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 AMICI CURIAE
THE INSTITUTE OF INTERNATIONAL BANKERS,
THE EUROPEAN BANKING FEDERATION,
AND THE AUSTRALIAN BANKERS' ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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INTERESTS OF AMICI CURIAE[1]

Founded in 1966, the Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing and advancing the interests

[1] No counsel for a party authored this brief in whole or in part, and no persons or entities, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

of the international banking community within the United States. IIB's members include 99 internationally headquartered financial institutions, from 39 countries around the world. Collectively, the U.S. branches, agencies, banking subsidiaries, securities affiliates and other operations of IIB's member banks are an important source of credit for U.S. borrowers and enhance the depth and liquidity of U.S. financial markets.

One of IIB's goals is to ensure that the global operations of its member banks are not impeded by the unjustified extraterritorial application of U.S. laws, including its securities laws. These laws may conflict or be in tension with the laws or regulations of the home countries of IIB's member banks. In addition, IIB members have a strong interest in continuing to do business in the U.S., and in encouraging their non-U.S. clients to expand their cross-border business in the U.S. To the extent that the U.S. legal framework is viewed as drawing what are essentially home-country disputes into U.S. courts, the interests of IIB members will be adversely affected. The question posed by this case is, therefore, of great significance to IIB and its members.

Founded in 1960, the European Banking Federation ("EBF") is the voice of the European banking sector. The EBF represents the national banking associations of 31 European Union and European Free Trade Association countries, totaling some 5000 European banks: large and small, wholesale and retail, local and cross-border financial institutions. Tracing its history back to the late 1940s, the Australian Bankers' Association ("ABA") represents the majority of the licensed wholesale and retail banks in Australia. The EBF and the ABA share IIB's goals as they relate to this case.

SUMMARY OF ARGUMENT

Section 10(b) of the Securities Exchange Act of 1934 does not provide a private cause of action against a foreign issuer in connection with purchases or sales of its securities in a foreign market. Nothing in the language of Section 10(b), or its legislative history, suggests that Congress intended to create such a cause of action. And two independent and venerable statutory rules of construction—the general presumption against extraterritoriality, and the specific presumption that Congress legislates consistent with prescriptive comity—counsel against expanding the judicially implied private cause of action to reach this context. *See infra* Part I.

The presumption of comity should have particular force here, because other nations have made very different policy choices from the United States in regulating their securities markets. These include: what conduct to prohibit, the extent to which private parties may bring suits for violations of the securities laws or whether enforcement of these laws is left to public entities, and what procedural rules should govern private suits. Allowing private plaintiffs to bring a global class action against a foreign issuer arising from purchases or sales of securities in its home market threatens to override those policy choices. *See infra* Part II.

For the same reason, whatever the Court's substantive holding as to the extraterritorial reach, if any, of Section 10(b), it is imperative that the Court adopt a bright-line test that enables district courts to adjudicate and the parties to know, at the outset, which private plaintiffs have stated a cause of action and which have not. The rule advocated here, under which a plaintiff who purchased or sold the securities of a for-

eign issuer in a foreign market would not have a private right of action, is such a rule. Absent a bright-line rule, foreign issuers may be subjected to the burdens and uncertainty of intensive U.S. discovery, pre-trial litigation, and perhaps even trial, before the question of extraterritoriality is resolved. By that point, much harm to the issuer, and thereby to its home country's regulatory policy choices, will have been done. *See infra* Part III.

ARGUMENT

I. SECTION 10(b) DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION AGAINST A FOREIGN ISSUER WITH RESPECT TO TRANSACTIONS IN ITS SECURITIES IN FOREIGN MARKETS

Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder bar deception in connection with the purchase or sale of securities. Beginning in 1946, the courts "implied" a private cause of action under these provisions against issuers who have made materially false disclosures. *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). Much of this case law was born under the philosophy that federal courts could create causes of action to serve the perceived objectives of a federal statute. *See, e.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *see generally* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). More recent decisions of this Court, however, have made it clear that a cause of action should be "implied" only where Congress itself intended to create one.

This Court has never extended the implied private cause of action under Rule 10b-5 to cover the purchase or sale of securities of a foreign issuer in a foreign mar-

ket. Nothing suggests that Congress intended to regulate wholly foreign transactions. On the contrary, the traditional indicia of congressional intent point the other way. Neither the text of the Exchange Act nor its legislative history contains any evidence that Congress intended Section 10(b) to protect U.S. or foreign persons who enter foreign markets to buy or sell the securities of an issuer whose disclosure obligations are prescribed by the laws of its own country.[2] And two well-established presumptions—the presumption against extraterritoriality and the presumption that Congress legislates consistent with prescriptive comity—weigh against implying a cause of action in these circumstances.[3]

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[2] A foreign issuer whose securities trade overseas but that also allows its securities to trade in American Depositary Receipt ("ADR") form subjects itself to certain specified U.S. disclosure obligations. Importantly, though, these obligations do not match those of U.S. issuers, *see, e.g.*, 17 C.F.R. § 240.13a-11(b), and the mere fact of ADR trading in the U.S. does not alter the foreign issuer's obligations to persons who trade its securities (not ADRs) in its home market. The fact of ADR trading thus adds nothing to a claim brought by persons who purchased a foreign security on a foreign market, as lower courts have uniformly recognized. *See, e.g.*, *In re Rhodia S.A. Sec. Litig.*, 531 F. Supp. 2d 527, 541 (S.D.N.Y. 2007); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 369 (S.D.N.Y. 2005). Put differently, purchasers of a foreign issuer's securities in a foreign market may not piggyback on the fact of ADR purchases by other persons as a basis for bringing suit against the issuer in the United States. *Cf. IIT* v. *Vencap*, 519 F.2d 1001, 1018 n.31 (2d Cir. 1975) (Friendly, J.) (warning of risk that "a very small tail may be wagging an elephant"). Petitioners do not argue otherwise.

