

No. 08-1191

In the Supreme Court of the United States

ROBERT MORRISON, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED, *ET AL.*,
Petitioners,

v.

NATIONAL AUSTRALIA BANK LIMITED, *ET AL.*,
Respondents.

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

**BRIEF OF THE INTERNATIONAL CHAMBER OF
COMMERCE, THE SWISS BANKERS
ASSOCIATION, ECONOMIESUISSE, THE
FEDERATION OF GERMAN INDUSTRIES AND
THE FRENCH BUSINESS CONFEDERATION AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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THE FRENCH BUSINESS CONFEDERATION AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

INTEREST OF THE *AMICI CURIAE*

Amici curiae—associations representing international and non-U.S. businesses and global financial institutions—share a significant common interest in ensuring stable and predictable legal regimes affecting international trade and investment.¹ In the aggregate, the organizations filing this brief represent a substantial portion of all non-U.S. entities doing business in the United States. The *amici* regularly file *amicus* briefs in cases such as this one that raise issues of vital concern to the non-U.S. business community.

The International Chamber of Commerce (“ICC”) is the world business organization representing thousands of companies, chambers of commerce and business associations in 130 countries. Among other functions, the ICC promotes voluntary rules governing the conduct of business across borders that are observed in countless thousands of transactions every day; provides essential trade-related services such as the ICC International Court of Arbitration, the world’s leading arbitral institution; and consults

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no such counsel or a party has made a monetary contribution to its preparation or submission. The parties’ letters consenting to the filing of this brief have been filed with the Clerk’s office.

on issues of international trade for the United Nations and its specialized agencies.

The Swiss Bankers Association (“SBA”) is the leading professional organization of the Swiss financial center, the members of which include the vast majority of banks and other financial institutions operating in Switzerland. Its purposes include setting standards that govern the operation of banks in Switzerland and promoting the interests of the Swiss financial center, both at home and abroad.

Economiesuisse is the largest umbrella organization representing the Swiss economy. Economiesuisse is comprised of more than 30,000 businesses of all sizes, employing a total of 1.5 million people in Switzerland. Economiesuisse’s mission is to create an optimal economic environment for Swiss business, to continuously improve Switzerland’s global competitiveness in manufacturing, services and research, and to promote sustained growth as a prerequisite for a high level of employment in Switzerland.

The Federation of German Industries (“BDI”) is the umbrella organization for all industrial businesses and industry-related service providers in Germany. It represents 34 industrial sector federations and has 15 regional offices in Germany. The BDI speaks for more than 100,000 private enterprises employing roughly eight million people.

MEDEF, the French Business Confederation, represents more than 700,000 companies of all sizes and sectors of business, including industry, commerce and services. About 15 million persons are employed by MEDEF members. MEDEF attempts to ensure that, in the development of rules affecting

cross-border business, equity and consistency are respected for all countries.

SUMMARY OF ARGUMENT

Section 10(b) does not apply to allegedly fraudulent statements a non-U.S. security issuer makes *outside the United States*. Rather, Section 10(b) reaches only deceptive devices or contrivances used or employed within this country. A holding to the contrary would substantially deter direct foreign investment in the United States. As these *amici* can attest, and as scholarly studies repeatedly have confirmed, potential U.S. class action litigation is chief among the concerns of would-be investors in the U.S. marketplace. Imposing securities liability simply because a non-U.S. company has a subsidiary or branch in the United States is likely to deter investors from entering the U.S. entirely, to the detriment of the United States economy.

Causation tests for determining the reach of Section 10(b) liability—such as those advocated by petitioners and the Solicitor General, and adopted by the court below—are precisely the type of subjective and highly fact-specific rules that drive foreign direct investment to other, non-U.S. markets.

The plain language of Section 10(b) and the relevant canons of statutory construction, applied in a rigorous and principled fashion, establish a bright line test that leaves no room for consideration of causation in assessing the extraterritorial reach of Section 10(b). Section 10(b) proscribes the “use or employ[ment]” of a “deceptive device or contrivance” in connection with the purchase or sale of a security. The presumption against extraterritorial application of federal statutes thus requires that Section 10(b)

apply only to a defendant’s “use or employ[ment]” *in the United States* of a “deceptive device or contrivance.” In this case, however, the deceptive conduct at issue—NAB’s purported fraudulent misstatements—allegedly occurred and were relied upon *in Australia*. As such, Petitioners’ claims fall beyond the scope of Section 10(b).

This interpretation of Section 10(b) is further confirmed by the canon that Congress legislates with due respect for comity and the interests of non-U.S. sovereigns. The nations from which *amici* have enacted robust anti-securities fraud regimes that reflect thoughtful policy choices about how best to achieve investor protection. Applying U.S. law to deceptive devices or contrivances that occur abroad, effectively trumping non-U.S. policy choices, significantly undermines comity.

The proper construction of Section 10(b) makes equal sense when the transaction at issue happens not on an exchange, but in another context, such as face-to-face transactions. In such transactions, if a U.S. audience is targeted—*i.e.*, if misrepresentations are used or employed in the United States—Section 10(b) may be applicable.

Although this interpretation of Section 10(b) applies equally to the SEC, it will not undermine the SEC’s ability to fulfill its mission. Rather, it will provide the SEC enforcement authority over all fraudulent conduct occurring in or directed into the United States.

Finally, in addition to the limits on the extraterritorial reach of Section 10(b) due to its plain language, the Court should take account of the significant jurisprudential and practical considerations

underlying the scope of the private cause of action. These concerns militate against extending the judicially created cause of action under Section 10(b) to either non-U.S. persons who purchase the shares of non-U.S. issuers on non-U.S. exchanges, or to U.S. persons who do not rely upon fraudulent statements, misrepresentations, or omissions used or employed within the United States.

ARGUMENT

I. APPLICATION OF SECTION 10(B) TO CONDUCT OCCURRING ABROAD UNDER VAGUE, EXPANSIVE STANDARDS IS LIKELY TO SUBSTANTIALLY REDUCE FOREIGN DIRECT INVESTMENT IN THE UNITED STATES.

