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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 FOR THE REPUBLIC OF FRANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE REPUBLIC OF FRANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE* [1]

The Republic of France has a substantial interest in the application of its laws to its citizens and residents who transact in securities on exchanges located on French territory. France has its own reticulated regime of securities regulation and enforcement that rests on legal traditions and policy

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae*, its staff, or its counsel made a monetary contribution to the preparation or submission of this brief. Written consents of the parties to the filing of *amici curiae* briefs have been filed with the Court.

judgments that are of fundamental importance to France, are shared with many countries, and differ in important respects from those of the United States. Among the differences are a greater role for government as opposed to private regulation and enforcement, as reflected in the reliance on public actions (*l'action publique*) rather than private class actions, and a concern with the procedural fairness of certain forms of class action that purport to bind persons who have taken no affirmative steps to participate in the collective lawsuit (the opt-out class action).

In addition to those policy concerns, France has a practical concern with the financial burden of settlements and judgments in potentially world-wide securities class actions on corporations organized under French law and the concomitant economic effects on French workers, French shareholders, and other stakeholders in France. In response to that concern, the Ministry of Justice of France has supplied correspondence in connection with securities class actions in federal trial courts. *See In re Alstom SA Sec. Litig.*, 253 F.R.D. 266, 287 (S.D.N.Y. 2008).

The extraterritorial application of U.S. securities fraud laws at the behest of plaintiffs who are not citizens or residents of the U.S., against defendants who are not citizens or residents of the U.S., for frauds perpetrated on exchanges that are not within the territory of the U.S., does not respect the laws and public policies of those foreign nations in which the parties reside and under which the exchanges operate. Extraterritorial application of U.S. securities fraud law interferes with the ability of foreign nations to regulate their own financial markets and craft remedies that they deem appropriate and

consistent with their own legal traditions and policy judgments.

The Republic of France believes that agreements between sovereign governments represent the most productive way to reconcile and coordinate the potentially conflicting interests of national securities regulators.

SUMMARY OF ARGUMENT

Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), should not be applied to alleged frauds perpetrated by foreign defendants against foreign plaintiffs on foreign securities exchanges, as a matter of comity to the laws and public policies of the foreign nations in which those parties reside and under whose laws those securities exchanges are regulated.

I. Generally speaking, international comity counsels against expansive extraterritorial application of the Exchange Act. International comity principles are reflected in four doctrines: the presumption against extraterritoriality, construing statutes to avoid unreasonable interference with foreign sovereignty, choice-of-law principles, and *forum non conveniens* doctrine. All four doctrines counsel against the application of the U.S. securities laws to cases that involve predominantly foreign interests and therefore interfere with the sovereign authority of foreign nations.

II. As applied to foreign-cubed securities fraud actions, international comity principles preclude application of the anti-fraud rules of U.S. securities laws because the U.S. interest is attenuated and the foreign interest is paramount. While no nation (to our knowledge) condones securities fraud, nations pro-

scribe securities fraud using incompatible regulatory schemes. For example, while the U.S. permits private plaintiffs to enforce anti-fraud provisions in class actions, France and many other nations have made a considered policy choice to rely instead on public actions. In addition, certain aspects of the U.S. approach conflict with specific legal rules of foreign nations. For example, the opt-out aspect of U.S. class actions runs afoul of fundamental French public policy and due process principles.

III. Foreign-cubed securities fraud actions should not be permitted to proceed in U.S. courts because they violate international comity principles as a class. A case-by-case application of international comity principles to foreign-cubed actions would itself disserve those principles by drawing foreign parties into U.S. courts to litigate foreign securities transactions that are more properly the domain of the laws, regulations, and public policies of other nations.

ARGUMENT

SECTION 10(b) OF THE EXCHANGE ACT DOES NOT APPLY TO ALLEGED FRAUDS PERPETRATED BY FOREIGN DEFENDANTS AGAINST FOREIGN PLAINTIFFS ON FOREIGN SECURITIES EXCHANGES

The question presented is whether Section 10(b) of the Exchange Act should be applied to "foreign-cubed" securities actions – *i.e.*, cases in which "foreign claimants fil[e] actions in U.S. courts that arise out of foreign defendants' securities offerings on foreign exchanges – hence the 'cubed' nature of the foreign elements."[2]

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[2] Note, *A Rat Res? Questioning the Value of Res Judicata in Rule 23(b) Superiority Inquiries for Foreign Cubed Class Action*

In the view of the Republic of France, the answer to that question should be "no." Longstanding legal doctrines based on international comity support a categorical rule against the application of U.S. securities law to claims of foreign investors seeking redress against foreign corporations for harm suffered in foreign securities markets.

I. INTERNATIONAL COMITY COUNSELS AGAINST BROAD EXTRATERRITORIAL APPLICATION OF THE EXCHANGE ACT

International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). International comity underlies several doctrines of U.S. law that militate against an expansive application of the U.S. securities fraud laws, including (A) the presumption that Congress did not intend extraterritorial application; (B) this Court's practice of construing statutes to avoid unreasonable interference with foreign sovereignty; (C), choice-of-law principles; and (D) the doctrine of *forum non conveniens*.

A. The Presumption that Congress Did Not Intend Extraterritorial Application

"It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian*

Securities Litigations, 48 COLUM. J. TRANSNAT'L L. 114, 115 (2009).

Am. Oil Co. ("*Aramco*"), 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 284 (1949)), *superseded by statute on other grounds*. For two centuries, this Court has consistently applied that principle to a wide variety of statutes. *See, e.g., United States v. Palmer*, 16 U.S. 610, 630-31 (1818) (Act of 1790); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31-32 (1925) (Federal Employees Liability Act); *Foley Bros*., 336 U.S. at 290 (1949) (Eight-Hour Law); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) (Foreign Sovereign Immunities Act); *Smith v. United States*, 507 U.S. 197, 203-05 (1993) (Federal Tort Claim Act); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993) (Immigration & Nationality Act); *Small v. United States*, 544 U.S. 385, 388-89 (2005) (Federal Firearms Statute).

