No. 08-1191

IN THE

Supreme Court of the United States

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK AND GERALDINE SILVERLOCK,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, HOMESIDE LENDING, INC., FRANK CICUTTO, HUGH R. HARRIS, KEVIN RACE AND W. BLAKE WILSON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

ERIC SEILER
FRIEDMAN KAPLAN SEILER & ADELMAN LLP
1633 Broadway
New York, New York 10019
(212) 833-1100

A. GRAHAM ALLEN
ROGERS TOWERS, P.A.
1301 Riverplace Boulevard, Suite 1500
Jacksonville, Florida 32207
(904) 398-3911

GEORGE T. CONWAY III
Counsel of Record
JOHN F. LYNCH
CARRIE M. REILLY
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000
gtconway@wlrk.com

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 statement contained in respondents' brief on the merits remains accurate.

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents respectfully submit this supplemental brief under this Court's Rule 25.6 and in response to petitioners' March 10, 2010 supplemental brief addressing this Court's decision in *Reed Elsevier, Inc. v. Muchnick*, No. 08-103 (U.S. Mar. 2, 2010). Petitioners' supplemental brief is both improper and meritless. It is a transparent effort to avoid a decision on the very question petitioners have presented to this Court.

1. Petitioners' brief is improper because Rule 25.6 provides that a supplemental brief may address "intervening matter that was not available in time to be included in a brief." Petitioners' reply brief is due

on March 22, 2010, and has not been filed yet. Their antedated supplemental brief should be stricken. *Cf., e.g.*, *Republic of Iraq v. Beaty*, 129 S. Ct. 1935 (2009) (mem.).

2. a. Petitioners' supplemental brief is also meritless. Grasping at *Reed Elsevier*, a case that applies principles that this Court has articulated and applied for decades, *see*, *e.g.*, *Bell v. Hood*, 327 U.S. 678, 682 (1946), *cited in Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), petitioners now claim that they "cannot identify the live issue before the Court," Pet. Supp. Br. 3. But the live issue is exactly the one they presented (one-sidedly) as Question I in their petition for certiorari:

> Whether the antifraud provisions of the United States securities laws extend to transnational frauds where: (a) the foreign-based parent company conducted substantial business in the United States … and (b) the claims arose from a massive accounting fraud perpetrated by American citizens….

Pet. i. That question makes no reference to jurisdiction of the subject matter. It correctly presumes—as did all parties and *amici* at the certiorari stage[1]—

[1] *See* Br. in Opp. 11 n.7 ("These 'drive-by jurisdictional rulings' should have been rulings on the merits, but this makes no difference to the outcome here"; citation omitted); U.S. Cert. Br. 5-6 ("Although the court of appeals erred in treating the question as one of 'subject matter jurisdiction,' the court correctly concluded that petitioners' private suit could not go forward."); NASCAT Br. 9 ("This case presents an opportunity for the Court to clarify the reach of the United States securities laws at a time when many similar cases are at their inception."); *see also* Pet. Second Supp. Cert. Br. 8 n.1 (arguing that petitioners would "prevail" "in the Third, Eighth or Ninth Circuits" "under a jurisdiction or merits-based standard").

that the jurisdictional label used by the court of appeals made no difference to the outcome of this case.

The substantive extraterritoriality issue, and *not* the propriety of the jurisdictional label, is the question that the Court decided to hear. And it is that question, not the lower courts' casual use of the wrong label, that matters not just to the Nation, but to the world—as demonstrated by the 18 *amicus* merits briefs, including those of foreign sovereigns, that have been filed here.

b. Nothing in *Reed Elsevier* makes the jurisdictional label matter here. The jurisdictional label made a difference in *Reed Elsevier* because, to sustain their settlement, the parties were effectively asking the courts to allow them to waive the Copyright Act's registration requirement. If that requirement had been jurisdictional, as the Second Circuit held, then it would have been unwaivable, and the district court would have lacked power to approve the settlement. *Reed Elsevier*, slip op. at 4. But since the requirement was not jurisdictional, the settlement could be approved. *Id.* at 16.