Foreign direct investment (“FDI”) is vitally important to the U.S. economy.² FDI creates jobs for Americans, increases the availability and lowers the cost of capital, and is a significant source of new technologies.³ The U.S. share of global FDI has declined since the late 1980s, indicating that the United States must compete more effectively to attract FDI in an increasingly competitive global marketplace.⁴

² See U.S. Dep’t of Commerce, Bureau of Econ. Analysis, *International Economic Accounts: Balance of Payments (International Transactions)*, <http://tinyurl.com/ygws9sr> (last accessed February 26, 2010).

³ See U.S. Dep’t of Commerce, Int’l Trade Admin., *Benefits of FDI*, <http://tinyurl.com/ykbnmx> (last accessed February 26, 2010).

⁴ See U.S. Dep’t of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* 2-3 (Oct. 2008), <http://tinyurl.com/yzbznt9>.

Vague, expansive standards for the extraterritorial reach of U.S. securities fraud prohibitions—like those urged by the Petitioners and the Government here—would substantially undermine this country’s ability to obtain FDI. As detailed by Bloomberg-Schumer Study, authored by McKinsey & Co. and the New York City Economic Development Corporation, the twin problems of “the increasing *extraterritorial reach* of US law” and “the *unpredictable nature* of the legal system” are “significant factors that caused” U.S. markets to lag in competitiveness. Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York’s and the US’ Global Financial Services Leadership* 73 (Dec. 2006) (emphasis added), <http://tinyurl.com/yf3uu6o>. Would-be investors are increasingly worried that even “the mere threat of legal action can seriously—and sometimes irrevocably—damage a company.” *Id.* at 76.

This Court too has recognized that “a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b-5’ is not a ‘satisfactory basis for a rule of liability imposed on the conduct of business transactions.’” *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 755 (1975)). Vague tests force companies “to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial.” *Id.* at 188-89. Although bright line rules may on occasion “exclud[e] plaintiffs who have in fact been damaged by violations of Rule 10b-5,” this Court has nevertheless insisted on clear

rules controlling the scope of liability under Section 10(b). *Blue Chip Stamps*, 421 U.S. at 742-43.

Petitioner's proffered rule, in contrast, is the antithesis of a bright line: They suggest using "proximate cause" to distinguish between "unbroken acts of fraud," for which they would impose extraterritorial liability, and "independent conduct that breaks the causal chain," for which they would not. Pet. Br. 29-30. This calls for an inquiry that "turn[s] on a welter of specific facts" resulting in a test "difficult to apply and * * * inherently unpredictable." *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 n.2 (D.C. Cir. 1987). See also *Adams v. Star Enter.*, 51 F.3d 417, 424 n.9 (4th Cir. 1995) ("proximate causation is a fact-specific inquiry that is normally left to a jury"). Petitioners' own argument, that the Second Circuit erred in holding that the causal chain here was too tenuous to support liability, demonstrates just how amorphous and subjective their test would be. And the Government's rule, also a causation test, would offer no greater clarity.

These approaches would license the plaintiffs' securities bar to engage in limitless discovery amounting to nothing more than fishing expeditions into the cross-border operations of non-U.S. entities, imposing excessive and unnecessary costs whenever they restate their earnings in their home countries or suffer a fluctuation in a stock listed on their home country exchange. Adopting any variant of such a rule would exacerbate the trend of non-U.S. investors directing their capital and operations elsewhere.

**II. THE PLAIN TEXT OF SECTION 10(B)
REACHES ONLY A “MANIPULATIVE OR
DECEPTIVE DEVICE” THAT A DEFENDANT
“USE[S] OR EMPLOY[S]” IN THE UNITED
STATES.**

By its terms, Section 10(b) prohibits, in connection with the purchase or sale of a security, the “use or employ[ment]” of a “manipulative or deceptive device or contrivance.” 15 U.S.C. § 78j. Because the statute is silent as to its extraterritorial reach, the long-standing canon cautioning against interpreting federal statutes to apply abroad—that is, the presumption that “United States law governs domestically but does not rule the world” (*Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454-55 (2007))—requires that the statute reach only prohibited conduct that occurs in the United States. That means that Section 10(b) prohibits the “use or employ[ment]” *within the United States* of a “manipulative or deceptive device or contrivance.” That understanding is further confirmed by the principle that Congress legislates with due respect for the laws of non-U.S. nations that police the same conduct when it occurs abroad. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004).

This rule is not novel. The D.C. Circuit announced this precise principle over two decades ago: “jurisdiction will lie in American courts where the domestic conduct comprises all the elements of a defendant’s conduct necessary to establish a violation of section 10(b) and Rule 10b-5.” *Zoelsch*, 824 F.2d at

33.⁵ The court explained that “this test is only a slight recasting, if at all, of the traditional view that jurisdiction will lie in American courts only over *proscribed acts done in this country*.” *Ibid.* (emphasis added).

This rule disposes of Petitioners’ claims: the fraudulent conduct they allege occurred—if anywhere—in Australia. Australia, and not the United States, is where Petitioners contend that NAB “used” a “deceptive device;” *i.e.*, where NAB allegedly made the misstatements on which the plaintiffs in Australia say they relied. There simply is no allegation that NAB “use[d] or employ[ed]” those statements in the United States. That is fatal to their claim.

A. The Presumption Against Extraterritorial Application Of U.S. Law Limits The Scope Of Section 10(b).

Congress did not express a clear intent for Section 10(b) to apply extraterritorially; the provision therefore reaches only violations of the statute that occur within the United States. In arguing to the contrary, Petitioners seek to undo this Court’s reasoning in *Stoneridge*; that attempt must be rejected. And, despite the Government’s contention, construing Section 10(b) the way Congress wrote it will not adversely impact the SEC’s enforcement authority.