The presumption against construing U.S. laws to apply extraterritorially serves important interests. To begin with, it recognizes that Congress is "primarily concerned with domestic conditions." *Foley Bros.*, 336 U.S. at 285. Additionally, the presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248 (citation omitted). At bottom, the presumption recognizes that "United States law governs domestically but does not rule the world." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007). Thus, an Act of Congress will be found to have extraterritorial reach only if there is an "affirmative intention of the Congress *clearly expressed*" to do so. *Aramco,* 499 U.S. at 248 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)) (emphasis added).

As the court of appeals below correctly found, Congress did not "clearly express[]" an "affirmative intention" to apply Section 10(b) of the Exchange Act extraterritorially. Pet. App. 6a-7a. Section 10(b) itself expresses no intention to regulate "[m]anipulative and deceptive devices" extraterritorially. 15 U.S.C. § 78j(b) (referring to the use of such devices in connection with the purchase or sale of securities registered or not registered "on a *national* securities exchange") (emphasis added). The only section of the Exchange Act that refers to "[f]oreign securities exchanges" is Section 30. 15 U.S.C. § 78dd. But that section authorizes the SEC to regulate transactions on foreign exchanges only by brokers and dealers in the securities of U.S. issuers, not foreign issuers. *Id.* § 78dd(a).

What is more, Section 30 specifically provides that nothing in the Exchange Act or the Commission's rules and regulations may apply to a business in securities transactions "without the jurisdiction of the United States" unless such rules and regulations are "necessary or appropriate to prevent the evasion" of the Exchange Act. *Id.* § 78dd(b). That purpose "rather clearly implies that Congress was concerned with extraterritorial transactions only if they were part of a plan to harm American investors or markets." *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987) (Bork, J.). Because foreign-cubed securities fraud actions seek to redress harm to foreign investors and markets, those actions seem plainly outside the scope of the authority that Congress exercised in the Exchange Act.[3]

[3] Petitioners and certain of their *amici* read Section 30(a) and the definition of "interstate commerce," which includes commerce between the U.S. and a foreign state, as contemplating

Nor does the legislative history of the Exchange Act support the extraterritorial application of Section 10(b). To begin with, statements not passed by both Houses of Congress and presented to the President would seem by their nature to lack the clarity required to satisfy clear-statement rules such as the presumption against extraterritorial application. But even if statements in the legislative history of an Act of Congress could, in principle, "clearly express[]" an "affirmative intention" to legislate extraterritorially (*Aramco*, 499 U.S. at 248), nothing in the legislative history of the Exchange Act expresses any extraterritorial ambitions, let alone an intention to regulate foreign-cubed securities frauds.

To the contrary, the congressional hearings and committee reports focus on the manipulation and deception of American investors by Wall Street on 34 exchanges located in the United States – what might be called *American*-cubed securities frauds.[4]

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extraterritorial application of the Exchange Act. *E.g.*, Pet. Br. at 23-24, 39-40. But the invocation of the foreign commerce clause does not itself reflect an intention by Congress to legislate extraterritorially. *See Aramco*, 499 U.S. at 251 ("even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad"). Moreover, that Congress specified limited extraterritorial application for a specific purpose does not qualify as a clear, affirmative congressional expression of intent to legislate extraterritorially for other purposes. *Cf. Microsoft*, 550 U.S. at 456 ("'[T]he presumption is not defeated . . . just because [a statute] specifically addresses [an] issue of extraterritorial application'; it remains instructive in determining the *extent* of the statutory exception.") (emphasis in original; internal citations omitted).

[4] S. REP. NO. 73-1455, at 7 (1934) ("Fletcher Report"). For discussion of the manipulative devices, see Fletcher Report at 30-55; see also, *e.g.*, S. REP. NO. 73-792, at 2-5 (1934); H.R. REP. NO. 73-1383, at 3-6 (1934).

Congress heard limited testimony regarding securities exchanges in London, Paris, and Berlin,[5] but it authorized the Commission to regulate foreign securities exchanges only to prevent circumvention of the Exchange Act in issues of "*American* securities."[6]

The 73d Congress' limited authorization of extra-territorial regulation is consistent with its concern that regulation even of domestic-cubed securities frauds might exceed its legislative authority as understood at that time.[7] It is also consistent with the three neutrality acts that were passed beginning with the 74th Congress,[8] which "signaled profound American opposition to overseas involvement."[9]

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[5] *See, e.g., Stock Exchange Practices, Hearings before the S. Banking and Currency Comm.*, 73d Cong. 6440-45, 6450-57 (1934) (testimony of Dr. E.A. Goldenweiser and W. Thomas, both Div. of Research & Statistics, Fed. Reserve Bd., respectively).

[6] S. REP. NO. 73-792, *supra* n.4, at 23 (authorizing Commission to regulate certain "foreign exchanges transactions in *American securities*" "in order to prevent evasion") (emphasis added); *see* H.R. REP. NO. 73-1383, *supra* n.4, at 28 ("to prevent evasion of the act").

[7] *See, e.g.*, H.R. REP. NO. 73-1383, *supra* n.4, at 6; *Stock Exchange Regulation, Hearings before the H. Interstate and Foreign Commerce Comm.*, 73d Cong. 16 (1934) (testimony of J.M. Landis, Comm'r, FTC); *Stock Exchange Regulation*, *Hearings before the H. Interstate and Foreign Commerce Comm.*, 73d Cong. 890 (1934) (testimony of J.M. Landis, Comm'r, FTC); *id*. at 917-39 (legal briefs).

