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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 OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, business

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for either party authored any part of this brief; and that no person or entity, other than WLF and its counsel, provided financial support for the preparation and submission of this brief. All parties have consented to the filing of this brief.

civil liberties, and a limited and accountable government. To that end, WLF regularly initiates litigation, files *amicus curiae* briefs, and publishes monographs and other publications on these and other related topics.

In particular, WLF has frequently appeared before this and numerous other federal and state courts to address issues concerning the proper scope of Section 10(b) of the Securities Exchange Act of 1934 and other related federal securities laws. *See, e.g., Merck & Co. v. Reynolds*, 129 S. Ct. 2432 (2009); *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006).

STATEMENT OF THE CASE

This action arises out of the allegedly false and misleading statements made by Australia's largest bank, National Australia Bank, Ltd. ("NAB"), in disclosures filed with the Australian Securities and Investment Commission ("ASIC") pursuant to Australian laws and rules governing the Australian Stock Exchange. NAB's ordinary shares trade exclusively on Australian and other foreign securities exchanges and 99.97% of NAB's ordinary shares were held by investors from Australia and other places outside the United States. Nonetheless, Petitioners, the Australian named plaintiffs, purporting to represent a world-wide class of investors who have no connection to the United States, seek to have their claims adjudicated in the United States courts under United States law.

Petitioners argue that their claims are properly brought in the United States pursuant to Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) ("Exchange Act") and Rule 10b-5, 17 C.F.R. § 240.10b-5, because some of the conduct underlying NAB's allegedly false and misleading statements occurred at NAB's United States subsidiary, Homeside Lending, Inc. ("Homeside"). Pet. Br. at 6-7. According to Petitioners, Homeside, a mortgage service provider, intentionally overvalued its mortgage portfolio in order to achieve overinflated earnings targets and then transmitted its allegedly fraudulent financial information to NAB. NAB, in turn, incorporated this information into reports it filed with ASIC thus rendering the reports false and misleading.[2] *Id.* at 5-6. After NAB disclosed problems with Homeside's mortgage portfolio and ultimately wrote down the value of this portfolio, NAB's shares declined in value allegedly causing loss to Petitioners and other members of the class.

The district court dismissed Petitioners' complaint on the basis that it lacked subject-matter jurisdiction over their claims. Pet. App. 23a-45a. The district court concluded that all of the elements of Petitioners' claims took place outside the United States and the United States conduct "amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad." *Id.* at 41a-42a. The court of appeals affirmed, holding

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[2] Because NAB has issued American Depository Receipts ("ADR"), it is required to file disclosures with the SEC. These disclosures are virtually identical to NAB's Australian disclosures, but the Australian plaintiffs do not allege that they were even aware of the SEC filings, much less relied on them.

that it was NAB's executives and advisors in Australia who bore "primary responsibility" for NAB's disclosures and, therefore, the actions in Australia were "significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of numbers in Florida." Pet. App. 1a-22a.

SUMMARY OF ARGUMENT

The issue presented in this case is whether the implied cause of action under Section 10(b) of the Exchange Act allows for the recovery of losses suffered by foreign investors trading foreign securities on foreign exchanges. For Petitioners to succeed, they must show not only that Section 10(b) applies in general to conduct that affects only securities traded on a foreign exchange, but also that courts should extend the implied cause of action under Section 10(b) to include losses suffered by foreign investors. Congress, however, enacted the Exchange Act to regulate and control United States securities exchanges and to protect United States investors. As this case involves neither, the court of appeals should be affirmed.

Whether Congress has exercised its authority to enforce its laws beyond the United States in any particular case is a matter of statutory construction. *EEOC v. Arabian American Oil Co. ("Aramco")*, 499 U.S. 244, 248 (1991). There is a strong presumption "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). This rule reflects that Congress is deemed to respect the legitimate sovereign interests of other countries and

intends to avoid any potential conflict with laws of different nations where possible. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004).

The Exchange Act is virtually silent on its application outside the United States. *See Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 121-22 (2d Cir. 1995). Indeed, its occasional references to "foreign commerce" or "commerce … between any foreign country and any state" are less clear and definitive than language this Court has previously held to be inadequate to confer extraterritorial effect. *See Aramco*, 499 U.S. at 251 ("we 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.") (emphasis in original). The virtual silence in the Exchange Act regarding its foreign application is unsurprising; the purpose of the statute was the protection of United States investors and the regulation of United States exchanges, not the creation of worldwide antifraud rules. *See* Section I.B *infra*. This is revealed in the Exchange Act's statutory language and legislative history, neither of which reveals any concern for foreign investors trading on foreign exchanges. *Id*.