[3] Amici respectfully suggest that the court of appeals also concluded, in essence, that Congress did not intend to provide a private cause of action under the facts as alleged. That court's use

That some of the alleged facts on which a claim is based relate to business activities of a foreign issuer's U.S. subsidiary is irrelevant. The foreign parent's disclosure responsibilities are established by foreign law, as are the remedies available to purchasers and sellers who go into foreign markets to purchase or sell the parent's securities.

This brief focuses on the facts that (1) respondent National Australia Bank Ltd. ("NAB") is a foreign issuer and (2) petitioners and the putative plaintiff class all traded in NAB's securities in foreign markets. Amici argue that, in this "foreign-squared" situation, Section 10(b) and Rule 10b-5 do not provide a cause of action against respondents. But this case also involves a third foreign factor: Petitioners and putative class members are not themselves U.S. persons, whom Congress was of course principally concerned to protect. If the Court elects not to rule with respect to the "foreign-squared" context, it should, at a minimum, hold that there is no cause of action in a "foreign-cubed" case—where the issuer, the relevant markets, and the plaintiffs are all foreign. *A fortiori*, the arguments in this brief as to why Section 10(b) does not supply a cause of action in the "foreign-squared" context apply with even greater force to the "foreign-cubed" context.

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of the word "jurisdiction," while longstanding in this area, confusingly suggests that the issue has to do with the power of the court, rather than whether Congress authorized the cause of action being asserted. *See* pp. 12-13, *infra* (noting that Second Circuit's "conduct" and "effects" tests arose from mistaken view that the extraterritoriality question was jurisdictional).

A. The Existence Of An Implied Private Cause of Action Depends On Whether Congress Intended To Create One

1. The private cause of action under Section 10(b) was created at a time when courts believed they should create causes of action to help enforce general federal policies

Section 10(b) of the Exchange Act does not expressly provide for any private right of action. 15 U.S.C. § 78j; *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). Rather, the cause of action is a judicial construct under an "*ancien regime*" in which federal courts felt a duty to create rights to effectuate Congress's perceived purposes. *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001); *see generally* Friendly, 39 N.Y.U. L. Rev. 383. Proceeding under this notion, courts liberally implied private rights of action under a variety of statutes, including the Exchange Act. *See, e.g., J.I. Case Co.*, 377 U.S. 426 (holding a corporate shareholder could sue for damages under section 14(a) of the Exchange Act because private enforcement was necessary to supplement the statutory scheme); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) (impliedly recognizing a private right of action based on Section 29(b) of the Exchange Act).

First recognized by a federal district court in 1946, the Section 10(b) cause of action was accepted by this Court 25 years later with virtually no discussion. *Kardon*, 69 F. Supp. 512; *Superintendent of Ins.* v. *Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). Thirty-five years ago this Court described this private right of action as a "judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975).

2. The Court has since clarified that causes of action are to be "implied" only where Congress intended them, and the Court has applied this principle to reject attempts to extend Section 10(b) beyond its current boundaries

The expansive view of the judiciary's power to create causes of action has long been discredited. It is now "settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one." *Stoneridge Inv. Partners*, 552 U.S. at 164. The "ultimate question" in determining whether an implied cause of action exists is "one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979); *see also Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 24 (1979). "Like substantive federal law itself, private rights of action to enforce federal law *must be created by Congress*." *Sandoval*, 532 U.S. at 286 (emphasis added).

Of particular relevance here, this Court has repeatedly refused to *expand* the implied private rights of action under the Exchange Act without proof of congressional intent to provide the claim at issue. *See, e.g.*, *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977) (tender-offer bidders do not have a private right of action under Section 14(e)); *Touche Ross*, 442 U.S. 560 (there is no private right of action under Section 17(a)); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (there is no private right of action under Section 10(b) for aiding and abetting); *Stoneridge Inv. Partners*, 552 U.S. 148 (similar).

Although the Court has continued to enforce the Section 10(b) private cause of action, it has "made no pretense that it was Congress' design to provide the remedy afforded." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 359 (1991); *see also Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976) ("there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy" (internal footnotes omitted)). In *Stoneridge Investment Partners*, this Court advised that the reach of the 10(b) private right of action should not be further expanded without congressional action:

> Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.

552 U.S. at 165.

B. Nothing In Section 10(b) Or Its Legislative History Suggests An Intent To Create A Private Cause Of Action For Plaintiffs Who Purchase Or Sell The Securities Of A Foreign Issuer In A Foreign Market

There is no evidence that Congress intended to create a private right of action for plaintiffs who purchase or sell foreign securities abroad. Not only is the text of Section 10(b) silent as to the very existence of a private right of action, it does not by its terms apply extraterritorially. *See* 15 U.S.C. § 78j. A reading of the statute as a whole, combined with the limited legislative history, suggests that in enacting Section 10(b), Congress was primarily concerned with regulating domestic markets and protecting domestic interests. *See*

id. § 78(b); *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 31 (D.C. Cir. 1987) (citing H.R. Rep. No. 73-1383, at 1-16 (1934); S. Rep. No. 73-792, at 1-13 (1934)); *see also Robinson* v. *TCI/US W. Commc'ns*, 117 F.3d 900, 907 (5th Cir. 1997).