[8] S.J. Res. 173, 74th Cong., 49 Stat. 1081 (1935).

[9] U.S. Senate Historical Minute Essay, *September 4, 1934 "Merchants of Death"*, available at http://www.senate.gov/artandhistory/history/minute/merchants_of_death.htm, last accessed Feb. 23, 2010.

Because neither the Exchange Act nor its legislative history expresses a clear intention by Congress to apply Section 10(b) to foreign securities transactions between foreign investors and foreign issuers, that provision should not be construed to reach such transactions.

B. This Court's Practice of Construing Statutes to Avoid Unreasonable Interference with the Sovereignty of Foreign Nations

Closely related to the presumption against extraterritorial application is the practice that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (citations omitted); *see Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (same).

That practice is "based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory." *Lauritzen*, 345 U.S. at 578 (citations omitted); *see Microsoft*, 550 U.S. at 455-56 ("courts should assume 'that legislators take account of the legitimate sovereign interests of other nations when they write American laws'" and that assumption "is not defeated . . . just because [a statute] specifically addresses [an] issue of extraterritorial application") (citation omitted); *Hartford Fire Ins. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) ("[E]ven where the presumption against extraterritoriality does not apply, statutes should not

be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law.").

To determine whether extraterritorial application of a statute would conflict with the law of nations, courts typically look to the limitations on a nation's "jurisdiction to prescribe" set forth in the *Restatement (Third) of Foreign Relations*. The *Restatement* provides that nations should refrain from exercising their jurisdiction "when the exercise of such jurisdiction is unreasonable." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1986). The relevant factors in making that determination include the citizenship or residence of the parties, the territory of the activity to be regulated, and the potential for conflict with foreign law. *Id*. §§ 403(2), 416(2).

Under the *Restatement*, it would be unreasonable for the U.S. to exercise jurisdiction over securities transactions that take place on foreign markets between foreign parties. Foreign nations have a primary interest in protecting their citizens and residents, punishing their wrongdoers, and regulating their exchanges. Application of U.S. law to foreign securities transactions would undermine those interests and conflict with the regulatory policies and legal systems of other nations.[10]

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[10] That conclusion accords with numerous lower court decisions. *See Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129 (2d Cir. 1998) (exercise of jurisdiction over securities fraud action by foreign investor against foreign defendant "would be unreasonable within the meaning of the Restatement of Foreign Relations" particularly because "the transaction is clearly subject to the regulatory jurisdiction of another country with a clear and

Construing the Exchange Act not to apply to foreign securities actions is supported by this Court's decision in *Empagran.* In that case, this Court applied principles of international comity to reject an application of the Sherman Act to claims by foreign plaintiffs for independent foreign injury suffered as a result of a world-wide price-fixing conspiracy. *See* 542 U.S. at 164. In so holding, the Court explained that U.S. courts should "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws," thereby enabling "the potentially conflicting laws of different nations [to] work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65. In particular, federal courts "must assume" that "Congress . . . would not have tried to impose [American laws], in an act of legal imperialism, through legislative fiat" in cases where "foreign . . . conduct plays a significant role and where foreign injury is independent of domestic effects." *Id.* at 169 (emphasis added). This Court rested its decision on the mere "risk of interference with a foreign nation's ability independently to regulate its own commercial affairs" – not proof of actual interference. *Id.* at 165.

The mere risk of interference with foreign securities regulation warrants care in applying the Exchange Act to any transaction on a foreign

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strong interest in redressing any wrong"); *Blechner v. Daimler-Benz AG*, 410 F. Supp. 2d 366, 369-70 (D. Del. 2006) (exercise of jurisdiction unreasonable under §§ 403 and 416 of the Restatement where shareholders "have no connection to the United States," "did not [purchase] their shares [in] an American market," and "[t]he outcome . . . will not affect American investors or markets").

securities exchange, as Congress recognized when making limited regulation discretionary with the Commission and specifying that it be used only to prevent the evasion of U.S. law. The substantial likelihood of actual interference by foreign-cubed actions transactions, as demonstrated in Section II, compels construction of the Exchange Act not to apply to disputes between foreign investors and foreign issuers on foreign exchanges.

C. Choice-of-Law Principles

Well-established choice-of-law principles also counsel against broad extraterritorial application of U.S. securities fraud laws. *See* RESTATEMENT OF CONFLICT OF LAWS §§ 378, 379 (1934) [hereinafter RESTATEMENT (FIRST)]; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 9, 145 (1971) [hereinafter RESTATEMENT (SECOND)]. Although the *Restatements* were adopted to govern choice of law among the several United States, their general principles apply to international disputes as well. *See* RESTATEMENT (SECOND) § 10 ("The rules in the Restatement of this Subject . . . are generally applicable to cases with elements in one or more foreign nations."); *see also Lauritzen*, 345 U.S. at 583 (applying the *Restatement (First)* in a case involving a choice between U.S. and foreign law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403, reporter's note 10 (incorporating the general choice-of-law factors of the *Restatement (Second) of Conflicts of Laws*).

According to the *Restatement (First)* – the leading authority on choice-of-law principles at the time of the Exchange Act's enactment – tort actions, including securities fraud actions, were governed by the law of the place of the wrong. RESTATEMENT (FIRST) §§ 378, 379. "The place of wrong is in the state

where the last event necessary to make an actor liable for an alleged tort takes place." *Id.* § 377. The "'last event' necessary to make an actor liable for fraud is the injury, and consequently, for purposes of *lex loci delictis*, the place of the wrong is where that injury is sustained.'" *NCI Group, Inc. v. Cannon Services, Inc.*, No. 09-CV-0441, 2009 WL 2411145, at *11 (N.D. Ga. Aug. 4, 2009); *see* RESTATEMENT (FIRST) § 377, note 4, illustration 5 ("When a person sustains loss by fraud, the place of wrong is where the loss is sustained, not where fraudulent representations are made."). Under the *First Restatement*, foreign, not U.S., law applies to claims by foreign investors seeking relief for harm suffered abroad.