Congress did not consider the possibility of private suits under Section 10(b) when it passed the Exchange Act in 1934; they are a subsequent judicial creation. Congress did consider such suits, however, in 1995, when it passed the Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995). There is no suggestion in the language of that statute or its legislative history that Congress intended the implied cause of action to extend to

foreign investors suing to recover losses incurred on foreign exchanges. See Section I.C, infra.

Principles of comity also argue against extending the implied cause of action to include losses suffered by foreign investors on foreign exchanges. Securities regulation touches directly on a nation's ability to regulate its own commercial affairs. Other countries have made their own determination on both the disclosure requirements of public companies and the remedies to be afforded to investors who suffer losses. The United States should not interfere with those determinations by affording foreign investors additional remedies in its own courts without a compelling justification. No such justification is present here.

The arguments against extending the implied cause of action to foreign investors suing to recover for foreign losses, as well as the patent practical concerns of managing a large class action where all the class members plus much of the evidence is located outside the United States, counsel against recognizing a cause of action even where the conduct within the United States forms a material part of the fraudulent scheme. Without a direct effect on a United States investor or exchange, the congressional concerns reflected in the Exchange Act are simply not implicated and the foreign investors should rely instead on the remedies that their own domestic law provides.

ARGUMENT

I. Allowing Foreign Investors to Recover Under the Exchange Act for Foreign Losses Violates the Presumption Against Extraterritorial Application of United States Statutes.

A. United States Laws Apply Only Within Its Territories Unless A Clear And Express Contrary Intent Appears In The Statute.

For over a century, this Court has applied the strong presumption that Acts of Congress do not ordinarily apply outside the United States and has declined to give extraterritorial effect to domestic laws absent contrary congressional intent. *See, e.g. Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173 (1993); *Aramco*, 499 U.S. 244, 248 (1991); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357-59 (1909). This "presumption is rooted in a number of considerations, not the least of which is the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993); *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949) ("The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States … is based on the assumption that Congress is primarily concerned with domestic conditions" (internal citation omitted)); *see also Small v. United States*, 544 U.S. 385, 388 (2005) (applying "'notion that Congress generally legislates with

domestic concerns in mind'" to determine scope of statutory phrase (citing *Smith*, 507 U.S. at 197)).

In applying this presumption, the Court "look[s] to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond [the United States.]'" *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285). This congressional purpose must be "clearly expressed," *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957), and "definitely disclose an intention to give [the statute] extraterritorial effect." *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31 (1925). "Boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas" is insufficient. *Aramco*, 499 U.S. at 251. So, in *Chisholm*, broad jurisdictional language that the Federal Employers Liability Act applied to common carriers engaging in "interstate or foreign commerce" or commerce between "any of the States or territories and any foreign nation or nations" was held to be insufficient to apply the Act to injuries to an employee suffered outside the United States. *Chisholm*, 268 U.S. at 31; *accord Aramco*, 499 U.S. at 249-51 (application of statute to commerce "between a State and any place outside thereof" insufficient to indicate extraterritorial effect).

B. The History and Purpose of the Exchange Act Evidence That Congress Had Domestic Concerns in Mind When It Enacted the Exchange Act And Did Not Intend To Extend Its Application Outside the United States.

There is no evidence in the language and history of the Exchange Act that Congress intended to extend the Act's coverage beyond the United States. Congress enacted the Exchange Act in the midst of the Great Depression to address the collapse of the United States economy and to restore United States investors' confidence in the United States' markets. *See* Katherine J. Fick, *Such Stuff as Laws are Made On: Interpreting the Exchange Act to Reach Transnational Fraud*, 2001 U. CHI. LEGAL. F. 441, 445 (2001); Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 407-408 (1990); Gregory K. Matson, *Restricting the Jurisdiction of American Courts Over Transnational Securities Fraud*, 79 GEO. L. J. 141, 143 (1990). Public perception was that excessive speculation in the stock market had caused the unprecedented rise and subsequent crash in the United States stock market, which dragged the United States economy down with it.[3] *Id.* Congress's primary concern when it enacted the Exchange Act

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[3] Government investigations revealed that the manipulation of market securities prices, achieved through the mass purchase and sale of securities by exchange members to increase or decreases prices, also contributed to the stock market decline. Thel, *supra* at 413. This strategy "did not depend on communication at all, but rather on the brute force of concentrated economic resources." *Id.*

was to protect the United States markets and United States investors from a recurrence – a wholly domestic concern reflected in the Exchange Act's language and legislative history.[4]