Section 30 of the Exchange Act, which explicitly addresses transactions in U.S. securities on foreign exchanges, is further evidence that Congress did not intend Section 10(b) to have general extraterritorial application. 15 U.S.C. § 78dd. In Section 30(a), Congress specified that the Exchange Act is applicable to brokers and dealers only in so far as they trade securities of *U.S.* companies on foreign exchanges. *Id.* § 78dd(a). This provision addressed Congress' concern that brokers and dealers might evade the Act, with respect to transactions in U.S. securities that are properly governed by U.S. law, by executing their transactions over foreign exchanges. *See Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 207 (citing *Hearings on S. Res. 89 (72d Cong.) and S. Res. 56 and S. Res 97 (73d Cong.) Before the S. Comm. on Banking and Currency*, 73d Cong., pt. 15, 6569, 6578-6579 (1934)), *rev'd in part on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc). The clear premise was that, without a congressional directive to the contrary, even transactions by U.S. broker-dealers in U.S. securities might be beyond the Exchange Act's reach if they were executed in a foreign market.

Congress confirmed that premise by stating in Section 30(b) that the section applied only to cases covered by SEC rules adopted "to prevent the evasion of this chapter." 15 U.S.C. § 78dd(b). The clear implication is that the entire "chapter" ordinarily reaches only domestic transactions; trading on foreign exchanges—even of U.S.-related securities—is covered only to prevent "evasion" of U.S. rules. *Id.*; *see also Schoenbaum*,

405 F.2d at 207 (Section 30(b) is "designed to take the Commission out of the business of regulating foreign security exchanges unless the Commission deems regulation necessary to prevent evasion of the domestic regulatory scheme."); *Zoelsch*, 824 F.2d at 32 ("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."). Notably, the SEC has not used its rulemaking authority to implement this provision.[4]

Additionally, recent scholarship analyzing the legislative history of the Securities Act of 1933 and the Exchange Act suggests that Congress specifically considered and rejected application of Section 10(b) to disclosures by foreign issuers in connection with purchases and sales of securities in their home markets. *See* Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677, 691-708 (1990) (dispelling myth that Congress could not foresee the internationalization of markets and pointing to evidence in legislative history of the 1933 Act suggesting that Congress intentionally decided not to regulate foreign transactions); *see also*

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[4] Section 30 is of course not remotely applicable here. NAB is not a resident of or organized under the laws of any U.S. jurisdiction, nor does it have its principal place of business here. But more fundamentally, any "evasion" is entirely on the other side. There is no sense in which this Australian bank or anyone else was somehow "using" facilities in Australia to escape the laws of the United States. On the contrary, it is petitioners who appear to be attempting to use U.S. law to evade Australian procedures in a suit that obviously belongs in an Australian court. Of course, if a foreign issuer uses the securities trading facilities of this country to perpetrate a fraud, there is a U.S. regulatory interest, but that is not this case.

Reuveni, *Extraterritoriality as Standing: a Standing Theory of the Extraterritorial Application of the Securities Laws*, 43 U.C. Davis L. Rev. ___, manuscript at 45-48 (forthcoming Apr. 2010) (similar), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1496049.

Courts that have nevertheless expanded the Section 10(b) private right of action to reach foreign transactions have acknowledged that they were making policy decisions independent of Congress. *See, e.g.*, *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975) (Friendly, J.) ("We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond."); *Continental Grain* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979) ("We frankly admit that the finding of subject matter jurisdiction in the present case is largely a policy decision."). Such policy decisions are for Congress to make.

Similarly, reliance on the "conduct" and "effects" tests to govern the extraterritoriality inquiry is misplaced. The Second Circuit contrived these tests over 40 years ago using a jurisdictional analysis. *See, e.g.*, *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972) (Friendly, J.); *Schoenbaum*, 405 F.2d at 206-209. The relevant inquiry, however, does not concern the power of the court but whether Congress authorized the cause of action. Indeed, Judge Friendly, who first articulated the "conduct" test, recognized in his final opinion on the subject that "[i]f this issue were arising here for the first time," the court might not analyze it as one of subject-matter jurisdiction. *AVC Nederland B.V.* v. *Atrium Inv. P'ship*, 740 F.2d 148, 153 (2d Cir. 1984). In the absence of congres-

sional intent to create a private right of action against a foreign issuer with respect to transactions in foreign markets, this Court should follow *Stoneridge Investment Partners* and leave it to Congress to expand the Section 10(b) private right of action beyond its present boundaries. *Stoneridge Inv. Partners*, 552 U.S. at 165.

C. Two Presumptions—A General Presumption Against Extraterritorial Effects And A Specific Presumption Of Comity—Counsel Against Extending the Section 10(b) Right Of Action To Transactions In Foreign Securities In Foreign Markets

1. Congress is presumed not to intend to regulate extraterritorially

This Court has observed the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 285 (1949)). This presumption recognizes that Congress is "primarily concerned with domestic conditions." *Foley Bros.*, 336 U.S. at 285. Accordingly, this Court has been unwilling to extend the reach of federal laws beyond the territorial boundaries of the United States absent an "affirmative intention of the Congress clearly expressed." *Aramco*, 499 U.S. at 248 (boilerplate language extending Title VII's prohibitions to "any activity, business, or industry in commerce" is insufficient to overcome the presumption against extraterritoriality).

So strong is the presumption that it "is not defeated" even where "'a statute specifically addresses [an] issue of extraterritorial application.'" *Microsoft*

Corp. v. *AT&T Corp.*, 550 U.S. 437, 455 (2007) (quoting *Smith* v. *United States*, 507 U.S. 197, 204 (1993) (alterations incorporated)). The presumption "remains instructive in determining the extent of the statutory exception." *Id.* In *Microsoft Corp.*, the Court rejected the argument that the presumption against extraterritoriality was inapplicable where Congress had enacted a provision to extend U.S. patent law to certain activity abroad. Recognizing that extraterritorial application is the exception, this Court interpreted the provision narrowly and concluded that foreign law, not U.S. law, governed the manufacture and sale of components of inventions in foreign countries. 550 U.S. at 442, 456.