Similar cases discussed in *Reed Elsevier*, slip op. at 5-7, and invoked by petitioners, Pet. Supp. Br. 1-4, also involved dispositive issues of waiver or forfeiture. For example, if the pre-arbitration conferencing requirement in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers*, 130 S. Ct. 584, 594-96 (2009), had been jurisdictional, then the railroad's failure to timely raise it as a defense would not have been a waiver, and the NRAB's dismissal of the union's claims for failure to satisfy the conferencing requirement would have stood. But since the requirement was not jurisdictional, the board's order

had to be set aside. *Id.* at 599; *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-11, 514 (2006) (waiver of Title VII's employee-numerosity requirement); *Kontrick v. Ryan*, 540 U.S. 443, 456-60 (2004) (forfeiture of right to rely on time limit for objection to bankruptcy discharge).

Petitioners make no suggestion of any waiver or forfeiture here, and they offer no argument as to how the Second Circuit's "drive-by jurisdictional ruling[]" otherwise affected the result. *Steel Co.*, 523 U.S. at 91. Under circumstances like these, where "nothing of substance" "*turned upon* whether [the legal issue] was technically jurisdictional," *ibid.* (emphasis in original), the Court is free to treat the lower court's jurisdictional ruling as a decision on the merits—which is what it really was—and to review it as such, *see Arbaugh*, 546 U.S. at 511-13 (discussing *Hishon v. King & Spalding*, 467 U.S. 69 (1984), and *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)).

That was exactly what the Court did, in fact, in *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004). Both the district court and the D.C. Circuit in that case had mistakenly viewed the dispositive question under the antitrust laws as one of "subject matter jurisdiction."[2] Indeed, *all* of the decisions that created the circuit split in *Empagran* had made the same mistake.[3] That did not keep this

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[2] *Empagran S.A. v. F. Hoffmann-LaRoche Ltd*, 315 F.3d 338, 343-57 (D.C. Cir. 2003), *rev'd*, 542 U.S. 155 (2004); *accord Empagran S.A. v. F. Hoffmann-La Roche Ltd*, Civ. No. 00-1686 TFH, 2001 WL 761360, at *2-*4 (D.D.C. June 7, 2001), *rev'd*, 315 F.3d 338 (D.C. Cir. 2003), *rev'd*, 542 U.S. 155 (2004).

[3] See *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420, 421, 424-31 (5th Cir. 2001), and *Kruman v. Christie's*

Court from resolving the conflict and reviewing the case on the merits—and "ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting); *see Empagran*, 542 U.S. at 163-75.

c. *Reed Elsevier* also did not dispense with an essential principle of appellate practice to which this Court has long adhered: "the decision of a lower court … must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'" *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

In fact, this Court has applied this affirm-on-any-ground rule to the use of a drive-by jurisdictional label in an extraterritoriality case. In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), the lower court dismissed, for lack of subject-matter jurisdiction, a foreign seaman's Jones Act claims against respondent Compania Trasatlantica, the foreign owner of a foreign-flag vessel. *Id.* at 355-56, 358-59. The Court noted the misuse of the jurisdictional label, observing that, "'[a]s frequently happens …, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.'" *Id.* at 359 (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951), *cited in Steel Co.*, 523 U.S. at 92). The Court then proceeded to decide the substantive extraterritoriality question on the merits anyway, and concluded that international choice-of-law

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Int'l PLC, 284 F.3d 384, 389-90 (2d Cir. 2002), both cited in *Empagran*, 542 U.S. at 160-61.

principles "preclude[d] the assertion of a claim under the Jones Act." *Id.* at 384. The Court "affirm[ed] the dismissal of petitioner's claims against Compania Trasatlantica," *ibid.*—just as it should affirm the dismissal here.