The purpose of the Exchange Act was two-fold – to regulate and control the United States' securities exchanges and to protect United States investors. Section 2 of the Exchange Act, titled "Necessity for Regulation," plainly states its purpose to regulate and control the securities exchanges, which are affected by a "national public interest." 48 Stat. 881. Significantly, Section 2 makes repeated use of the word "national" to describe the "market system for securities" and the "system for the clearance and settlement of securities transactions" Congress sought to regulate as well as the "public interest" it sought to protect. *Id.* Moreover, the legislative history of the securities legislation reveals explicit

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[4] *See, e.g.*, Securities and Exchange Act of 1934, Title I, § 2, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a, et seq.) (listing "national emergencies" caused by "manipulation" of securities prices and "excessive speculation" as one the reasons necessitating regulation and control of the securities exchanges); H.R. REP. NO. 73-1383 (April 30, 1934) ("the bill … attempts to change the practices of exchanges and the relationships between listed corporations and the investing public to fit modern conditions … [because] the lesson of 1921-30 is that without changes they cannot endure."); 3 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *reprinted in* 78 Cong. Rec. 2264 (1934) (recommending that Congress enact legislation to regulate the exchanges to protect investors from speculation); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 416, comment a (1987) (principal purpose of the securities legislation is "to protect United States investors as well as the securities markets of the United States and those who buy and sell in those markets").

Congressional intent to protect United States investors trading on the United States markets.[5]

By contrast, neither the language of the Exchange Act nor its legislative history evidences any congressional concern with foreign citizens trading foreign securities on foreign exchanges. Petitioners primarily rely on two phrases in the Exchange Act. First, Petitioners point to Congress's use of the vague term "foreign commerce" in the Exchange Act's preamble. Pet. Br. at 23. Second, they note the inclusion of commerce "between any foreign country and any State" in the Act's definition of the term "interstate commerce." *Id.* Petitioners also argue that the explicit extraterritorial limit contained in Section 30(b) of the Exchange Act demonstrates that Congress intended that the remainder of the Act should apply extraterritorially. *Id*. at 39-40.

These terms are very similar to the statutory language considered by this Court in *Aramco* and found to be insufficient to indicate a congressional intent to apply the statute outside the United States. In *Aramco*, the Court considered whether Title VII of the Civil Rights Act of 1964 applied to United States citizens employed by American employers outside the United States. Title VII stated that it applied to employers engaged in "commerce … between a State and any place outside thereof" and also expressly

[5] *See, e.g.*, S. REP. NO. 73-47 (1933) (commenting on the "billions of dollars" that the "American public" invested in "practically worthless securities, both foreign and domestic"); S. REP. NO. 73-1455 (1934) (commenting on the need to regulate investment bankers who "indulged in practice of doubtful propriety in the promotion of foreign loans and in the sale of foreign securities to the American public").

exempted employers "with respect to the employment of aliens outside any State." *See Aramco*, 499 U.S. at 249-53. This Court held that the quoted language was too ambiguous to indicate a congressional intent that Title VII should apply extraterritorially; it noted that when Congress does intend legislation to apply outside the United States, it knows how to make a clear statement to that effect. *Id.* at 258.

A review of the Exchange Act's legislative history reveals that the impetus behind the Act's references to foreign commerce was to provide protection to United States investors who trade in foreign securities in the United States, not to foreign investors trading foreign securities on foreign exchanges. Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 699-701 (1990) (reference to foreign commerce was inserted to address concern that "its absence would jeopardize statutory coverage of foreign securities trading in the United States."). The legislative history of the Exchange Act makes no mention whatsoever of lawsuits involving foreign exchanges. *Id.* at 706. In fact, the legislative history of the related Securities Act of 1933 reveals Congressional apathy towards securities transactions conducted on foreign exchanges. *Id.* at 695.

Section 30(b) also provides no support for the extraterritorial application of the Exchange Act. Although it states that the Exchange Act may apply to persons transacting business in securities outside the United States, that is so only if the Securities and Exchange Commission ("SEC") issues rules and regulations making the statute applicable to such

businesses where "necessary or appropriate … to prevent the evasion" of the Exchange Act. *See* 15 U.S.C. § 78dd(b). "That 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 Anderson & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987). At least one commentator has also noted that because Congress had failed to follow England's lead in exempting foreign government securities from the Securities Act and Exchange Act's requirements, it enacted Section 30(b) as an "olive branch" to signal to foreign governments that it would not interfere with those foreign securities activities that operated "without the jurisdiction of the United States" – i.e., did not affect domestic traders. Under this view, Section 30(b) further supports the presumption that Congress did not intend that the Act should apply extraterritorially. Sachs, *supra* at 698-699.

Thus, while courts have repeatedly noted the Exchange Act's silence on its extraterritorial application,[6] the presumption against such application could not be stronger. The historical context of the Exchange Act, its language and the legislative history all evidence congressional concern with United States markets and United States investors, and an intent to enact legislation that regulates and controls such markets and protects such investors. Congress expressed no analogous concern with foreign investors trading foreign securities on foreign exchanges.