The same result obtains under the *Restatement (Second)*, which provides that "[a] court may not apply the local law of its own state to determine a particular issue unless [that] would be reasonable in the light of the relationship of the state and of other states to the person, thing or occurrence involved." RESTATEMENT (SECOND) § 9. Section 145 states that the governing law for tort actions should be that of the state which "has the most significant relationship to the occurrence and the parties." *Id*. § 145(1). The relevant factors for making that determination in a fraud or misrepresentation case include (a) the place where the plaintiff acted in reliance upon the defendant's representations; (b) the place where the plaintiff received the representations; (c) the place where the defendant made the representations; and (d) the domicile, residence, nationality, place of incorporation, and place of business of the parties. *See id*. § 148(2).

The *Restatement (Second)* plainly weighs against the application of U.S. law to claims brought by foreign investors against foreign corporations for fraud committed in connection with the purchase or sale of foreign securities on foreign securities exchanges. Even if some conduct related to the securities fraud took part in the U.S., other countries – those in which the securities were bought or sold or the parties reside – have a more "significant relationship to the occurrence and the parties" in all such cases. RESTATEMENT (SECOND) § 145(1). Accordingly, under choice-of-law principles existing at the time Congress enacted the Exchange Act, and more modern principles applicable today, foreign, not U.S., law would – and should – govern securities fraud disputes among foreign parties on foreign exchanges.

D. *Forum Non Conveniens* Doctrine

Lastly, the longstanding U.S. and international doctrine of *forum non conveniens* militates against the exercise of jurisdiction over securities actions involving predominantly foreign interests. That doctrine instructs courts to defer jurisdiction where the gravamen of the suit is in another country and principles of fairness and convenience favor resolution of the action by a foreign court. Under that doctrine, courts choose an appropriate judicial forum to adjudicate a particular dispute by considering (1) the degree of deference to be accorded the plaintiff's choice of forum; (2) whether an adequate alternative forum exists; and (3) whether the balance of private and public interest factors favors adjudication in the alternative forum. *See Piper Aircraft Co. v.*

Reyno, 454 U.S. 235, 241 (1981); *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508-09 (1947).[11]

Those factors firmly favor foreign resolution of foreign-cubed securities disputes. First, although the plaintiff's choice of forum is generally respected, that presumption is weaker when, as in foreign-cubed cases, the plaintiff is foreign. *Piper*, 454 U.S. at 241. Second, an alternate forum typically exists in a case involving a foreign issuer's sale of stock on a foreign securities exchange. Third, a balance of the relevant private and public factors favors deference to a foreign forum in foreign-cubed securities cases. *Cf. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435-36 (2007) (dismissal on *forum non coveniens* grounds was proper where "the gravamen of Malaysia International's complaint – misrepresentations to the Guangzhou Admiralty Court in the course of securing arrest of the vessel in China – is an issue best left for determination by the Chinese courts").[12]

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[11] The relevant interest factors include the countries in which evidence and witnesses are located, the unfairness of imposing jury duty on a community with no relation to the litigation, the "local interest in having localized controversies decided at home," and the interest in having a case decided by the court of the forum whose law governs the dispute. *See Gulf Oil*, 330 U.S. at 508-09.

[12] U.S. courts have frequently applied *forum non conveniens* principles to dismiss securities fraud actions involving foreign parties. *See, e.g., Alfadda v. Fenn*, 159 F.3d 41, 46-49 (2d Cir. 1998) (affirming dismissal of securities fraud action by Saudi Arabian investors); *Warlop v. Lernout*, 473 F. Supp. 2d 260, 262-65 (D. Mass. 2007) (dismissing action brought on behalf of investors who bought stock on European exchange); *In re Royal Group Techs. Sec. Litig.*, No. 04-CV-9809, 2005 WL 3105341, at *3 (S.D.N.Y. Nov. 21, 2005) ("while the United States has an interest in addressing allegations of fraud against corporations

In sum, *forum non conveniens* principles favor resolution of foreign-cubed securities actions by foreign courts applying foreign law. Although the *forum non conveniens* doctrine is typically applied on a discretionary, case-by-case basis, nothing in the doctrine precludes the drawing of a bright line with respect to a particular class of cases – like foreign-cubed securities actions – that always favor resolution by a foreign jurisdiction.

II. FOREIGN-CUBED SECURITIES ACTIONS AS A CLASS PRESENT INHERENT CONFLICTS WITH THE LAWS AND PUBLIC POLICIES OF FOREIGN NATIONS

As numerous commentators have recognized,[13] the broad application of U.S. securities law to cases involving foreign conduct and foreign parties threatens substantial – and unreasonable – interference with the sovereign interests, policies, and laws of other nations. That is particularly true with respect to claims by foreign plaintiffs against foreign defendants for fraudulent transactions on foreign securities exchanges. Principles of international comity therefore support a categorical rule against application of U.S. securities fraud law to foreign-cubed cases.

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listed on the NYSE, Canada has an interest in addressing allegations of fraud against its domestic corporations and its individual citizens"); *Yung v. Lee*, No. 00-CV-3965, 2002 WL 31008970, at *2 (S.D.N.Y. Sept. 5, 2002) ("While this Court agrees that the allegedly fraudulent SEC filing by ITNG has potential domestic impact, that impact is dwarfed by the vast majority of conduct in and impact upon China.").