d. Nor do the GVR orders cited by petitioners support a remand. This is not a case in which "'(1) … an intervening factor has arisen that has a legal bearing upon the decision, (2) … clarification of the opinion below is needed to assure our jurisdiction, [or] (3) … the respondent … confesses error in the judgment below.'" Pet. Supp. Br. 3-4 (quoting *Lawrence v. Chater*, 516 U.S. 163, 191-92 (1996) (Scalia, J., dissenting)). And the GVRs cited by petitioners in support of remand in light of the Solicitor General's brief (*id.* at 4) are patently irrelevant: They were cases in which the Solicitor General, representing respondents and not *amici*, suggested at the certiorari stage that the cases be GVR'd.[4] Here, certiorari has already been granted, there is no intervening factor bearing upon the result reached below, and no issue as to the jurisdiction of this Court. And respondents—along with, among other *amici*, the United States, Australia, the United Kingdom, and France—all agree: "The judgment of the court of appeals should be affirmed." *E.g.*, U.S. Br. 34.

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[4] *See* Brief for the United States in Opposition, *Brown v. United States*, No. 02-8263 (U.S. filed Apr. 4, 2003) ("the Court may wish to remand this case to the Eleventh Circuit for further consideration in light of the position of the United States taken in this brief"); Brief for the Respondent in Opposition, *Jackson v. Massanari*, No. 00-9044 (U.S. filed June 20, 2001) ("the Court may wish to grant the petition, vacate the judgment of the court of appeals, and remand … for further proceedings in light of the position taken by the Commissioner in this brief").

An order vacating and remanding for reconsideration in light of *Reed Elsevier* or the Solicitor General's brief would not only be unwarranted but also pointless. "The reason for" the affirm-on-any-ground

> rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.

Chenery, 318 U.S. at 88. Particularly pointless would be a remand that merely resulted—as would be likely here—in a decision by the Second Circuit removing the jurisdictional label but adhering to its extraterritoriality standard. That would simply leave for this Court to decide on another day, perhaps years hence, the real question in this case—whether that standard is valid. And until the Court finally addresses that question, a remand would work mischief. It would multiply proceedings involving claims that have been properly dismissed (but with the wrong label), and it could enable foreign-cubed plaintiffs in some cases to elude dismissal through artful pleading. Cases like this one should be dismissed at the threshold, through the application of a clear, simple, predictable rule that this Court can and should pronounce now. *See*, *e.g.*, Resp. Br. 52-55; IIB Br. 27-33, EADS Br. 33-35; France Br. 30-33; Law Profs. Br. 2-3, 21-29; SIFMA Br. 36-40; *cf. Hertz Corp. v. Friend*, No. 08-1107, slip op. at 15-16 (U.S. Feb. 23, 2010) (noting that "[p]redictability is valuable to corporations making business and investment decisions").

Finally, the wastefulness of a remand would be compounded here by the fact that this case has already been extensively briefed, including by deeply

interested foreign sovereigns, and is set to be argued presently. That the governments of the United States, Australia, the United Kingdom, France, and Switzerland unanimously agree, as the Swiss put it in their diplomatic note, that the petitioners' proposed application of Section 10(b) "would be inconsistent with established principles of international law,"[5] may well have made petitioners regret they filed a petition for certiorari. But such international unity provides a most compelling reason why the question presented in that petition should now be addressed by this Court.

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERIC SEILER
FRIEDMAN KAPLAN SEILER
& ADELMAN LLP
1633 Broadway
New York, New York 10019
(212) 833-1100

A. GRAHAM ALLEN
ROGERS TOWERS, P.A.
1301 Riverplace Boulevard,
Suite 1500
Jacksonville, Florida 32207
(904) 398-3911

GEORGE T. CONWAY III
Counsel of Record
JOHN F. LYNCH
CARRIE M. REILLY
WACHTELL, LIPTON, ROSEN
& KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000
gtconway@wlrk.com

Counsel for Respondents

March 19, 2010

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[5] Embassy of Switzerland in the United States of America, Diplomatic Note to the United States Department of State, Note No. 17/2010 (Feb. 23, 2010), *reprinted in* ICC Br. App. 1a-4a; *accord* U.S. Br. 26-28; Aust'l Br. 23-38; U.K. Br. 33-37; France Br. 10-15, 17-33.