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[6] *See, e.g.*, *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F. 3d 118, 125 (2d Cir. 1998); *Itoba Ltd.*, 54 F.3d at 121.

C. Absence of Express Congressional Intent to Apply the Exchange Act Extraterritorially Means the Court Should Not Recognize an Implied Cause of Action for Foreign Investors Trading Foreign Securities on Foreign Exchanges.

The presumption against extraterritorial application of United States statutes carries particular weight in this case because it concerns the judicially-created implied cause of action under Section 10(b) of the Exchange Act. The history of the provision shows that Congress did not "consider[] the possibility of private suits" under Section 10(b) when it passed the Exchange Act. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729 (1975). Neither did the SEC when it adopted Rule 10b-5. *Id.* at 730. Instead, private actions under Section 10(b) and Rule 10b-5 arose through judicial implication. *See Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971) (recognizing an implied private action under 17 C.F.R. § 240.10b-5). "Concerns with the judicial creation of a private cause of action caution against its expansion." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165 (2008).

This Court limits the right to pursue implied actions by requiring plaintiffs to belong to the class of intended beneficiaries. *Cort v. Ash*, 422 U.S. 66, 78 (1975) (implied action available only to plaintiffs who belong to "the class for whose especial benefit the statute was enacted"). This requirement applies equally to actions implied under the federal securities laws. *See Blue Chip Stamps*, 421 U.S. at 754.

In *Blue Chip Stamps*, the Court considered whether the implied cause of action under Section 10(b) of the Exchange Act extended to an investor who did not actually purchase or sell the relevant security. The Court held that it did not, even though the potential investor may have suffered losses due to a violation of Section 10(b) by the defendants. *Id.* at 738-55. Because both the terms and underlying purpose of the Exchange Act showed a congressional intent to limit civil remedies to actual purchasers or sellers of securities, the implied cause of action should be similarly limited. *Id.* at 735-36.[7]

Here, the express terms and the underlying purpose of the Exchange Act is to regulate the United States exchanges and to protect United States investors; the implied cause of action under Section 10(b) should be limited accordingly. This is confirmed by the legislative history of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) ("PSLRA"), the most detailed consideration by Congress of the implied cause of action under Section 10(b) and Rule 10b-5. In the PSLRA, Congress imposed limits on private actions under the securities laws, particularly class actions, to reduce meritless suits. In doing so, Congress determined that "the private securities

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[7] *See also Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), where the Court refused to imply a cause of action in favor of unsuccessful bidders for a company under Section 14(e) of the Securities Exchange Act, as added by Section 3 of the Williams Act, 82 Stat. 457 (as codified at 15 U.S.C. § 78n(e)), or under Rule 10b-6, 17 C.F.R. § 240.10b-6. The Court considered the Williams Act's legislative history and concluded that the intended beneficiaries of the Act are investors confronted with a tender offer, not offeror-bidders. *Id.* at 30-33.

litigation system is too important to the integrity of *American* capital markets to allow the system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits." H.R. REP. NO. 104-369, at 26 (1995) (Conf. Rep) *reprinted in* 1995 U.S.C.C.A.N. 730, 731 (emphasis added). The Senate Report concluded that "*United States* securities markets are the most liquid and deep in the world" and that private rights of action together with the SEC enforcement program contribute to the "success of the *U.S.* securities markets." S. REP NO. 104-67, at 8 (1995) *reprinted in* 1995 U.S.C.C.A.N. 679, 687 (emphasis added). Nowhere in Congress's lengthy discussion of private causes of action under the securities laws, or in the text of the PSLRA itself, is there any mention of foreign investors or the benefits of allowing them to bring an action under Section 10(b) for losses suffered outside the United States.

In sum, the intended beneficiaries of the Exchange Act are United States investors and persons trading on the United States securities exchanges, not foreign citizens trading foreign securities on foreign exchanges. The legislative history of the Exchange Act and the PSLRA does not contemplate lawsuits by foreign citizens trading foreign securities on foreign exchanges. If anything, the legislative history demonstrates congressional apathy towards such investors. The Court's implied action jurisprudence therefore bars Petitioners' action.

D. Recognizing a Cause of Action For Foreign Investors Trading Foreign Securities On Foreign Exchanges Would Be Contrary To The National Public Interest.