The presumption that "United States law governs domestically but does not rule the world," 550 U.S. at 454, applies equally to Section 10(b) of the Exchange Act. As discussed *supra*, Section 30 extends the statute to certain transactions on foreign exchanges that could otherwise be used to evade U.S. law, but its application is carefully limited to transactions in U.S. securities where there has been a violation of an SEC rule adopted to prevent evasion, which is plainly not the case here.

2. Congress is also presumed to take into account the proper interests of foreign nations

A second important canon of construction is that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Courts should "assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*,

542 U.S. 155, 164 (2004); *see also Microsoft Corp.*, 550 U.S. at 455 (same); *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 817 (1993) (Scalia, J. dissenting) (describing "'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws"). Accordingly, this Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164 (application of Sherman Act to foreign conduct); *see also Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382-383 (1959) (application of Jones Act in maritime case); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (same).

This rule of construction, which is "wholly independent" of the presumption against extraterritoriality, *Aramco*, 499 U.S. at 264; *Hartford Fire Ins.*, 509 U.S. at 815 (Scalia, J., dissenting), "reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow," *Empagran*, 542 U.S. at 164 (citing *Restatement (Third) of Foreign Relations Law* ("*Restatement*") §§ 403(1), 403(2) (1986)).

In *Empagran*, the Court considered whether foreign plaintiffs could bring claims under the Sherman Act to recover damages caused by "anticompetitive price fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury." The plaintiffs were able to point to a specific provision of the Foreign Trade Antitrust Improvements Act ("FTAIA") that authorized extraterritorial reach in certain circumstances. Specifically, the FTAIA placed "within the Sherman Act's reach" foreign conduct that "has a 'direct, substantial and reasonably foreseeable effect'" on American commerce. 542 U.S. at 162 (quot-

ing 15 U.S.C. § 6(a)(1), (2)). Nevertheless, in light of the evidence that Congress intended the Sherman Act to reach only foreign conduct that causes domestic injury and the presumption that Congress takes into account the interests of other nations, this Court concluded that it would not be "reasonable to apply [the Sherman Act] to … significantly foreign" conduct that "causes independent foreign harm [which] alone gives rise to the plaintiff's claim." *Id.* at 164, 166.

Because applying U.S. laws abroad "creates a serious risk of interference with a foreign nation's ability to regulate its own commercial affairs," there must be a strong justification for doing so. 542 U.S. at 165.[5] The Court has noted that whether the extraterritorial application of American law is reasonable depends on a variety of factors such as connections with the regulating nation, harm to that nation's interests, the extent to which other nations regulate the activity at issue, and the potential for conflict. *Id.* (citing *Restatement* § 403(2)).

Other nations have a strong interest in regulating disclosures by their own issuers. This interest extends not only to the nature, content, and timing of disclosures, but also to litigation related to disclosures, including the availability of class actions, contingent fees,

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[5] Commentators have suggested that Section 30(b), discussed *supra*, functions as a "built-in prescriptive comity mechanism" by placing the responsibility for determining the application of U.S. law to certain foreign transactions in the hands of the SEC. Reuveni, 43 U.C. Davis L. Rev. ___, manuscript at 48; Sachs, 28 Colum. J. Transnat'l L. at 698 (Section 30(b) was intended as an "olive branch signaling an intention not to interfere with foreign securities activities.").

and other procedures. *See* Part II, *infra*. Where, as here, the plaintiffs have chosen to trade in a foreign security in a foreign market, "[w]hy should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from [] conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" *Empagran*, 542 U.S. at 165.

A rule that Section 10(b) does not provide a cause of action against foreign issuers for disclosures governed by the laws of their own countries in connection with the purchase or sale of their securities in their own countries accords with the presumption that United States law governs domestically and respects the rights of other nations to make different decisions about how to regulate securities disclosures and prevent fraud in their own markets. Such a bright line rule would also be easily administrable and "is likely to comport with most investors' a priori views on when the U.S. laws apply." Choi & Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 465, 500 (2009).

II. THE EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS RISKS INTERFERING WITH OTHER NATIONS' POLICY DECISIONS IN THIS HEAVILY REGULATED AREA

As this Court recognized in *Empagran*, the extraterritorial application of U.S. statutes risks "interfere[ing] with the sovereign authority of other nations." 542 U.S. at 164. That risk is strongly present here.

There is no self-evidently optimal approach to the regulation of securities markets. Regulation of such markets and their participants necessarily entails pol-

icy judgment and the balancing of different concerns. These policy questions are a matter of great debate in other nations.[6] Not surprisingly, other nations have answered the questions in ways markedly different from the United States.

Specifically, while "governments … are generally in agreement that fraud should be discouraged" (Pet. Br. 35 (internal quotation marks omitted)), different nations have reached different conclusions about what constitutes fraud and how to deter and prosecute it.[7]

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[6] *E.g.*, Loke, *The Efficacy of Securities Investors' Rights in Singapore*, 2009 Sing. J. Legal Stud. 109 (2009); Condon, *Rethinking Enforcement and Litigation in Ontario Securities Regulation*, 32 Queen's L.J. 1 (2006); Wang, *Dancing with Wolves: Regulation and Deregulation of Foreign Investment in China's Stock Market*, 5 Asian-Pac. L. & Pol'y J. 1 (2004).