⁵ *Zoelsch*, like most Section 10(b) cases from the Courts of Appeals, viewed this issue as one of jurisdiction. 824 F.2d at 33. Petitioners, Respondents, and the Government alike agree that the question is not subject matter jurisdiction (controlled by Fed. R. Civ. P. 12(b)(1)), but rather the scope of Section 10(b) liability (controlled by Fed. R. Civ. P. 12(b)(6)). See Pet. Br. 15-20; Resp’t. Br. 22; U.S. Cert. Br. 8-11.

1. *Section 10(b) reaches only proscribed conduct that occurs within the United States.*

The Court consistently has reaffirmed 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. v. Filardo*, 336 U.S. 281, 285 (1949)). “[U]nless there is ‘the affirmative intention of the Congress clearly expressed’” to apply Section 10(b) abroad, it must be limited to controlling only domestic conduct. *Ibid.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

No such intent appears in the language of the statute. On its face, the text of Section 10(b) is silent as to the location of the prohibited conduct: it simply prohibits “any person” from “us[ing] or employ[ing], in connection with the purchase or sale of any security * * *, any manipulative or deceptive device or contrivance.” 15 U.S.C. § 78j. The statute does not state where the defendant must “use or employ” the “device or contrivance” for liability to attach.

Other provisions of the Exchange Act, however, indicate that Section 10(b) does *not* reach non-U.S. conduct. In Section 30(b), Congress regulated certain transactions in U.S. securities that occur abroad. 15 U.S.C. § 78dd. For example, Congress prohibited security issuers from giving non-U.S. officials anything of value to gain a business opportunity. 15 U.S.C. § 78dd-1(a)(1). This provides context-specific proof of “Congress’ awareness of the need to make a clear statement that a statute applies

overseas * * *.” *ARAMCO*, 499 U.S. at 258. Nothing in Section 10(b) provides such a clear statement.

Moreover, the Exchange Act expressly confirms that it was intended to protect the “*national* public interest” by safeguarding the “*national* market system for securities.” 15 U.S.C. § 78b (emphasis added). See also *Zoelsch*, 824 F.2d at 31 (“[I]t is quite clear that the Securities Exchange Act of 1934 had as its purpose the protection of American investors and markets.”). Nor is there any legislative history to suggest a broader interpretation of the statute. See *id.* at 31-32. See also Margaret V. Sachs, *The International Reach of Rule 10B-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat’l L. 677 (1990) (arguing that at time of drafting the Exchange Act, Congress was aware of non-U.S. security issuers, but chose not to regulate transactions occurring abroad).

This interpretative canon, therefore, compels the conclusion that for Section 10(b) to apply, a defendant must “use or employ” *in the United States* an unlawful “device or contrivance” “in connection with the purchase or sale of any security.” In other words, Section 10(b) attaches if a non-U.S. entity issues statements *in the United States* that violate a “duty to disclose” (*Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008)) or that “communicate to the public” (*ibid.*) fraudulent information.⁶

⁶ It could be argued that the canon against extraterritorial application of the statute requires not only that the “use or employ[ment]” of the “deceptive device or contrivance” occur in the United States, but also that “the purchase or sale” of a security (“in connection with” the “use or employ[ment]” of the

Whether a defendant engages in proscribed conduct in the United States by “using or employing” a device or contrivance unlawful under Section 10(b) is a straightforward inquiry. If a non-U.S. entity uses or employs fraudulent statements in the United States in connection with the purchase or sale of a security (*e.g.*, at a road show, through a U.S.-based marketing office, or by directing phone calls or e-mails into the United States), the issuer will have violated Section 10(b) by “us[ing] or employ[ing]” *in the United States* a “manipulative or deceptive device or contrivance.” 15 U.S.C. § 78j. For example, if a non-U.S. Ponzi schemer targets individuals in the United States and makes fraudulent representations in the United States in connection with the sale of a security, that conduct would fall within the ambit of Section 10(b). If an investor relies on the statements made in the United States to his or her detriment, a civil claim also may lie.

But a non-U.S. entity does not “use or employ” in the United States a “manipulative or deceptive device or contrivance” if it releases allegedly fraudulent statements in its own country not in any way targeted to U.S. investors. To be sure, it is possible that U.S. investors may reach outside the United States and obtain those statements on their own initiative—*e.g.*, via the internet—and subsequently use them when making an investment. But Section 10(b) prohibits the use of a fraudulent statement *by the* defendant, and not *by the investor*. Thus, by simply

“deceptive device or contrivance”) likewise occur within the United States. The Court need not resolve that question in this case, because it is clear that the “deceptive device” cited by petitioners was not “use[d]” by NAB in the United States.

releasing a statement abroad that might ultimately come into the possession of a U.S. investor, a *defendant* will not have “*use[d] or employ[ed]*” a fraudulent statement *in the United States*. Investors who rely on such extraterritorial statements have no remedy under Section 10(b). Only those who have relied on U.S. conduct may pursue a civil claim.

Finally, investors claiming injury from the defendant’s use or employment of the false statements in other countries may not assert claims under Section 10(b)—even if the statement also was used or employed in the United States as well—because those investors’ alleged injuries stem from the use or employment of the statements outside the United States. They may not circumvent the statutory requirement of injury from conduct within the United States by piggybacking on the claims of U.S. investors whose alleged injury does flow from U.S.-based conduct.

2. Petitioners’ claim that their interpretation does not apply Section 10(b) extraterritorially misconstrues the presumption against extraterritoriality and the text of Section 10(b).

Under Section 10(b), the prohibited conduct that must occur in the United States to avoid running afoul of the presumption against extraterritoriality is the use or employment within the United States of a “manipulative or deceptive device or contrivance”—here, allegedly false statements. That did not happen. Petitioners acknowledge that the allegedly fraudulent statements upon which they relied were made “in Australia.” Pet. Br. 25.

Petitioners assert (Pet. Br. 32-34) that applying Section 10(b) in the instant case is consistent with the presumption against extraterritoriality because some conduct, not itself sufficient to establish a violation of Section 10(b), occurred here. They point to the gathering and analysis of information later incorporated into the disclosures and offering materials used or employed outside of the United States. Pet. Br. 8-10.