When determining whether an implied right of action exists, a court must also ascertain whether it is "consistent with the underlying purposes of the legislative scheme." *See Piper*, 430 U.S. at 39; *Cort*, 422 U.S. at 78 (same). As the Court recognized in *Blue Chip Stamps*, private actions under Section 10(b) and Rule 10b-5 are "a judicial oak which has grown from little more than a legislative acorn." 421 U.S. at 737. In the absence of "conclusive guidance" from Congress or the SEC on the contours of the cause of action, it is proper to consider policy factors regarding the advantages and disadvantages of implying a cause of action for a particular class of plaintiffs. *Id.*

Recognizing an implied cause of action for foreign investors trading on foreign exchanges would invite virtually any aggrieved investor into the United States courts, further burdening already overtaxed district courts and diverting precious judicial resources to redress harms having nothing to do with United States markets or United States investors.[8] Undoubtedly, foreign investors will accept this invitation to avail themselves of more favorable United States law. *See* Paige Keenan Willison,

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[8] *See, e.g.*, RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49 (5th ed. 2003) ("By most if not all accounts, the federal district courts are severely overtaxed by their current caseloads.").

Europe and Overseas Commodity Traders v. Banque Paribas London: Zero Steps Forward and Two Steps Back, 33 VAND. J. TRANSNAT'L L. 469, 471 (2000) (explaining that "foreign victims of securities violations are tempted to seek recovery in the United States, rather than in their own countries"); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUMB. J. TRANSNAT'L L. 14, 61 (2007) ("Given that the substantive and procedural law of the United States currently provides certain advantages to plaintiffs as compared to the law of other systems, this might lead to the undesirable result of centralizing litigation in United States courts."). Indeed, the potential for a huge jury award is reason enough to select a United States forum over a foreign one. *See, e.g.* Richard T. Marooney & George S. Branch, *Corporate Liability Under the Alien Tort Claims Act: United States Court Jurisidiction Over Torts*, 12 CURRENTS INT'L TRADE L. J. 3 (2003) (noting that the recent explosion of litigation under the Alien Tort Claims Act involving claims that bear little or no connection with the United States may be attributed to the desire "to take advantage of accommodating procedural rules" and "the well-known propensity of U.S. juries to award huge damages awards, including punitive damages.").

Securities class actions already comprise approximately 47% of federal class actions and consume more judicial resources than other types of class actions. John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1540-1541 (2006). Furthermore, international class

actions are particularly onerous on courts. They present challenges in managing discovery where a substantial part of the evidence and parties reside outside the United States and also for class notice and administration when most of the class members reside in other countries. The national public interest is hardly served by spending the nation's judicial resources on these particularly demanding actions and leaving United States taxpayers to foot the bill.

Recognizing a cause of action for foreign investors for foreign losses would also discourage foreign business investment in the United States. This Court has recognized that "litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739. Overseas firms are justifiably wary of being involved in United States class actions due to the costs and disruption associated with such cases as well as the often high cost of settling them. *See Tellabs*, 551 U.S. at 313 ("Private securities actions, … if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.") Subjecting a company to a United States securities class action, even where it sells no securities in the United States, on the basis of conduct at a United States subsidiary or division would increase the risk of investing in the subsidiary or division in the first place. As the Court noted in *Stoneridge*, "[o]verseas firms with no other exposure to our securities laws could be deterred from doing business here" if exposed to the risk of liability under Section 10(b) and the resulting uncertainty and disruptions of class

action lawsuits. 552 U.S. at 163-64. This reasoning supported *Stoneridge*'s prudential limit on the implied cause of action so that it did not extend to an issuer's vendors and customers, which may include overseas firms. Similarly, it supports a limitation on the implied cause of action where the claims would be aimed directly at overseas firms.

II. The Extraterritorial Application of the Exchange Act to Actions in Which a Foreign Jurisdiction Has Greater Interest Than the United States Offends Principles of International Comity.

The Supreme Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *see also 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"). "This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.* at 164. It "reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow" and "thereby helps the potentially conflicting laws of different nations work in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65.

Australia and other foreign nations have a strong interest in regulating their securities exchanges and designing their own private or public securities

enforcement schemes. United States law often conflicts with the regulations and enforcement schemes adopted by other nations. *See* Buxbaum, *supra* at 61-64; Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 ALA. L. REV. 927, 957 (1994). For example, some nations are reluctant to even regulate securities transactions. *See* Matson, *supra* at 164. Other nations regulate securities transaction through public enforcement schemes and do not afford investors private rights of action under securities law. *See* Buxbaum, *supra* at 61. Moreover, American legal doctrines – such as the fraud on the market doctrine – are not necessarily recognized abroad. *Id.* Finally, certain procedural mechanisms, available in the United States, such as class actions and contingency fee agreements, are not available in other nations. *Id.* at 63. Thus, even if the concerns addressed by United States anti-fraud regulations are the same as those addressed by foreign anti-fraud regulations, "many differences remain both in the specific rules and in the broader cultural approaches that infuse the regulatory choices of other countries." *Id.* at 61.