[7] Petitioners' own authorities (Br. 35-36) make this very point, though petitioners obscure that fact. According to petitioners, the *Restatement (Third) of Foreign Relations Law* (1987) ("*Restatement*") states: "'[N]o instance is known in which a transaction challenged under United States law—such as misrepresentation or insider trading—was asserted to be mandated or encouraged by the law of a foreign state.'" Br. 36 (quoting *Restatement* § 416, Reporters' Notes No. 3) (petitioners' alteration). By use of strategically placed brackets, petitioners suppress the first part of the sentence: "Many states define prohibited conduct with respect to securities differently from the United States[.]" *Restatement* § 416, Reporters' Notes No. 3.

Petitioners also rely (Br. 36) upon the statement that "the area of securities regulation has simply not generated the same level of difficulty and hostility as extraterritorial regulation in other areas." Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 62 (2007). But petitioners leave out the author's immediately ensuing conclusion: "I believe this is going to change …. Although foreign claimants have long had the ability to

Extraterritorial application of U.S. securities law necessarily risks interfering with the authority of other sovereign nations to make these policy choices.

For example, a basic question is how much information a corporation must publicly disclose. A nation must strike a "balance between the need to insure adequate disclosure and the need to avoid the adverse consequences of setting too low a threshold for civil liability." *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 n.10 (1976); *see also id.* at 448 (absent some limitation, "not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information").

In the United States, the balance is struck by "the standard of materiality," with disclosure generally required where there is "a substantial likelihood that the disclosure of the omitted fact would [be] viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus.*, 426 U.S. at 449; *see also Basic Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988); 17 C.F.R. § 240.12b-2 ("The term 'material,' when used to qualify a requirement for the furnishing of information … , limits the information re-

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seek inclusion in U.S. class actions, they have been exploiting that opportunity more frequently in recent years." *Id.* Petitioners also ignore the discussion preceding the sentence they tout. *Id.* at 61 ("Although the central concerns addressed by anti-fraud rules may be the same across systems, many differences remain both in specific rules and in the broader cultural approaches that infuse the regulatory choices of other countries." (citation omitted)).

quired to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.").

To the extent that other nations have even developed similar concepts, they have not all agreed upon this definition. In China, for example, disclosure of new information that arises in between routine reports is required where the company experiences a "major event that may *considerably affect the trading price*." Securities Law of the People's Republic of China, art. 67 (2005) (emphasis added), *in International Securities Regulation* (Rosen et al. eds., Dec. 2007). In India, securities law also defines materiality distinctly: Indian law mandates disclosure in between routine reports of new "price sensitive" information, defined as "any information which relates directly or indirectly to a company and which if published is *likely to materially affect the price*" of a company's security. Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, § 2(ha), Schedule II, at 2.1 (2009) (emphasis added).[8]

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[8] Similarly, in both China and India, a false statement or omission is actionable only when it reaches this stricter definition of materiality. *See* Supreme People's Court, *Trial of Civil Damages Cases Arising from Misrepresentation in the Securities Market Several Provisions*, art. 17 (Jan. 9, 2003) (P.R.C.) ("false statement" or "major omission" not actionable unless the statement or omission pertains to "important information," defined as a "major event that may considerably affect the trading price"), *available at* http://www.chinalawandpractice.com/Article/1693266/Search/Trial-of-Civil-Damages-Cases-Arising-from-Misrepresentation-in-the.html ?Keywords=%22Trial+of+Civil+Damages+Cases+Arising+from+ Misrepresentation%22 (unofficial translation); Zhu, *Securities Dispute Resolution in China* 163 (2007); Securities and Exchange

A related point of difference concerns the definition of materiality in insider trading cases, which, within the United States, may be brought under Section 10(b).[9] The differing definitions of materiality for these purposes result in substantially different liability regimes. In Spain, for example, the securities laws distinguish between material information for purposes of insider trading and material information for purposes of non-routine disclosure. *Compare* Spanish Securities Market Law, art. 81(1) (2007), *with id.* art. 82(1), http://www.cnmv.es/index_n_e.htm?english/Legislacion/Legislacion/indi_general_e.htm~/english/p_legislacion__1_e.html (unofficial translation). Under Spanish law, insiders are prohibited from trading on the basis of information "likely to have a significant effect on the price[]" of the security. *Id.* art. 81(1); *see also* Securities Law of the People's Republic of China, art. 75 (2005) (insider trading prohibited on the basis of information that "may have a major effect on the market price" of the security), *in International Securities Regulation* (Rosen et al. eds., Dec. 2007); Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, §§ 2(ha), 3 (2009) (applying "price sensitive" standard of materiality to insider trading). Other countries have chosen not to prohibit insider trading at all. *See* Bhattacharya & Daouk, *The World Price of Insider Trading*, 57 J. Fin. 75, 77-78 (2002)

Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2(c)(9) (2009) ("misinformation" is not sufficient, because the information must also "affect[] the market price of the security").

[9] *See, e.g., United States* v. *O'Hagan*, 521 U.S. 642, 649-652 (1997).

(listing 15 countries that do not have insider trading laws).[10]

Further, "even where nations agree about primary conduct, … they disagree dramatically about appropriate remedies." *Empagran*, 542 U.S. at 167 (speaking in the antitrust context). That is particularly true in the securities area, where "[r]egulations impose substantial additional costs beyond those borne directly by regulated parties," including "disrupt[ion of] some number of transactions that would have been socially desirable." Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 Yale J. Reg. 253, 261 (2007).