But an extraterritorial application of a statute is not made territorial simply because some acts that in some way contributed to the offense occurred in the United States—the conduct constituting the offense must have occurred here. Otherwise extraterritoriality would become an entirely elastic concept, turning entirely on litigants’ ingenuity in asserting that “relevant” conduct occurred within the United States.

“The difference between a domestic application of United States law and a presumptively impermissible extraterritorial application of United States law” turns on the occurrence within the United States of “the conduct that the law prohibits.” *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1077-78 (9th Cir. 2006) (holding that because “the operative event creating a liability under CERCLA is the release or threatened release of a hazardous substance” and not “[a]rranging for disposal of such substances,” the former, and not the latter, is “controlling for purposes of assessing whether CERCLA is being applied extraterritorially”).

Petitioners’ concession that the allegedly fraudulent statement occurred in Australia is therefore dispositive of the extraterritoriality issue in this case.

3. *The Court should reject petitioners' attempt to undermine Stoneridge.*

Unable to shrink the definition of extraterritoriality, petitioners next seek to expand the definition of a violation of Section 10(b), suggesting that any act that is a “substantial and material link in the chain of events leading to the foreign investors’ losses” is sufficient to give rise to Section 10(b) liability. Pet. Br. at 25.

This Court in *Stoneridge* directly rejected the concept of liability based on anything less than a violation of “*each* of the elements or preconditions for liability.” 552 U.S. at 158 (emphasis added). *Stoneridge* explains that, in a civil suit, where a defendant’s “acts or statements were not relied upon by the investors * * *, liability cannot be imposed upon respondents.” *Id.* at 159. Moreover, the Court found that liability does not accrue based on an “indirect chain” of causation that was “too remote for liability.” *Ibid.* Yet here, Petitioners would impose liability based upon U.S. conduct on which they did not rely.

Further, in arguing that the alleged conduct by NAB’s Florida subsidiary, HomeSide, was “primary, not secondary; central, not incidental,” (Pet. Br. 25), Petitioner’s seek to revisit *Stoneridge*’s conclusion that a respondent’s conduct is *not* “primary” or “central,” where “nothing respondents did made it necessary or inevitable for [the issuer] to record the transactions as it did.” 552 U.S. at 161. Rather, a theory of “scheme liability”—which Petitioners essentially propose here—“does not answer the objection that petitioner did not in fact rely upon [HomeSide’s] own deceptive conduct.” *Id.* at 159-60. Here, Petitioners do not (indeed, cannot) contend

that they relied upon statements made by HomeSide. Thus, under *Stoneridge*, HomeSide's conduct cannot be considered primary or central.

Applied in this context, the import of *Stoneridge* is clear: HomeSide's alleged conduct itself does not support a Section 10(b) civil claim. And Petitioners may not use this conduct to bootstrap a claim against NAB where NAB's alleged misrepresentation occurred abroad. Moreover, Petitioners' reading overreaches; it would, whenever U.S. data were used to prepare a non-U.S. disclosure, "convert[] a single act of supply from the United States into a springboard for liability" to be imposed upon fundamentally extraterritorial conduct. *Microsoft*, 550 U.S. at 456.

4. *Construing Section 10(b) to apply only to U.S. conduct would not inappropriately limit SEC enforcement.*

Interpreting Section 10(b) in accordance with settled principles of statutory interpretation will not hamper the SEC's ability to fulfill its mandate, because the SEC may bring enforcement actions whenever a deceptive device or contrivance is used or employed here.

First, focusing on the place of the alleged misconduct fully addresses the SEC's fear of "open[ing] a 'Barbary Coast' safe harbor for fraud that occurred here but led to injury abroad." Pet. Br. 7-8 (quoting *SEC v. Kasser*, 548 F.2d 109, 126 (3d Cir. 1977)). "Outbound" fraud committed in the United States and directed at citizens of other nations would fall within the scope of Section 10(b). Cf. *Kasser*, 548 F.2d at 110 (SEC could bring enforcement action against "defendants who have allegedly engaged in

fraudulent conduct within the United States, when the sole victim is a foreign corporation”).

Nor would *amici's* reading allow “perpetrators * * * [to] escape accountability in *any* jurisdiction” were it adopted globally. U.S. Cert. Br. 12. A fraudulent statement, or other device or contrivance, must be used or employed in at least *one* jurisdiction, and that jurisdiction will have the power to initiate an enforcement action. Here, NAB’s allegedly fraudulent statements made and relied upon in Australia are subject to Australian securities law. There exists no gap in international enforcement.

Second, many non-U.S. issuers of securities that are publically-traded on non-U.S. exchanges (including Respondent NAB), offer their equity on a U.S. exchange through American Depositary Receipts (“ADRs”). See American Depositary Receipts, Exchange Act Release No. 274, 1991 WL 294145, at *2 (S.E.C. May 23, 1991). Even ADRs that are exempt from Exchange Act reporting are required to post, for the benefit of U.S. ADR buyers, disclosures that are subject to the antifraud provisions of the securities laws. See Ziegler, Ziegler & Assoc. LLP, *The U.S. Legal Environment for Sponsored and Unsponsored ADR Programs* (Apr. 10, 2009), <http://tinyurl.com/yfvo6o8>.

Third, the SEC enjoys significant authority that private plaintiffs do not. Unlike a private litigant, the SEC need not show reliance, economic loss, or causation, and may bring cases for attempted fraud. See *United States v. Hagan*, 521 U.S. 642, 650-51 (1997). Thus, if a non-U.S. issuer makes material misrepresentations here in connection with the purchase or sale of a security, the SEC will have enforcement authority even if no U.S.-based persons

detrimentally rely on this conduct. The SEC has enforcement authority over *all* such securities fraud that occurs in the United States.