[13] *See, e.g.,* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law*, 46 COLUM. J. TRANSNAT'L L. 14,

A. Foreign Sovereigns Have a Paramount Interest in Foreign-Cubed Securities Transactions

Foreign nations have interests far superior to those of the U.S. in foreign-cubed securities fraud actions. By definition, such actions involve *foreign* plaintiffs suing a *foreign* company for losses suffered in connection with the purchase or sale of securities on a *foreign* exchange. Foreign nations have a substantial interest in regulating securities transactions that take place on their own exchanges and in protecting investors who trade on such exchanges. By contrast, the U.S. has little, if any, interest in regulating transactions that occur on foreign soil between foreign parties. In particular, the U.S. has little, if any, interest in protecting foreign securities markets,

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67 (2007) (foreign-cubed claims "generate excessive levels of conflict with other countries"); Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 ALA. L. REV. 927, 957 (1994) ("applying the U.S. securities laws to transactions having only a tangential relationship to the U.S. risks offending other nations by perpetuating an already problematic image of American pomposity"); Stevan Sandberg, *The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law*, 17 HARV. INT'L L.J. 315, 326 (1976) (citing the "dangers of United States intrusion into a foreign nation's regulation of its securities markets and American interference with a sovereign state's management of its economy"); Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws*, 9 FORDHAM J. CORP. & FIN. L. 89, 117-18 (2003); Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 208 (1996); Jill E. Fisch, *Imprudent Power*, 87 NW. U. L. REV. 523, 524 (1993) (applying U.S. securities laws abroad "has offended the sovereignty of other countries which have reacted by passing retaliatory legislation of their own").

compensating foreign investors, or punishing foreign corporations.

That is true even in cases in which conduct occurred in the U.S. in relation to the securities fraud at issue. The elements of a section 10(b) claim are: (1) a material misrepresentation (or omission); (2) scienter, *i.e.*, a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance, often referred to in cases involving public securities markets as transaction causation; (5) economic loss; and (6) loss causation, *i.e.*, a causal connection between the material misrepresentation and the loss. *See Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005). In foreign-cubed cases, all of those elements take place abroad. Even if a *related* fraud occurred in the U.S., the *securities* fraud takes place abroad where investors are in fact defrauded. Any related U.S. fraud is not itself securities fraud that can or should be subject to private relief under the U.S. securities fraud laws.[14]

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[14] Petitioners' argument that a rule against U.S. jurisdiction in foreign-cubed cases would make the U.S. a "haven for fraud" is without merit. *E.g.*, Pet Br. at 21. In foreign-cubed securities frauds, the foreign country on whose exchange the securities fraud took place will necessarily govern the securities fraud at issue and can provide a remedy for such fraud in accordance with its own laws and policies. To the extent related fraudulent conduct occurred in the U.S., that separate fraud can be addressed by U.S. criminal and public enforcement authorities against the specific U.S. perpetrators. It is highly implausible that refusing to apply Section 10(b) in foreign-cubed cases would create an incentive for corporations to commit fraud in the U.S., especially with respect to securities sold on foreign exchanges. In any event, that highly theoretical possibility is far outweighed by the real world, practical comity concerns that would be implicated by an attempt by the U.S. to impose global application of its securities laws.

B. Application of U.S. Securities Fraud Laws to Foreign-Cubed Cases Would Conflict With the Regulatory Policies of Foreign Countries

Not only do foreign nations have a paramount interest in foreign-cubed securities cases, but application of U.S. securities laws to such cases would "create[] a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran,* 542 U.S. at 165. To be sure, most foreign countries proscribe securities fraud. But foreign nations have made very different choices with respect to the best way to implement that proscription. In particular, the U.S. approach to policing securities fraud – by privately initiated class actions instituted by plaintiffs' attorneys working on a contingency-fee basis – is not one that has commended itself to most foreign nations. *See* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy*, 10 TUL. J. INT'L & COMP. L. 5, 9 n.18 (2002) (European nations generally prefer "state actions, not private ones" for the enforcement of law); Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 32 ("[m]ost foreign legal systems do not permit group litigation"); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 484 (2009) ("only a few other countries have adopted class-action mechanisms for securities violations").

The policy decision by foreign countries not to follow the American model is not surprising in light of the numerous and well-documented problems caused by private class actions. While the U.S. attempted to address some of those concerns in the 1995 PSLRA and other reforms, the Senate report on

the PSLRA clearly states the substantial downsides of civil class actions in securities cases. *See* S. REP. NO. 104-98, 1995 U.S.C.C.A.N. 679, 687-88 (describing the myriad ways plaintiffs can abuse the U.S. securities laws); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) ("[p]rivate 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").

Indeed, it is widely recognized that even meritorious "[s]ecurities class actions impose enormous penalties, but they achieve little compensation and only limited deterrence." John C. Coffee, Jr., *Reforming the Securities Class Action*, 106 COLUM. L. REV. 1534, 1534 (2006) ("This is because of a basic circularity underlying the securities class action: When damages are imposed on the corporation, they essentially fall on diversified shareholders, thereby producing mainly pocket-shifting wealth transfers among shareholders. The current equilibrium benefits corporate insiders, insurers, and plaintiffs' attorneys, but not investors."); *see* Comment, *Securities Litigation As a Coordination Problem*, 11 U. PA. J. BUS. L. 475, 513 (2009) ("Securities litigation merely redistributes wealth among innocent shareholders and fails to penalize the most culpable parties. Shareholders lose value as a whole because litigation reduces the prices of their shares and transfers a large amount of their wealth to lawyers.").