To avoid friction between United States and foreign law and policies, principles of international comity require United States courts to respect the regulatory and enforcement schemes other nations adopt and the policy judgments they embody. *See, e.g.*, *Empagran*, 542 U.S. at 169 (when American regulatory "policies could not win their own way into 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"); *Microsoft Corp.*, 550 U.S. at 454

("United States law governs domestically but does not rule the world."). Indeed, some foreign nations have enacted "blocking statutes" and "secrecy laws" to combat the extraterritorial application of United States law. *See* Matson, *supra* at 166-67. Respecting the laws of a foreign nation not only prevents such hostile reactions to and resentment towards the United States, but it also benefits the United States and the international community as a whole by promoting reciprocity in foreign tribunals. *See Chisholm*, 268 U.S. 29 ("interference with the authority of another sovereign, contrary to the comity of nations" may breed resentment); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("The expansion of American businesses and industry will hardly be encouraged if … we insist on parochial concept that all disputes must be resolved under our laws and in our courts."). Moreover, respect for the laws of foreign nations is "essential to the growth of an international legal and financial community." Matson, *supra* at 166.

Here, application of United States securities law runs the real "risk of interference" with Australia's securities law and its "ability to independently regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. Australia has adopted a regulatory and enforcement scheme that governs the Australian Stock Exchange and Australian issuers thereby providing a forum for Petitioners to bring a class action lawsuit. The Australian lead plaintiffs (and other foreign investors) purchased Australian securities on an Australian or other foreign securities exchange in reliance upon alleged misstatements an Australian company made in Australia. Under a traditional conflicts of law analysis, Australia plainly

has the greatest interest in this action. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148 (1971).

The remedy sought by the plaintiff class also underlines the greater interest of Australia in this action. As the Court in *Empagran* recognized, even where nations may agree about the undesirability of primary conduct, such as price fixing or fraud, they may disagree dramatically about appropriate remedies. 542 U.S. at 167. In the PSLRA, Congress made its intent clear that private securities fraud actions focus on the recovery of loss actually suffered by the plaintiff. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (discussing 15 U.S.C. § 78u-4(b)(4)). The plaintiff class is seeking to recover losses suffered in Australia and any recovery by the class will be largely returned to Australia, less plaintiffs' counsel's fees and expenses.[9] By litigating in United States courts and invoking United States law, the Australian plaintiff class are avoiding any restrictions that Australian law may place on their ability to recover their losses "thereby upsetting a balance of competing considerations that their own domestic [securities] laws embody." *Empagran*, 542 U.S. at 167.

Therefore, none of the factors courts consider when determining what law to apply favor the application of United States law. Application of the Exchange Act here thus begs the same question the

[9] This consideration is not present in the context of a government action which typically seeks broad relief rather than damages and generally is not required to demonstrate economic losses in addition to a violation of the relevant law. *Empagran*, 542 U.S. at 170-71.

court asked in *Empagran*: "Why is it reasonable to apply this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?" *Empagran*, 542 U.S. at 165 (emphasis omitted). The answer, again, is the same: "We can find no good answer to the question." *Id.*

Moreover, allowing Australian investors who purchased Australian securities on the Australian Stock Exchange to bypass Australia's securities law would encourage forum shopping. Petitioners have an adequate remedy in Australia. They are presumably pursuing their claims in the United States rather than Australia so that they may take advantage of what they perceive to be more favorable law. Certain American legal doctrines and procedural mechanisms may appear more attractive to Petitioners than those available to them in Australia. For example, Australia has not recognized the fraud on the market theory. *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, 655 (2005). Similarly, while class actions are available in Australia, they are more difficult to finance because the losing party must bear the costs of litigation and contingency fee arrangements are generally prohibited. *See, e.g.*, S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289, 301 (2001); Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 COMMON L. WORLD REV. 123, 143 (2002). That these characteristics of the United States legal system –

absent in Australia – may indeed prove advantageous to Petitioners is no reason to allow them to proceed in United States courts.

This case belongs in Australia. The United States can assert no interest greater than Australia's interest in enforcing its own laws against its own citizens based on conduct occurring on its own territory. Moreover, no good can come from the exercise of jurisdiction over this action; it would only offend the principles of international comity and encourage securities plaintiffs from around the world to pursue actions in the already overtaxed United States district courts. All the foregoing further suggests that Congress did not intend extraterritorial application of the Act.

III. Foreign Investors Purchasing Securities Outside the United States Have No Implied Cause of Action Under Section 10(b) Even Where a Material Part of the Alleged Fraudulent Conduct Occurs in the United States.