For these reasons, there is no need to ignore conventional statutory interpretation principles and adopt the amorphous standard that the SEC advocates, extending Section 10(b) to a “fraudulent scheme [that] bears a sufficient connection to the United States.” U.S. Cert. Br. 11. Section 10(b), by its plain terms, prohibits the use of a “manipulative or deceptive device or contrivance,” and the canon against extraterritorial application means that precisely that proscribed conduct must occur in the United States. A test turning on whether or not the “scheme” is “sufficient[ly] connect[ed]” to the United States is a standard of the Government’s own design, constructed specially for this statute. It should be rejected by this Court.

B. Principles Of Comity Confirm That Section 10(b) Does Not Apply To Non-U.S. Conduct.

This Court interprets federal statutes so that they do not interfere with the appropriate function of non-U.S. law. Petitioners’ expansive extension of Section 10(b), however, would do exactly that.

1. *Section 10(b) must be interpreted to accord comity to non-U.S. law.*

Section 10(b) should be construed “to avoid unreasonable interference with the sovereign authority of other nations.” *Empagran*, 542 U.S. at 164. “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. It thereby helps the potentially conflicting laws of different nations work together in

harmony—a harmony particularly needed in today’s highly interdependent commercial world.” *Id.* at 164-65.

As *Empagran* explained in the anti-trust context, the United States has no interest in the application of its laws to “foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff’s claim.” *Id.* at 165 (emphasis omitted). Although Congress may hope that the principles underlying its laws (here, the Exchange Act, in *Empagran*, the Sherman Act) “would commend themselves to other nations,” Congress does not seek “to impose them, in an act of legal imperialism, through legislative fiat.” *Id.* at 169. Section 10(b) accordingly must be interpreted to avoid creating “a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.” *Id.* at 165.⁷

2. *An expansive interpretation of Section 10(b) would substantially interfere with the interests of non-U.S. nations.*

The dramatic expansion of Section 10(b) liability that petitioners advocate would severely undermine international comity.

The home countries of the companies and financial institutions that are members of *amici* have, like Australia, enacted robust prohibitions against secur-

⁷ As Member countries of the Organisation for Economic Co-Operation and Development (“OECD”), the United States and Australia have agreed to “[t]ake fully into account the sovereignty and legitimate economic, law enforcement and other interests of other Member countries.” OECD, *Conflicting Requirements Imposed on Multinational Enterprises*, <http://tinyurl.com/yjppjlyn> (last accessed February 26, 2010).

ities fraud and maintain an active enforcement culture dedicated to ensuring their laws are honored. But “not all nations agree on how securities markets should be designed or regulated. While there may be widespread agreement on certain forms of fraud, perhaps the classic forms of deceit or manipulation, nations have often widely divergent views on what constitutes the entire panoply of actionable securities fraud.” Kellye Y. Testy, *Comity & Cooperation: Security Regulation in a Global Marketplace*, 45 Ala. L. Rev. 927, 957 (1994). Other nations’ remedial schemes reflect their individual and considered policy choices, and the United States should afford its fellow sovereigns’ enforcement regimes the space they need to function.

Exporting the U.S. regulatory regime through private civil litigation is not only unnecessary,⁸ but unwelcome. U.S. rules inevitably will fall into tension with non-U.S. law. See Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 Nw. J. Int’l L. & Bus. 207, 208 (1996) (“Extraterritoriality results in frequent conflicts between the United States and other nations.”). This, in turn, will make it harder for non-U.S. enforcement authorities to do their jobs. Cf. Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 Chi.-Kent L. Rev. 1065, 1117 (2002) (“Extraterritorial ap-

⁸ See Howell E. Jackson, *Regulation in a Multisectoral Financial Services Industry*, 77 Wash. U. L.Q. 319, 379 (1999) (“Exercising jurisdiction over foreign [securities] transactions * * * in many jurisdictions it will be redundant if foreign regulatory structures also govern the transactions and are effectively enforced.”).

plication of law has become worrisome to many observers because it interferes with sovereign authority by limiting the extent to which a State can control the local conditions.”).

In addition, because clarity and cooperation are the lifeblood of deterrence, muddying the waters through extraterritorial application of U.S. law will further hinder the common objective of preventing securities fraud. See, e.g., Siddharth Fernandes, *F. Hoffman-Laroche, Ltd. v. Empagran and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide*, 20 Conn. J. Int’l L. 267, 306 (2005).

To illustrate the foregoing points, we below highlight the regulatory regimes of several countries.

Switzerland. Switzerland unambiguously opposes extraterritorial application of U.S. law, and has informed the U.S. government that “[t]he extraterritorial assertion of jurisdiction requested by the plaintiffs in this [NAB] case would be inconsistent with established principles of international law.” See Swiss Diplomatic Note No. 17/2010, App., *infra.*, 1a. Switzerland has myriad other reasons to object to U.S. securities litigation that interferes with its sovereignty.

To begin with, Switzerland recently enhanced its supervision of its financial markets by enacting umbrella legislation—the Swiss Financial Market Supervision Act (“FINMASA”)—that centralizes and harmonizes several longstanding laws governing the

Swiss financial center.⁹ Swiss law requires Swiss listed entities to periodically file financial reports and imposes an ongoing duty for securities issuers to disclose potentially price-sensitive facts as they arise.¹⁰ Moreover, Swiss Penal Code § 152 makes it unlawful for corporate officers or directors to willfully release any inaccurate or incomplete information that may cause economic damage to shareholders. A plaintiff in Switzerland may be able to bring a private civil claim for monetary damages caused by a statement intentionally designed to mislead the markets.¹¹ And if an issuer publishes a misleading prospectus in connection with an IPO, a civil plaintiff need only prove negligence to recover.¹²

FINMASA also creates a new regulatory agency—the Swiss Financial Markets Supervisory Authority (“FINMA”)—that combines previously independent Swiss bank, insurance and anti-money laundering agencies.¹³ FINMA’s investor protection efforts include: enforcing Switzerland’s anti-fraud prohibitions by investigating leads that FINMA generates or that are supplied by Switzerland’s self-

⁹ Thouvenin Rechtsanwälte, *Switzerland: Financial Market Supervision Act*, Int’l Fin. L. Rev. (May 2009), <http://tinyurl.com/yfteoqx>.