Accordingly, just as foreign nations argued in *Empagran* that "to apply [U.S.] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own

domestic antitrust laws embody" (542 U.S. at 167), the same is true for U.S. securities actions. Where foreign plaintiffs seek redress for foreign harm suffered abroad, why "should American law supplant, for example, Canada's or Great Britain's or Japan's [or France's] own determination about how best to protect Canadian or British or Japanese [or French] customers from [securities fraud] engaged in significant part by Canadian or British or Japanese [or France] or other foreign companies?" *Id*. at 165; *cf. Microsoft*, 550 U.S. at 439 (refusing to apply patent law provision to foreign conduct because, among other reasons, foreign law "may embody different policy judgments about the relative rights of inventors, competitors, and the public in patented inventions") (citation omitted). The U.S. has no valid interest in undermining the policy judgments of foreign nations by applying its chosen method of remedying securities fraud to foreign securities transactions.[15]

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[15] Allowing U.S. foreign-cubed securities actions would be especially unfair to foreign companies, which would potentially be exposed to greater or different regulation than their governments have decided is fair or necessary. Especially troubling is the potential for U.S. courts in foreign-cubed actions to hand down large damages awards that greatly exceed what would be available under foreign law, and that may substantially affect the financial condition of the foreign company – to the potential detriment of the company, the long-term interests of its shareholders, and the nation in which it is organized and operates – and to the substantial benefit of self-appointed lawyers in another country. *See* John C. Coffee, Jr., *Global Class Actions*, NAT'L L. J., June 11, 2007, at 12 (observing that allowing U.S. securities class actions to be brought by foreign plaintiffs against foreign corporations "disruptively expos[es] foreign corporations to a litigation environment in which plaintiffs arguably have undue leverage" and that "the United States' foreign neighbors

C. Application of U.S. Securities Fraud Laws to Foreign-Cubed Cases Would Conflict with the Specific Legal Rules of Foreign Countries

In addition to conflicting with fundamental regulatory choices of foreign nations, allowing U.S. foreign-cubed securities actions would pose a substantial conflict with specific substantive and procedural rules of foreign countries. Even when foreign countries permit private rights of action for securities fraud, they often have different schemes of disclosure, different pleading and substantive standards for scienter, different standards of reliance,[16] materiality and causation, different rules governing contribution and indemnity, and different limitations periods. In addition, foreign countries may approve of different measures of damages. For example, many foreign nations do not permit the award of punitive damages. *See* Edward F. Sherman, *Group Litigation Under Foreign Legal Systems*, 52 DEPAUL L. REV. 401, 419 (2002).[17]

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must fear that a global class action in a U.S. court may threaten the solvency of even their largest companies and could have an adverse impact on the interests of local constituencies, including labor, creditors and local communities").

[16] *See, e.g.*, Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 61 (noting that "the United States is unusual in recognizing presumed reliance based on the fraud on the market theory, rather than requiring investors to prove actual reliance on misleading information").

[17] Although punitive damages are not available under Section 10(b), such damages are often "recoverable in a pendent state [law] claim." *Cyrak v. Lemon*, 919 F.2d 320, 326 (5th Cir. 1990). It is possible that French courts in particular would refuse to enforce U.S. class action judgments that award punitive damages on the ground that such judgments violate the

Foreign jurisdictions also generally have different rules governing attorney's fees, contingency fees, jury trials, and pre-trial discovery.[18] Although those rules are often characterized as "procedural," they have substantial practical effect and application of U.S. rules to foreign securities transactions could upset a foreign nation's carefully thought out balancing of plaintiffs' and defendants' interests.

One particular rule that conflicts with the public policy of many nations is the opt-out procedure of U.S. class actions. "Opt out" class actions permit plaintiffs' attorneys to sue on behalf of large numbers of individuals based on a theory of constructive notice. An individual can become a member of an "opt out" class without ever having made an informed

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French constitutional principle of proportionality of damages. *See, e.g.*, Court of Appeal of Poitiers, No. 0702404 (Feb. 26, 2009) ("a foreign decision which . . . awards punitive damages far in excess from the price of the vessel, object of the contract . . . infringes upon the principle of proportionality between the damages and the breach guaranteed by Article 8 of the French Declaration of the Rights of Man and the Citizen."); J. Ortscheidt, "Les dommages et intérêts punitifs en droit de l'arbitrage international," *Petites Affiches*, No. 232/2002, at 17 (Nov. 20, 2002); Conseil Constitutionnel, Decision No. 88-248 DC, at §§ 35 & 36 (Jan. 17, 1989).

[18] *See, e.g.*, Stefano M. Grace, *Strengthening Investor Confidence in Europe*, 15 J. TRANSNAT'L L. & POL'Y 281, 289 (2005) ("The 'English rule' is the predominant rule in Europe, and only one EU member state, Luxembourg, has rejected the rule requiring each party to pay their own litigation costs similar to the American approach."); Sherman, 52 DEPAUL L. REV. at 421 ("EU countries follow the 'loser pays' rule requiring the losing side to pay the other side's attorney's fees, in contrast to the 'American rule' by which the parties pay their own attorney's fees."); *id*. (contingency fees are generally not allowed in EU countries).

decision to do so. Indeed, the reality is that many, if not most, members of a typical "opt out" class will never learn of the existence of the lawsuit until it is over, if then. The U.S., of course, has a sovereign right to apply the opt-out mechanism to cases involving its own citizens. Most other nations, however, do not permit the "opt out" method of binding individuals to the outcome of litigation. *See* Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 61 (even foreign legal systems "that have adopted some form of collective action mechanism do not recognize the validity of opt-out procedures").[19] There is accordingly a significant risk that courts in one or more foreign systems would refuse to recognize a U.S. class action settlement or judgment, creating the further risk that a defendant would face further litigation in a country in which transactions in its securities had taken place. *See id.*; *see also Alstom*, 253 F.R.D. at 281-82 (foreign shareholders should not be included in U.S. securities fraud class actions against foreign companies if there is a likelihood that foreign courts would refuse to recognize and give preclusive effect to a judgment of the U.S. court). That risk is analyzed as a matter of French law in the next section.