When considering the proper contours of the implied cause of action under Section 10(b), it is proper to weigh the practical difficulties of applying an expansive cause of action and limit the availability of a remedy under the statute accordingly. *Blue Chip Stamps*, 421 U.S. at 748-49. This consideration counsels for a prudent limitation on the implied cause of action by not allowing it to be invoked by foreign investors seeking to recover foreign losses.

The presumption against extraterritorial effect and principles of international comity dictate that the

implied cause of action under Section 10(b) does not extend to foreign investors purchasing securities on foreign exchanges. Nonetheless, some courts have allowed some foreign investors to bring claims under Section 10(b) even for securities purchased outside the United State, where "the defendant's activities in the United States were more than 'merely preparatory' to a securities fraud conducted elsewhere," and "these activities or culpable failures to act within the United States 'directly caused' the claimed losses." *Itoba Ltd.*, 54 F.3d at 122 (quoting *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 987 (2d Cir. 1975) and *Alfdadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991)). Other courts will allow foreign investors to sue for foreign losses "where the defendants' conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment." *Continental Grains (Aust.) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979).

This Court should reject these unworkable tests that allow foreign investors to proceed with claims based solely on whether some portion of the alleged fraudulent conduct occurred in the United States. "The chronic difficulty with such a methodology has been describing, in sufficiently precise terms, the sort of conduct occurring in the United States that ought to be adequate to trigger American regulation of the transaction." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998). The fact-specific inquiry required by this approach, as well as the ambiguity inherent in the stated tests has led inevitably to inconsistent application and a lack of clear guidance on this fundamental issue. "[A]ny notion that a single precedent or cohesive doctrine

may be found which may apply to dispose of all jurisdictional controversies in this sphere is bound to prove as elusive as the quest for a unified field theory explaining the whole of the physical universe." *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005).

In response, Petitioners argue that this Court could resolve these issues by adopting a test that would allow a foreign investor to bring a claim under Section 10(b) for losses incurred overseas "where the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme." Pet. Br. at 19.[10] Petitioners state that this standard "would provide greater guidance to the lower courts in resolving future cases" but at the same time "permit the courts to make flexible case-by-case determinations of the extraterritorial applicability of the antifraud provisions of the Exchange Act." *Id.* at 32 and 40. Petitioners do not explain, however, *how* their proposed standard provides any greater clarity than the standards it would replace. It appears to simply replace one generally applicable standard with another that is no more precise. To determine

[10] Petitioners base this proposed test on a test suggested by the SEC and Solicitor General. *Id.* The test suggested by the SEC and Solicitor General, however, applies in the context of enforcement or criminal actions by the SEC and/or United States. United States Amicus Br. at 13. The Solicitor General and SEC expressly state that their proposed test does not support allowing foreign investors to proceed under Section 10(b) to recover foreign losses unless they resulted "directly from the component of the scheme that occurred in the United States." Id. at 14. Petitioners omit this aspect from their formulation of the proposed test.

whether a defendant's conduct is "material" and a "significant component" of a fraudulent scheme, courts will have to engage in precisely the same fact-specific "flexible case-by-case determination" with the same lack of direction as they do when determining whether the conduct was "merely preparatory" and a "direct cause" of plaintiff's losses under the current standard. One can expect the same results: inconsistent and incoherent decisions as courts struggle to apply a general standard to varying factual allegations.

The fundamental problem with this approach is not the wording of the standard but rather the entire approach. Any attempt to describe the sort of conduct that should be sufficient to support a claim under Section 10(b) of the Exchange Act will, inevitably, be broadly stated and highly fact-dependent. As Judge Bork noted in *Zoelsch*, such tests tend to be "counterproductive" because "as we know from our experience in the extraterritorial application of antitrust law, such tests are difficult to apply and are inherently unpredictable." 824 F.2d at 32 n.2. This leads necessarily to increased uncertainty and litigation over this threshold issue, further burdening American courts. *Id*. These practical difficulties, properly considered by the Court in considering the scope of the implied cause of action under Section 10(b), support a prudential limit on the implied cause of action by not allowing it to be invoked by foreign investors seeking to recover foreign losses.

Apart from the practical difficulties of applying the Petitioners' standard, there is no convincing basis in either law or policy to support extending the

implied cause of action under Section 10(b) to foreign investors for losses incurred for transactions executed on foreign exchanges. As discussed *supra*, there is no indication in the text or legislative history of the Exchange Act or the PSLRA that Congress intended for foreign investors to be able to bring such a claim. Courts that have extended the implied cause of action to foreign investors in some circumstances claim to be implementing "what Congress would have wished if these problems had occurred to it." *Bersch*, 519 F.2d at 993. But it is clear "that Congress in 1934 had no intention at all on the subject because it was concerned with United States investors and markets." *Zoelsch*, 824 F.2d at 33. A review of the PSLRA's legislative history shows a similar lack of intent in 1995 when Congress considered the proper scope of the implied cause of action under Section 10(b). Under these circumstances, any attempt to divine Congress's intentions with regard to foreign investors is destined to be fruitless. In any event, the absence of reliable evidence pointing one way or the other requires application of the presumption against extraterritoriality.