¹⁰ Listing rules enacted by SIX Swiss Exchange (formerly SWX Swiss Exchange) Art. 53 (<http://tinyurl.com/yjens7j>).

¹¹ See Swiss Diplomatic Note No. 17/2010, App., *infra.*, 3a; Swiss Code of Obligations Art. 41 ¶ 2, reprinted in Robert Briner, *Insider Trading in Switzerland*, 10 Int’l Bus. L. 348 (1982), <http://tinyurl.com/yzvq9ss>.

¹² See Swiss Diplomatic Note No. 17/2010, App., *infra.*, 3a; Swiss Code of Obligations Art. 752.

¹³ See FINMA, *FINMA Objectives*, <http://tinyurl.com/yfzm4mr> (last accessed February 26, 2010).

regulating stock markets; imposing administrative sanctions; and referring appropriate cases to Swiss cantonal prosecutors for criminal action.¹⁴

FINMA, like its predecessor agencies, regularly coordinates with the SEC, both formally and informally, and considers doing so an important aspect of fulfilling its mandate.¹⁵ But Switzerland nonetheless deems its comprehensive approach to combating securities fraud—which includes criminal, civil and administrative enforcement—to be carefully calibrated to best achieve investor protection. As FINMA has explained, “[e]nforcement is just one of several mechanisms for enforcing regulatory compliance. This can have a significant impact on the parties involved, and FINMA takes great care in considering how and when to apply such measures.”¹⁶ Suits in the United States threaten to circumvent this thoughtful and deliberate regime.

¹⁴ See FINMA, Enforcement/Market Supervision, <http://tinyurl.com/yhztkny> (last accessed February 26, 2010).

¹⁵ See Letter from Warren Christopher, U.S. Secretary of State, to Carlo Jagmetti, Swiss Ambassador to the United States (Nov. 3, 1993), and Letter from Carlo Jagmetti to Warren Christopher (Nov. 3, 1993) (extending the Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters to “violations of the laws and regulations governing the offer, purchase and sale of securities”) (<http://tinyurl.com/yzxphd3>); SEC, Int’l Regulatory Policy, <http://tinyurl.com/yl9qo8k> (last accessed February 26, 2010) (noting “regular discussions” with FINMA).

¹⁶ FINMA, Enforcement/Market Supervision, <http://tinyurl.com/yhztkny>. See also FIMNA’s Principles of Enforcement, Principle 3 (Enforcement with Measured Judgment) (Dec. 17, 2009), <http://tinyurl.com/yjuydve>.

U.S. lawsuits also conflict with many Swiss policy judgments in the civil arena. Switzerland, for example, does not allow securities fraud class actions.¹⁷ Likewise, Switzerland defines “materiality” of disclosures or statements differently than the United States.¹⁸ Swiss law calculates securities fraud damages differently.¹⁹ And Switzerland does not recognize the “fraud on the market” theory of presumed reliance.²⁰ Extraterritorial application of

¹⁷ See Samuel P. Baumgartner, *Class Actions & Group Litigation in Switzerland*, 27 Nw. J. Int'l L. & Bus. 301, 303 (Winter 2007) (“Switzerland is one of the many countries that do not currently have an American-style class action. Suggestions to examine the possibility of introducing such a procedural vehicle have met with considerable opposition.”).

¹⁸ The Swiss test considers a fact “material,” in Swiss parlance, “price-sensitive” if it is “capable of triggering a significant change in market prices.” SIX Exchange Listing Rule Art. 53, <http://tinyurl.com/yjcns7j>, whereas the U.S. test asks if “there is a substantial likelihood that a reasonable shareholder would consider [the information] important.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

¹⁹ Compare 15 U.S.C. § 78u-4(e) (limiting damages under the Exchange Act to no more than largest different between price paid for securities and average closing price for 90 days following announcement that cause stock drop) with Bundesgericht [BGer] [Fed. S. Ct.] 129 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 332 (damages are the difference between the actual value of the shares and the hypothetical value of the shares had no inaccurate or incomplete disclosure been made); Peter Böckli, *Schweizer Aktienrecht*, 4th ed., Zurich 2009, § 18 n.34 (same).

²⁰ Marco G. Carbonare et al, *Liability and Due Diligence in Connection with Equity Securities Offerings: An overview of U.S., Swiss, and German Law*, GesKR 2/2008, 129 n.62 (<http://tinyurl.com/y1aq775>) (whereas the U.S. law recognizes “fraud on the market,” “[a]ccording to Swiss law * * * no rebut-

U.S. law in these actions thus would permit investors who have purchased Swiss securities on Swiss exchanges, and interacted with Swiss issuers only in Switzerland, to circumvent the Swiss anti-securities fraud regime.

Germany. Germany has enacted comprehensive legislation, the Securities Trading Act (“WpHG”) that prohibits insider trading, market manipulation, and the provision of untrue information of crucial importance to the valuation of securities. German law also imposes liability upon issuers for failing promptly to publish inside information that directly affects them, or publishing such information that is false.²¹ Investors suffering damages from securities fraud may bring suit against issuers in German courts. In August 2005, Germany enacted a law that streamlines the procedure for such suits.²²

Germany’s financial supervisory authority, the Bundesanstalt für Finanzdienstleistungsaufsicht (“BaFin”) is chiefly responsible for ensuring compliance with the WpHG, and actively investigates and refers to German federal and local prosecutors securities fraud falling within the WpHG’s broad ambit.²³ Germany has agreed to cooperate with the

table presumption in favour of the existence of transaction causation exists”).

²¹ See German Securities Trading Act (WpHG), §§ 14, 20a, 37b, 37c (<http://tinyurl.com/yjekadx>).