In sum, foreign countries – including France – have struck their own balance in regulating securities fraud in accordance with their own legal cultures, traditions, and public policy objectives. To allow

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[19] *See also* Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 63 ("opt-out mechanism is seen as contrary to public policy in most countries"); Choi & Silberman, 2009 WIS. L. REV. at 484 ("only a few other countries have adopted class-action mechanisms for securities violations"); Sherman, 52 DEPAUL L. REV. at 418-32 (many foreign countries believe the opt-out procedure is inconsistent with due process).

foreign investors to pursue U.S. securities fraud class actions would upset that delicate balance and offend the sovereign interests of foreign nations in cases where the U.S. has no good reason to do so.

D. Example: the Fundamental Due Process Concerns Posed by Opt-Out Class Actions According to French Law

The *Cour de cassation* (the highest court in the French judiciary) recently held that a French judge should recognize and enforce a foreign judgment only if three conditions are met: (1) there is a sufficient link between the dispute and the chosen forum; (2) the decision does not violate French public policy; and (3) the party seeking enforcement did not evade French law in obtaining the foreign judgment. *Cornelissen v. Société Avianca Inc., et autres*, Appeal No. 05-14.082, *Cour de cassation*, First Civil Chamber (Feb. 20, 2007).

French courts would almost certainly refuse to enforce a court judgment in a U.S. "opt out" class action because it violates the second prong of that test – specifically, the "opt out" mechanism violates French constitutional principles and public policy.[20]

[20] Even apart from the opt-out problem, French courts might well decline to enforce a judgment in a foreign-cubed lawsuit. Foreign-cubed lawsuits by their nature involve, at best, an attenuated link between the dispute and the U.S. and thus plaintiffs would have an uphill battle in satisfying the first prong of the test for enforcing foreign judgments. Moreover, plaintiffs would have difficulty satisfying the third prong because a French court faced with a French citizen seeking to enforce a U.S. judgment against a French company based on losses incurred on securities sold on a French exchange could easily conclude that such a judgment was the product of an evasion of French securities regulations.

The *Conseil Constitutionnel* (the sole French high Court authorized to declare the constitutionality of French legislation) has held that any "individual associated with a collective action must be offered the opportunity to give an informed consent and remain at liberty to personally conduct the defense of his interests and to terminate the action." Decision No. 89-257 DC (July 25, 1989).[21] That decision reflects the French constitutional principle that the choice to initiate and terminate a legal action is an important individual right. AJDA, L'Actualité juridique - Droit administratif, at 796 (Dec. 20, 1989). French legal scholars and official commentators agree that the Conseil Constitutionnel's reasoning precludes the "opt out" method of binding class members. *See, e.g.*, *Les cahiers du Conseil Constitutionnel*, No. 23/2007, at 22 ("In case of a failure to respect this individualized consent, which does not, for example, exist in the Anglo-Saxon opt-out mechanism in class actions, the individual would, in violation of the Constitution, be improperly deprived of a right."); S. Guinchard, "Une class action à la française?" *Recueil Dalloz*, at 2180 (32/2005) (noting that the Conseil Constitutionnel's decision requires "pro[of] at the outset of the proceedings that the [party] has had actual notice (personal knowledge) of the action" and concluding that it "amounts to a rejection of the opt-out mechanism").

The conclusion that the "opt out" mechanism is inconsistent with French constitutional law and public policy was reaffirmed in a May 2006 interview

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[21] Quotations from French authorities provided herein were translated to English by counsel. Counsel is prepared to lodge the original French versions and English translations with the Clerk of the Court upon request.

by Guy Canivet, the chief justice of France's highest civil court at the time. In that interview, Justice Canivet explained that "[t]he exclusion option ('opt out') is too far removed from [France's] own legal reflexes, and even dangerous" in that "[i]t seems . . . very difficult to hold someone bound to a legal decision in which he did not willingly participate." *La Tribune*, at 30 (May 16, 2006); *see also* J. Lemontey & N. Michon, "Les 'class actions' américaines et leur éventuelle reconnaissance en France," *JDI* 2/2009 at 535 (noting that "US class actions entail a loss of control on the dispute for the members of the class which is incompatible with fundamental principles of French law").[22]

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[22] "Opt out" class actions may also be found to violate French public policy on the ground that they are incompatible with French due process requirements. Due process under French law and Article 6 of the European Court of Human Rights requires, among other things, that both parties be offered similar procedural rights. *See, e.g., Ankerl v. Switzerland* (Oct. 23, 1996); *Feldbrugge v. The Netherlands*, at 15 (May 29, 1986). The "opt out" mechanism, however, results in the defendant being forced to litigate against absent and unidentified members of a class. This type of uneven battle is inconsistent with French due process standards and a judgment entered under such circumstances would likely be found by a French court to violate public policy. *See* S. Guinchard, "Une class action à la française?" *Recueil Dalloz*, at 2180 (32/2005) ("Could the defendant not argue that, in the opt-out system, he does not know all of its opponents while on the other hand, the class representative knows its adversary? The breach of equality between the parties is inherent to the opt-out mechanism"); M-A Frison-Roche, "Les résistances mécaniques du système juridique français à accueillir la class action: obstacles et compatibilités," *Les Petites Affiches*, No. 115/2005, at 22 (June 10, 2005) ("the breach of equality [in an opt-out class action] infringes upon due process rights").

Relying on the above authorities, a U.S. court correctly found that "[a] French court would likely conclude that any judgment rendered by this Court involving absent French class members offends public policy because absent French investors did not consent to this Court's jurisdiction over their claims and the United States' class action procedure would deny them an adequate opportunity to participate in the litigation." *Alstom*, 253 F.R.D. at 286. The court properly noted that recent legal developments "demonstrate that French authorities have repeatedly rejected the adoption of an opt-out class action system in France because that type of system violates French constitutional principles and public policy." *Id*. at 287. "French authorities' rejection of opt-out class action mechanisms thus provide further evidence suggesting that a French court would likely not recognize a judgment of [a U.S.] Court if the class included absent French investors." *Id*.