An additional, critical question for each nation is *who* should enforce its securities laws—and therefore who decides what alleged misconduct triggers potential liability. This, too, entails weighing the benefits and costs of alternative approaches. *See, e.g.*, *Stoneridge*, 552 U.S. at 164 (describing certain "risks" of private enforcement); *see generally* Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229 (2007). A nation might choose purely public enforcement of securities laws (with civil penalties, criminal penalties, or both); purely private enforcement; or

[10] Section 10(b) prohibits not only "fraud" but also "manipulat[ion]," a concept as to which countries have taken diverging approaches. *See, e.g.*, Carroll, *Market Manipulation: An International Comparison*, 9 J. Fin. Crime 300, 304 (2002) (describing differences between the U.S., U.K., and Germany); *see also* Fischel & Ross, *Should the Law Prohibit "Manipulation" in Financial Markets?*, 105 Harv. L. Rev. 503, 512-529 (1991).

some combination.[11] China, for example, has determined that private actions should be allowed only when they are predicated on findings made in the course of a public enforcement proceeding. *See* Supreme People's Court, *Trial of Civil Damages Cases Arising from Misrepresentation in the Securities Market Several Provisions*, art. 6 (Jan. 9, 2003) (P.R.C.) (requiring plaintiff to submit evidence of the administrative penalty or criminal judgment as the foundation, or "yiju," for a civil action), *available at* http://www.chinalawandpractice.com/Article/1693266/Search/Trial-of-Civil-Damages-Cases-Arising-from-Misrepresentation-in-the.html?Keywords=%22Trial+of+Civil+Damages+Cases+Arising+from+Misrepresentation%22 (unofficial translation).[12]

In those nations that do allow private enforcement, moreover, it often bears little resemblance to private enforcement in the United States. Irrespective of the degree of similarity between the substantive content of U.S. securities laws and those of other nations, extraterritorial application of U.S. remedies in cases brought

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[11] These choices can be finely tuned. Although the United States generally permits private actions for securities fraud, Congress has determined that alleged aiders and abettors "should be pursued by the SEC and not by private litigants." *Stoneridge*, 552 U.S. at 163.

[12] *See also* Comm. of European Securities Regulators, *Executive Summary to the Report on Administrative Measures and Sanctions as well as Criminal Sanctions Available in Member States under the Market Abuse Directive*, CESR-08-099, at 2 (Feb. 2008) (noting wide divergence in civil and criminal sanctions that apply to fraud, insider trading and market manipulation in enforcement proceedings), *available at* http://www.cesr.eu/index.php?page=document_details&id=4975&from_id=22.

under Section 10(b) would thus "unjustifiably permit [foreign] citizens to bypass their own [nations'] less generous remedial schemes, thereby upsetting a balance of competing considerations that their own [nations'] … laws embody." *Empagran*, 542 U.S. at 167.

An obvious example is presented by the fact that "[o]nly a few other nations have adopted the class action device even to a limited extent[.]" Rowe, Jr., *Debates Over Group Litigation in Comparative Perspective: What Can We Learn From Each Other?*, 11 Duke J. Comp. & Int'l L. 157, 157-158 (2001); *see also, e.g.*, Coffee, Jr., 56 U. Pa. L. Rev. at 267 ("Class actions remain rare to unknown in Europe[.]"). Even in those countries having a group-litigation mechanism, "few are structured in a manner similar to the U.S. class action." Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 Cornell L. Rev. 1563, 1597 (2005).

Of critical importance, the U.S. "opt-out mechanism" in class actions "is seen as contrary to public policy in most countries"[13]—so much so that in some countries, there is a risk that "courts will not recognize a U.S. judgment against [an absent] class member."[14] This risk exists in, among other countries, the United Kingdom,[15] Germany, Denmark, Luxembourg, and

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[13] Buxbaum, 46 Colum. J. Transnat'l L. at 63.

[14] Buschkin, 90 Cornell L. Rev. at 1580-1581.

[15] *See Campos* v. *Kentucky & Ind. Terminal R.R. Co.*, 2 Lloyd's Rep. 459, 473, 1962 WL 22148 (Q.B. 1962) (stating in dicta that "in accordance with English private international law a for-

Switzerland.[16] Foreign defendants thus may settle, or prevail in, a global class action filed in a U.S. court, only to find themselves sued abroad by foreign persons who are members of the class or for the same conduct. *See, e.g.*, *Bersch*, 519 F.2d at 996 ("[W]hile an American court need not abstain from entering judgment simply because of a possibility that a foreign court may not recognize or enforce it, the case stands differently when this is a near certainty. This point must be considered not simply in the halcyon context of a large recovery which plaintiff visualizes but in those of a judgment for the defendants or a plaintiffs' judgment or a settlement deemed to be inadequate.").

Another example: "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 based on misleading information." Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 62 (2007). Australia is one of the nations that has not recognized the fraud on the market presumption. Duffy, "*Fraud on the Market": Judicial Approaches to Causation and Loss from Se-*

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eign judgment could not give rise to a plea of *res judicata* in the English Courts unless the party alleged to be bound had been served with the process which led to the foreign judgment"); *see also* Briggs & Rees, *Civil Jurisdiction and Judgments* 573 (4th ed. 2005).

[16] *See* Declarations in Support of Defendants' Motion to Dismiss Foreign Lead Plaintiffs' Claims For Lack of Subject Matter Jurisdiction, *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (S.D.N.Y. filed Sept. 30, 2009) (Dkt. Nos. 120, 122, 124-126).

curities Nondisclosure in the United States, Canada and Australia, 29 Melb. U. L. Rev. 621, 655 (2005).[17]

As demonstrated in Part I, *supra*, there is no reason to assume that Congress intended effectively to impose our nation's resolution of the foregoing substantive, remedial, evidentiary and procedural issues on other sovereign nations. As this Court has put the point: "Congress might have hoped that America's … laws … would commend themselves to other nations as well. But, if America's … policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat." *Empagran*, 542 U.S. at 169. Nor is there reason to conclude that it would be in the United States' interest for all nations to mimic its approach. Far from it: Just as under our "federal system … a single … state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), so too in the international sphere, "[a]pproaches that prove to be efficient regulatory devices can lead the way for other nations," Cox, *Regulatory Competition in Securities Markets: An Approach for Reconciling Japanese and United States Disclosure Philosophies*, 16 Hastings Int'l & Comp. L. Rev. 149,

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[17] The United States also stands virtually alone in other ways. "Loser-pays rules governing liability for attorney['s] fees" are "followed nearly everywhere but in the United States." Rowe, Jr., 11 Duke J. Comp. & Int'l L. at 159. In many countries, "contingent fees are not permitted." Coffee, Jr., 156 U. Pa. L. Rev. at 267.