²² See Kapitalanleger-Musterverfahrensgesetz of [KapMuG] [Act on Streamlined Procedure for Investor Suits] August 16, 2005, <http://tinyurl.com/yksc3lo>.

²³ See, e.g., BaFin, Annual Report 2008, at 157-64 (Nov. 9, 2009) (<http://tinyurl.com/yjenvot>) (describing recent prosecution of insider trading and market manipulation).

SEC in the prosecution of securities fraud matters,²⁴ and in practice has done exactly that.²⁵ But, given its commitment to address securities fraud under its own laws, and its willingness to cooperate with the SEC in appropriate cases, Germany has made plain its strenuous objection to U.S. civil suits that encroach on its sovereign prerogative to decide for itself how securities fraud occurring within its borders should be addressed.

In *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996-97 (2d Cir. 1975), Germany submitted an affidavit explaining that, in the context of a class action by non-U.S. plaintiffs against non-U.S. issuers, Germany “would not recognize a United States judgment in favor of the defendant as a bar to an action by [its] own citizens.”²⁶

In April 2005, Germany enacted a law that expressly grants, in securities fraud cases, exclusive venue to the issuer’s home court, and consequently blocks the enforcement of judgments or settlements in U.S. securities fraud class actions against German issuers.²⁷ If the U.S. judiciary continues to entertain

²⁴ See generally Mem. of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, U.S.-Ger. SEC-Ger. (Bundesaufsichtsamt für den Wertpapierhandel (predecessor to BaFin)), Oct. 17, 1997 (<http://tinyurl.com/yl6cxfm>).

²⁵ *International Agreements and Understandings for the Production of Information and other Mutual Assistance*, 29 Int’l Law. 780, 821 (Winter 1995).

²⁶ England, Switzerland, Italy and France submitted declarations to the same effect. *Ibid.*

²⁷ See Zivilprozessordnung [ZPO] [civil procedure statute] Art. 32b (F.R.G.).

extraterritorial actions, other nations may well follow Germany's lead. See Sharon E. Foster, *While America Slept: The Harmonization of Competition Laws Based Upon the European Union Model*, 15 Emory Int'l L. Rev. 467, 486 (Fall 2001) ("the unilateral approach of extraterritorial enforcement risks increased use of blocking or 'clawback' statutes that could further undermine the fragile world trade order.").

When it comes to securities regulation, Germany, like its fellow E.U. member states, places a premium on "uniformly consistent application of existing law, all with the objective of reducing the burden of regulatory costs for the industry."²⁸ Extraterritorial application of U.S. securities fraud standards runs counter to that goal.

France. Through legislation and regulations implemented by the French financial markets supervisory authority (the *Autorité des Marchés Financiers* or "AMF"), France has established a comprehensive set of rules to enhance transparency in its financial markets²⁹ and to strictly punish market abuses.³⁰

²⁸ Jochen Sanio, President, BaFin, Opening Remarks at the European Financial Forum (Nov. 30, 2007), <http://tinyurl.com/yjogok5>.

²⁹ These rules are found principally in the French Commercial Code (<http://tinyurl.com/ykex96r>), the French Monetary and Financial Code (<http://tinyurl.com/yjq3v5o>), and in Book II of the General Regulation of the AMF (<http://tinyurl.com/yfzkehr>).

³⁰ These rules implement the January 28, 2003 European Directive n°2003/6/EC of the European Parliament and Council on insider trading and market manipulation, <http://tinyurl.com/yzj797g>.

Issuers whose securities trade on regulated markets must report their financial results on a periodic basis and disclose market sensitive information as it arises. All information disclosed to the public must be exact, precise and sincere.³¹ Insider trading and market manipulation are strictly prohibited³² and may result in criminal prosecution, incarceration, and significant administrative and criminal fines.³³

The AMF is vested with broad powers of investigation and takes a leading role in initiating proceedings when a market abuse has been committed.³⁴ Its power to sanction violations was recently enhanced through the establishment of an independent Sanctions Commission within the AMF and an increase in the maximum sanctions permitted. If an investor believes that one of the foregoing prohibitions has been violated, the investor may file an application with the AMF seeking an administrative sanction, initiate civil proceedings to recover losses, or initiate criminal proceedings that may, in addition to punitive measures, grant restitution to investors. Under Article 1382 of the French Civil Code, investors may recover based on negligent violations of the French securities laws. French investors may bring civil actions collectively through the appointment of

³¹ See General Regulation of the AMF, Arts. 223-1 *et seq.*, http://www.amf-france.org/documents/general/7552_1.pdf.

³² See *id.*, Arts. 611-1 *et seq.*, <http://tinyurl.com/yzro3v5>.

³³ See Monetary and Financial Code, Arts. L. 465-1 *et seq.* (Fr.), <http://tinyurl.com/yjq3v5o> (imposing up to 2-years imprisonment and 1,500,000 euros fine); *id.* Art. L. 621-15 (imposing up to 10,000,000 euros fine or confiscation of the profits realized).

³⁴ See Monetary and Financial Code, Art. L. 621-15 (Fr.), <http://tinyurl.com/yjq3v5o>.

a common agent or through the auspices of a certified association representing investor interests.³⁵

The AMF (directly and through its predecessor, the COB) has long actively cooperated and exchanged information with other markets' supervisory authorities, including the SEC.³⁶ Notwithstanding such cooperation, the regulatory regimes of the two countries remain different in significant ways. For example, opt-out class actions are considered contrary to the French Constitution and to Article 6 of the European Convention on Human Rights, and, as noted above, France allows civil damages actions for securities violations based on a showing of negligence.

* * * * *

The above discussion demonstrates that permitting litigation in the United States for securities fraud committed abroad would create the sort of “serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs” that this Court has consistently refused to countenance. *Empagran*, 542 U.S. at 165. This is plainly a situation where, “even where nations agree about primary conduct,” they may still “disagree dramatically about appropriate remedies.” *Id.* at 167.

³⁵ French Monetary and Financial Code, Art. L. 452-2 (Fr.).