That courts in France (and probably other nations) will likely refuse to enforce judgments in opt-out foreign-cubed cases counsels strongly against opening the door to such lawsuits, especially given the absence of any clear congressional command to do so.

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Extraterritorial application of U.S. securities laws in foreign-cubed cases would pose just the sort of unreasonable interference with sovereign interests that this Court found precluded extraterritorial application of the antitrust laws in *Empagran*. If such lawsuits were permitted, U.S. courts would become a magnet for foreign plaintiffs who believe they can obtain a better result in the U.S. than they

can under their nation's laws.[23] French regulatory authorities and courts would have greater difficulties reaching resolutions of such disputes if a complainant believed it had the option of bypassing the French regulatory system altogether by filing a lawsuit in the U.S. That sort of international forum shopping would undermine the laws of other nations while imposing an unnecessary burden on U.S. courts.[24]

III. FOREIGN-CUBED SECURITIES ACTIONS SHOULD BE CATEGORICALLY PRECLUDED

International comity principles support a categorical rule barring foreign-cubed securities class actions from U.S. courts at the outset of litigation. As Judge Bork explained for the D.C. Circuit in *Zoelsch*, a case-by-case application of international comity principles would be "difficult to apply," "inherently unpredictable," provide "powerful incentives" to "litigat[e] . . . the jurisdictional issue itself," divert "limited American judicial resources" to foreign disputes, and – most importantly – be unfaithful

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[23] Indeed, in the hope of prosecuting global class actions, U.S. law firms have attempted to recruit foreign investors in recent years by, among other things, opening offices in Europe. *See* Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 71 n.198 & n.199 (noting that in 2007, Cohen Milstein, Hausfeld & Toll, P.L.L.C., a leading plaintiff's firm, opened its own branch in London, and that "[p]rominent U.S. plaintiffs' firms, including Lerach Coughlin Stoia Geller Rudman & Robbins LLP, promote their representation of foreign institutional investors and their affiliations with foreign offices on their websites").

[24] Although different nations' securities laws may interact, the exact nature of those interactions should be the product of careful negotiations between governments and not dictated by the self-interested acts of private parties.

to international comity principles and "tend to deemphasize foreign sovereign interests." 824 F.2d at 32 n.2. A case-by-case analysis that is not applied at the threshold (which appears to be Petitioners' position) would require foreign companies to bear the immense burden, expense, and uncertainty of U.S. discovery, dispositive motions, and perhaps trial before a court rules on the extraterritoriality issue – and the concomitant pressure to settle that accompanies such uncertainty.

The inherent unpredictability of a case-by-case approach and its tendency to disserve international comity principles is illustrated by the court of appeals' unsuccessful attempt to reconcile its prior decisions in the opinion below. In *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 986 (2d Cir. 1975), the "heart" of the fraud that "directly caused loss to investors," according to the court below, was "*placing* the allegedly false and misleading prospectus 'in the purchasers' hands.'" Pet. App. 13a (quoting *Bersch*, 519 F.2d at 987) (emphasis added). (In *Bersch*, the court found no subject-matter jurisdiction because the placement occurred outside the U.S. Pet. App. 12a-13a.) By contrast, in *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003), the act that directly caused the investors' loss was *creating* the fraudulent statements. *See* Pet. App. 14a. (In that case, the court found subject-matter jurisdiction because the statements were created in New York, even though they were placed in investors hands outside the U.S. *Id.*) The two decisions are flatly inconsistent, illustrate the inherent unpredictability of a case-by-case approach, and underscore the need for a categorical rule that may be applied at the outset of litigation to protect international comity.

A categorical rule could be based on subject-matter jurisdiction – *i.e.*, Section 10(b) of the Exchange Act does not confer subject-matter jurisdiction over foreign-cubed securities actions. The courts of appeals considering the extraterritorial application of U.S. securities laws have consistently analyzed the issue as one of subject-matter jurisdiction. *See, e.g.*, Pet. App. 22a; *Berger*, 322 F.3d at 192; *Continental Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 413 (8th Cir. 1979); *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977); *Bersch,* 519 F.2d at 984. Although this Court's recent decisions suggest that statutory limitations not characterized by Congress as jurisdictional should not be construed as jurisdictional (*see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511, 516 (2006); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)), the jurisdictional nature had been established for two decades before Congress "ratified the implied right of action" in 1995 in the PSLRA and "accepted the §10(b) private cause of action as then defined." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165-66 (2008).

Alternately, a categorical rule could be based on foreign-cubed plaintiffs' failure to state a claim upon which relief can be granted – *i.e.*, Section 10(b) of the Exchange Act simply does not apply to foreign-cubed securities actions as a matter of international comity. That statutory construction is identical in principle to this Court's "across the board" determination in *Empagran* that the Sherman Act does not apply to antitrust actions claiming independent foreign injury. 542 U.S. at 168. In both cases, the Court is declining to "take . . . account of comity considerations case by case" because that "approach is too complex to prove workable" and would impose "procedural costs and delays [that] could themselves

threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust [or here, securities] enforcement system." *Id*. at 168-69. The respondents in this case "moved to dismiss the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure." Pet. App. 5a. Under this alternate, merits-based approach, the judgment below could be affirmed for failure to state a claim rather than dismissed for lack of jurisdiction.[25]

Either approach, however, would prevent foreign-cubed securities actions from proceeding past the pleadings; would avoid the extraterritorial application of the anti-fraud provisions of the U.S. securities laws to actions involving solely foreign parties and foreign exchanges, and would protect the ability of foreign sovereigns to regulate their citizens, residents, and exchanges according to their own legal traditions, cultural values, and public policies.

[25] The Court could reach a similar result by holding that all foreign-cubed securities fraud actions should be dismissed under the doctrine of *forum non conveniens*. *See supra* pp. 17-19.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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