156-157 (1993).[18] "[A] multiplicity of jurisdictions—each seeking to develop the best regulatory framework …. This is something from which we all can benefit: observing what works, and how the market responds, and learning from what doesn't work." SEC Chairman Christopher Cox, Speech before the 34th Annual Securities Regulation Institute (Jan. 24, 2007), *available at* http://www.sec.gov/news/speech/2007/spch012407cc.htm.

III. A BRIGHT-LINE TEST AS TO THE EXTRATERRITORIAL REACH, IF ANY, OF THE U.S. SECURITIES LAWS IS NECESSARY, SO AS TO RESPECT THE INTERESTS OF OTHER SOVEREIGN NATIONS

This brief advocates a bright-line test under which a plaintiff who purchased or sold the securities of a foreign issuer in a foreign market would not have a private right of action under Section 10(b). An important practical virtue of this test—or any similarly bright-line test, such as one that categorically precludes "foreign-cubed" claims—is that it enables district courts to adjudicate on the pleadings, and the parties to know at the outset of the case, which private plaintiffs have stated a cause of action and which have not. Such a bright-line test is important not merely because in general, "[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." *Tellabs, Inc.* v. *Makor*

[18] The importance of allowing nations to experiment remains even if all were to have similar regulatory approaches at a given point in time; extending the Section 10(b) private cause of action would diminish the ability of other nations to make changes to their securities laws, thereby depriving the United States of real-world experiments from which to learn.

Issues & Rights, Ltd., 551 U.S. 308, 313 (2007). It is also necessary as a matter of comity: Absent a bright-line rule as to the extraterritorial scope (if any) of the statute, foreign issuers will often be subjected to the burdens and uncertainty of intensive U.S. discovery, pre-trial litigation, and perhaps trial before plaintiffs' claims can be ruled out-of-bounds as improperly extra-territorial, and by that time much harm to the foreign issuer will have been done.

As discussed in Part I, *supra*, the principle that ambiguous statutes are ordinarily construed "to avoid unreasonable interference with the sovereign authority of other nations," *Empagran*, 542 U.S. at 164, counsels in favor of holding that Section 10(b) has no extraterritorial reach. The same principle also requires fashioning a test governing that subject that permits straightforward resolution at the outset of a litigation. Otherwise, there is a great risk that claims on behalf of a global putative class will proceed against a foreign defendant deep into a case, at great interference with other nations' interests—whatever the ultimate resolution.

If, for example, another nation has chosen to preclude private securities suits in favor of public enforcement, or to adopt rules that encourage plaintiffs to bring only particularly meritorious claims, a dismissal following substantial discovery and litigation in the United States may impose burdens and costs on a foreign issuer that likely would not have been imposed under the law of the company's own nation—and thus stands to affect that company in ways not desired by that nation. *Cf. Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224, 242 (2007) ("T]he very purpose of sovereign immunity is to avoid subjecting a foreign sovereign to the rigors and 'inconvenience of

suit.'"); *United Phosphorus, Ltd* v. *Angus Chem. Co.*, 322 F.3d 942, 952 (7th Cir. 2003) (en banc) (treating a provision of the FTAIA as affecting "subject matter jurisdiction," and thus allowing for early resolution of a suit, "reduces the potential for offending the economic policies of other nations").

These concerns are well illustrated by considering the operation, in practice, of a fact-dependent "conduct" test. To date, because the courts of appeals have regarded the extraterritoriality inquiry as one of subject-matter jurisdiction, the district courts have had authority to resolve issues of improper extraterritorial scope (couched in terms of lack of subject-matter jurisdiction) at the outset of the litigation. These courts have tended to resolve such claims expeditiously and efficiently, based on the allegations within the complaint or, increasingly, on factual declarations submitted by the parties. However, should the Court regard the question of extraterritoriality as relevant not to jurisdiction but instead to whether the facts of the case are within the scope of the cause of action impliedly authorized, it is not clear that district courts, as opposed to the jury, would retain authority to resolve factual disputes bearing on that question.

Under those circumstances, a malleable, fact-specific standard such as a "conduct" test might well open the door to protracted discovery, pretrial litigation—and, assuming that material facts were in dispute—jury trial on these issues. Securities class actions, especially those against foreign companies on behalf of a global putative class, commonly involve astoundingly long complaints, which recite dozens of allegedly false or misleading statements or material omissions, made over a lengthy period, in connection

with annual reports, press releases, conference calls, regulatory filings, or investor presentations.[19]

Under a multi-factor "conduct" test, relevant issues might include whether "activities in this country were more than merely preparatory," "what and how much was done in the United States and on what and how much was done abroad," and, ultimately, in which country corporate authority for each allegedly actionable statement or material omission rested. *See Morrison* v. *National Austl. Bank Ltd.*, 547 F.3d 167, 171 (2d Cir. 2008). Under such a test, depending on the allegations in the case, detailed discovery might be necessary on a vast range of subjects: Where was each statement made? Who made it? Where did the speakers work? Who authorized each statement? Where did those persons work? If a statement was made on a conference call, who else was in the room? Who authorized the call? Was it designed for U.S. investors or foreign investors? Who was responsible for ensuring the accuracy of information disclosed to the public during the call—and more generally? Where did those persons

