fraud on the market theory did *not* render Belgium an inadequate alternative forum. However, in an earlier decision, the same court declined to dismiss claims brought on behalf of a class of different investors on *forum non conveniens* grounds because it determined that Belgium would *not* be an

adequate alternative forum. *In re Lernout & Hauspie Sec. Litig.*, 208 F. Supp. 2d 74, 92 (D. Mass. 2002) (“When combined with the lack of a fraud-on-the-market theory, . . . [Belgium’s] lack of a class action mechanism creates *virtually insurmountable* concerns regarding the adequacy of the foreign forum.”) (emphasis added).

These cases demonstrate that the solution is not to add another layer of inconsistent rulings. Rather, the correct solution is simply to exclude such claims from the reach of Section 10(b) liability in the first place.

IV. EXTRATERRITORIAL APPLICATION OF SECTION 10(b) IMPLIED RIGHTS HARMS THE COMPETITIVENESS OF THE GLOBAL SECURITIES MARKETS

The extraterritorial application of the implied rights under Section 10(b) to claims of f-cubed purchasers harms the competitiveness of the global securities markets. For years, commentators have observed that foreign issuers have elected not to list their securities on U.S. exchanges precisely to avoid exposure to the U.S. legal system.²⁸ The extraterritorial application of Section 10(b) liability converts that general fear of litigation into a real risk. As this Court recognized in *Stoneridge*, in the context of addressing the contours of so called “scheme liability” under Rule 10b-5(a)-(c):

28. See Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York’s and the U.S.’ Global Financial Services Leadership*, ii, 5, 12, 43-54 (2006), http://www.nyc.gov/html/om/pdf/ny_report_final.pdf.

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

Stoneridge, 225 U.S. at 164. That is exactly what is happening through the extraterritorial extension of Section 10(b) liability.²⁹

In this case, application of the U.S. securities laws to Petitioners' claims could lead to the absurd result that a U.S. court would be adjudicating a case in which 99% of NAB's shares were traded in Australia—where all the purported members of the class have adequate remedies—while leaving NAB subject to a U.S. class decision affecting 100% of its shares. Such a result acts as a significant deterrent to investment in the U.S. capital markets, and begs the question why Australian regulation and law should not govern those claims. Issuers should not be faced with such expansive and unpredictable liability under Section 10(b).

V. THIS COURT SHOULD AFFIRM THE HOLDING BELOW AND ARTICULATE A BRIGHT-LINE EXCHANGE-BASED STANDARD

For the reasons set forth above, the Court should affirm the holding below that Section 10(b) does not apply to the claims of these foreign purchasers who purchased shares of NAB on the Australian exchange.

29. *See id.* at 50-54.

Applying Section 10(b) extraterritorially contravenes this Court’s repeated interpretation of the reach of U.S. statutes, and interferes with the orderly functioning of the world’s markets. As this Court has recognized: “We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.” *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

The Court should, however, revisit the standard to be applied to determine the applicability of Section 10(b) to claims by f-cubed plaintiffs generally. The “conduct and effects” tests—created by the Second Circuit and applied by that and other courts for the last 30 years to determine the extraterritorial reach of the Exchange Act—have resulted in unpredictable and inconsistent decisions that often focus on different aspects of the foreign securities transactions. Indeed, in their Petition for a Writ of Certiorari, Petitioners themselves pointed out that inconsistency to the Court. Cert. Pet. 10-15. Yet, the standard they propose would at once have this Court preempt the role of Congress and expand the extraterritorial reach of Section 10(b) liability, despite the absence of any supporting language in the text of the Exchange Act, while in no way eliminating the inconsistency of the “conduct and effects” tests nor their interference with foreign sovereignties.

In order to provide predictability to the international marketplace regarding the application of Section 10(b), and to end practices that offend foreign sovereignty and cast parties into a hinterland of enforcing U.S. judgments, NYSE Euronext urges this Court to set forth a rule that any action brought by a

foreign purchaser and arising out of the purchase of a foreign issuer's securities on a foreign exchange should be litigated in the country where the purchase occurred and the exchange is located. In other words, "[c]ourts should presume jurisdiction over all investors trading in a foreign issuer's securities *within* the United States, and presume *no* jurisdiction over [Section 10(b)] suits for foreign investors trading in the securities of a foreign issuer *outside* the United States." Choi & Silberman, *supra* note 16, at 506 (emphasis added).

Such a rule is consistent with the reasonable expectations of foreign investors who purchase a foreign issuer's shares on a foreign exchange and provides clear guidance to foreign issuers, regulators and investors, permitting them to accurately predict their U.S. litigation risk and potential liability under Section 10(b).

By contrast, Petitioners' proffered standard, taken from the brief submitted by the SEC as *Amicus Curiae* to the Second Circuit—that proposes to reach f-cubed claims "if the conduct in the United States is *material* to the fraud's success and forms a *substantial component* of the fraudulent scheme"—provides for virtually unbound application of Section 10(b) to foreign transactions, while ignoring the strong presumption against the extraterritorial application of U.S. laws. Pet. Br. 19 (emphasis added).

Worse still, Petitioners' proffered standard would be subject to exactly the same inconsistent and unpredictable results that have characterized the

existing tests.³⁰ While the words in Petitioners' test are different, there is simply no reason to believe that their application in particular cases will yield results that are any more predictable than the divergent outcomes of the last 30 years, with cases decided "on very fine distinctions." *See In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 5537 (BSJ), 2006 WL 3844465, at *4 (S.D.N.Y. Oct. 25, 2006) (citation and internal quotations omitted). Interpretation of what is "significant conduct" in the United States and what is "material" to a fraud's success remains subject to the same debate that the "conduct and effects" tests have generated for decades. Petitioners' test will require courts to analyze disputes on a case-by-case basis, and will surely result in a lack of predictable guidance for future cases. This confusion is precisely the phenomenon that the court referred to in *Zoelsch* when observing that tests that "turn on a welter of specific facts" are "difficult to apply and are inherently unpredictable" and "thus present powerful incentives for increased litigation." *Zoelsch*, 824 F.2d at 32 n.2.

Moreover, because Petitioners' proposed test establishes what is plainly a lower threshold for permitting foreign plaintiffs to bring their disputes with foreign issuers before U.S. courts, there will be greater interference with foreign laws and further undermining

30. As several courts have observed, no "cohesive doctrine" has emerged from application of the "conduct and effect" tests. *See In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005). Instead, as Petitioners themselves stressed in their Petition for Writ of Certiorari, there has emerged "potentially incompatible statements of applicable rules." *Id.*

of foreign regulatory schemes. As a consequence, Petitioners' proposed standard will simply transform the "risk" of interference with a "foreign nation's ability independently to regulate its own commercial affairs" into a certainty. *Empagran*, 542 U.S. at 167.

In sum, an exchange-based rule provides the most guidance and predictability, while respecting the sovereign rights of other countries and aligning with the reasonable expectations of investors.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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