Other courts have candidly admitted that their decision to extend the implied cause of action to foreign investors "is largely based upon policy considerations." *Continental Grain*, 592 F.2d at 416. Two policy objectives have been identified as justifying suits by foreign investors in United States courts for foreign losses: (1) the prevention of the United States being used as a base for fraudulent activity directed at foreign investors thus diminishing confidence foreign investors have in American capital markets; and (2) the encouragement of other nations to take steps to

prevent fraudulent activity directed at the United States, which would be diminished if the United States was seen as condoning fraudulent conduct occurring within its territory. *SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977); *see also Continental Grain*, 592 F.2d at 421-22.[11]

Neither objective is compelling and both are certainly outweighed by the strong arguments against extending the implied cause of action including principles of comity and the other policy considerations discussed *supra*. There is no reason why foreign investors would necessarily associate a fraud committed by a foreign issuer with the United States and its securities laws simply because even a material part of the fraudulent conduct occurred within the United States. One would more reasonably expect investors to connect the fraud with the regulatory regime where the issuer was headquartered or where the securities were sold. As this Court noted in *Stoneridge*, communication of the deceptive acts to the public is central to a claim under Section 10(b) and this communication must be connected to the purchase or sale of the relevant security. 552 U.S. at 160-61. Communication occurs where the public issuer is located or where the securities are sold, not where some part of fraudulent conduct takes place, even if that conduct is significant or material.

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[11] A third reason for recognizing the extraterritorial coverage of the Exchange Act's antifraud provisions is that it will assist the SEC in its enforcement role. *See Kasser*, 548 F.2d at 116. That is irrelevant here as this case concerns a private plaintiff seeking to recover damages on behalf of a class of foreign investors, not the SEC enforcing the federal securities laws and its regulations. *See Empagran*, 542 U.S. at 170-71.

In addition, failure to extend an implied cause of action to foreign investors for foreign losses does not mean that the United States condones fraudulent conduct when it is aimed at foreign investors or that it will become a "'Barbary Coast' … harboring international securities 'pirates.'" *Kasser*, 548 F.2d at 116. The SEC has jurisdiction to bring enforcement actions over any significant fraudulent conduct occurring at a United States subsidiary of a foreign issuer.[12] Criminal penalties may also be available under the Exchange Act, 15 U.S.C. § 78ff, as well as other federal criminal statutes. *See*, *e. g*., *Pasquantino v. United States*, 544 U.S. 349 (2005) (applying wire fraud statute to cover schemes to defraud foreigners through misrepresentations). Both the SEC's enforcement power and the threat of criminal penalties act as strong deterrents against fraudulent conduct. *Stoneridge*, 552 U.S. at 166. They are certainly sufficient to ensure that the United States does not become a "Barbary Coast" of international securities piracy. If Congress disagrees, then it may expressly provide a cause of action for foreign investors in United States courts to recover losses incurred overseas. In that legislation, Congress could balance the competing concerns of comity and foreign policy that such claims present. *See Zoelsch*, 824 F.2d at 33.

[12] The SEC may have jurisdiction under Section 10(b) as it is not required to make any showing of reliance or damages, 15 U.S.C. § 78u(d)(1), and it may also have jurisdiction under Section 20(e) of the Exchange Act, 15 U.S.C. § 78t(e), giving the SEC authority to bring enforcement actions against any person who provides substantial assistance to another person's violation of the securities laws.

The current standards applied by some lower federal courts in deciding whether to accept claims under Section 10(b) from foreign investors are unsatisfactory. They are difficult and time-consuming to apply, uncertain and inconsistent in outcome. There is a need for a clear and consistent rule, but it is not the rule proposed by Petitioners. Instead, the absence of any express authorization for extraterritorial effect, the stated domestic intent and purpose of the Exchange Act, and issues of international comity all strongly suggest that Congress did not authorize United States courts to accept any claims from foreign investors based on purchases or sales of securities on foreign exchanges no matter what fraudulent conduct occurred in the United States. The Court, therefore, should resolve the inconsistency and uncertainty in this area by setting this clear and prudent limit on the judicially-created cause of action under Section 10(b).

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court affirm the judgment of the Court of Appeals for the Second Circuit.

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