[19] *See, e.g.*, *In re Societe Generale Sec. Litig.*, No. 08 Civ. 2495 (S.D.N.Y. filed Jan. 8, 2010) (204-page second amended complaint alleging numerous actionable statements or omissions in connection with shareholder letters, press releases, filings, conference calls, and statements to a foreign newspaper); *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (S.D.N.Y. filed May 8, 2009) (548-page consolidated amended complaint alleging actionable statements or omissions in connection with 64 different documents or events over more than 5 years); *Cornwell* v. *Credit Suisse Group*, No. 08 Civ. 3758 (S.D.N.Y. filed Oct. 21, 2008) (200-page amended complaint alleging numerous actionable statements or omissions in connection with annual and quarterly reports, conference calls, presentations, an interview with Reuters, and correspondence with the SEC).

work? What should be deemed the relevant headquarters of the company?[20] In an era in which complex litigation is dominated by electronic discovery, document production and depositions on these multiplying questions in a global class action would likely take many months, if not years, at massive expense, primarily to the defense. For the foreign issuer, it would be little solace that, at the end of this process, a district court (on summary judgment), a jury, or an appellate court might conclude that certain—or all—of the plaintiffs' claims were outside the territorial scope of Section 10(b).

A nebulous test, moreover, would make it impossible for foreign companies "to determine in advance whether their activities are likely to subject them to

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[20] *See, e.g.*, *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1316 (11th Cir. 2009) ("Although other divisions of the Company's headquarters were located in … England, the headquarters operations which were central to the misconduct in this case were located … in Tampa." (internal quotation marks omitted; alteration incorporated)); *Cornwell* v. *Credit Suisse Group*, No. 08 Civ. 3758, __ F. Supp. 2d ___, 2009 WL 3241404, at *10 (S.D.N.Y. Oct. 5, 2009) (discussing relevance of allegation that certain executives who participated in conference calls "resided in the United States at the time [the] calls were made"); *City of Edinburgh Council ex rel. Lothian Pension Fund* v. *Vodafone Group Public Co.*, No. 07 Civ. 9921, 2008 WL 5062669, at *4 (S.D.N.Y. Nov. 24, 2008) (reviewing "evidentiary submissions includ[ing[slides from [a] … presentation held in New York City"); *In re SCOR Holding (Switz.) AG Litig.*, 537 F. Supp. 2d 556, 565, 566 n.11 (S.D.N.Y. 2008) ("key decisions underlying the alleged misrepresentations … were made in Switzerland," though the "scheme necessarily involved communication with the North American employees"); *In re Vivendi Universal, S.A.*, 381 F. Supp. 2d 158, 169-170 (S.D.N.Y. 2003) (focusing on two corporate officers' "decision to move to the United States, allegedly to better direct corporate operations").

[suit in the United States]," and thus would unavoidably extend the reach of U.S. law into conduct properly governed by other nations' laws. *See* Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 Harv. L. Rev. 1310, 1321 (1985). For this reason, as former Judge Bork aptly observed, a conduct test, turning as it does "on a welter of specific facts," is both "difficult to apply" and "inherently unpredictable, and "present[s] powerful incentives for increased litigation." *Zoelsch*, 824 F.2d at 32 n.2. Simply put, it fails to achieve what is required by comity: efficient resolution of claims that threaten, if unresolved, to interfere with another nation's ability to regulate its own affairs.

A final shortcoming of an unpredictable test of extraterritoriality is the pressure to settle that it, inevitably, would place upon a foreign issuer defendant. The intense pressure to settle securities class actions that survive an initial motion to dismiss is well-chronicled. *See, e.g.*, *Blue Chip Stamps*, 421 U.S. at 740-741. But foreign issuer defendants are particularly vulnerable to such pressure, because they are, frequently, sued in the name of a putative massive *global* class of plaintiffs. And while the vast majority of such a putative class often consists of persons who have purchased shares on a foreign market and rightfully should be precluded from bringing suit in the United States, *see* Part I, *supra*, under a "conduct" test, claims on behalf of such class members may remain in the case through verdict or appeal. In such circumstances, foreign issuers thus face

the possibility of a massive judgment far exceeding what the company can bear, or risk.[21]

By contrast, the test that amici advocate—in which private plaintiffs, categorically, would not have a cause of action against a foreign issuer for alleged false disclosures in connection with the purchase or sale of securities on a foreign market—is a bright-line test. Its adoption, as the test of extraterritoriality, would enable all parties at the outset of a case to know which plaintiffs' claims fell within the territorial scope of Section 10(b). The Court has authority to adopt such a test, as part of the process of defining "the contours of [the] private cause of action under Rule 10b-5" and "to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." *Blue Chip Stamps*, 421 U.S. at 737; *see also Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 293 (1993); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1104 (1991).[22]

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[21] Because under a nebulous test such as the "conduct" test foreign issuers can avoid this risk only by avoiding doing business in the United States entirely, such a test necessarily provides a disincentive for foreign investment in the United States. *See* Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents 25-26 & n.53.

[22] At least one commentator has identified an alternative means to reach the same result: treating the issue of extraterritoriality as one of statutory standing, and holding that plaintiffs who purchased shares of a foreign company on a foreign exchange lack standing to bring claims under Section 10(b). *See* Reuveni, 43 U.C. Davis L. Rev. ___, manuscript at 55-66.

CONCLUSION

For these reasons, the decision below should be affirmed.

Respectfully submitted.

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