³⁶ See Mutual Assistance Agreement entered into between the COB and the SEC on 14 December 1989, <http://tinyurl.com/ykbjeeu>; Agreement entered into between the SEC and the European financial markets supervisory authorities on 25 January 2007 for the purpose of cooperating and exchanging information in relation to the supervision of the financial markets, <http://tinyurl.com/yg719nx>.

Moreover, the plaintiff-friendly provisions of U.S. securities law, including the U.S. class-action mechanism and the enormous recoveries available in U.S. courts,³⁷ would undoubtedly attract plaintiffs to the United States. And the sheer size of these claims often means that “even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment.” *Blue Chip Stamps*, 421 U.S. at 740. The threat of costly and disruptive discovery adds an additional “*in terrorem* increment” to the settlement value of even meritless claims. *Id.* at 741 (emphasis added).

Studies confirm that virtually every securities fraud claim that survives a motion to dismiss is settled; few businesses can afford to risk a trial, regardless of the merits of the claim. See Francis J. Menton, Jr., *New Opportunities for Defendants in Securities Class Actions*, (Federalist Soc’y for Law & Pub. Policy Studies 2007), <http://tinyurl.com/yhk7wp7> (“[O]nce they have survived pre-trial motions, almost no securities class actions have gone to trial, and virtually all are set-

³⁷ Cornerstone’s analysis found that the 210 securities class action claims filed in 2008 presented a maximum dollar loss of \$856 billion. Cornerstone Research, *Securities Class Action Filings, 2008: A Year in Review* 12 & 13 (2009), <http://tinyurl.com/yl2fp49>. Of those claims, ninety-nine settled for an average of over \$31 million per settlement. Cornerstone Research, *Securities Class Action Settlements, 2008 Review and Analysis* 2 (2009), <http://tinyurl.com/yft5g65>. Overall, there were nine settlements in excess of \$1 billion from 1999-2008. *Ibid.*

tled.”); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) (finding that, rather than the merits, the magnitude of a stock-price drop and the amount of insurance are the best predictors of whether suit would be brought and the size of the ultimate settlement).³⁸

If Section 10(b) were applied to fraudulent statements, misrepresentations, or omissions made abroad, therefore, the magnitude of the U.S. claim would encourage plaintiffs to circumvent the carefully crafted securities regimes created by other nations and would compel a defendant to settle, regardless of the law or remedy available in the non-U.S. country. That would severely compromise the ability of non-U.S. nations to regulate their domestic security issuers in accord with their domestic policy decisions. U.S. law would effectively trump policy decisions of other nations.

3. *The forum non conveniens doctrine is insufficient to preserve comity.*

Petitioners’ contention that the *forum non conveniens* doctrine can alleviate these substantial comity concerns misses the mark. See Pet. Br. 41-42.

The *forum non conveniens* doctrine is inherently discretionary. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (“The *forum non conveniens* determination is committed to the sound discretion of

³⁸ Congress too has recognized that “basic economics” can force defendants to settle “meritless” Section 10(b) class actions that have “only a five percent chance of success” if the defendants are unable to obtain early dismissal. S. Rep. No. 109-14, at 21 (2005).

the trial court.”). It turns on the district court’s “assessment of a ‘range of considerations.’” *Sinochem Int’l. Co. v. Malaysia Int’l Shipping Co.*, 549 U.S. 422, 429 (2007) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996)). These factors include a broad variety of private and public interests that may be balanced in a wide-variety of ways. See *Piper Aircraft Co.*, 454 U.S. at 257-60.

In practice, the doctrine does not provide a clear rule that will ensure respect for the sovereignty of non-U.S. nations, as well as create the certainty that businesses need when conducting business across borders. See, e.g., *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21 (2d. Cir. 2002) (split decision reversing the district court’s grant of *forum non conveniens* dismissal in securities fraud case against Canadian company); *E.ON AG v. Acciona, S.A.*, 468 F. Supp. 2d 559, 586-88 (S.D.N.Y. 2007) (despite recognizing that “the epicenter of this dispute is in Spain” and that plaintiffs chose “to litigate in the United States because it perceives that American securities laws may give it a tactical advantage by providing discovery and even relief which it has no reasonable expectation of obtaining in Spain,” court refused to dismiss Section 14 claim on *forum non conveniens* basis).

III. THE COURT SHOULD DECLINE TO EXPAND THE IMPLIED PRIVATE ACTION TO ENCOMPASS EXTRATERRITORIAL CLAIMS.

This Court has never held that the judicially-created implied private action under Section 10(b) extends to claims by non-U.S. persons who purchase or sell securities outside the United States or to claims of U.S. persons based on fraudulent statements, misrepresentations, or omissions used or employed outside the United States. Such a holding

would require an extension of the implied cause of action well past its breaking point. Both jurisprudential and practical concerns preclude such a further judicial expansion of this non-statutory cause of action.

1. This Court recently reaffirmed that “[t]he [Section] 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes.” *Stoneridge*, 552 U.S. at 164. See also *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 358-59 (1991) (“[W]e have made no pretense that it was Congress’ design to provide the remedy afforded.”). It does not comport with the “settled” principle “that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.” *Stoneridge*, 552 U.S. at 164. Because these “[c]oncerns with the judicial creation of a private cause of action caution against its expansion,” “the [Section] 10(b) private right should not be extended beyond its present boundaries.” *Id.* at 165 (citation omitted).

Stoneridge, accordingly, followed an unbroken line of cases in which this Court has refused to broaden Section 10(b) liability. See, e.g., *Cent. Bank*, 511 U.S. at 164; *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1 (1977); *Blue Chip Stamps*, 421 U.S. at 723. This Court has never held that Section 10(b) provides a private cause of action to a non-U.S. plaintiff who alleges fraud in connection with the purchase or sale of a non-U.S. security on a non-U.S. exchange, or to a U.S. person whose claim is not based on the use or employment of fraudulent communications within the United States. If such a broad private

cause of action is to be created, Congress—not this Court—should take that step.

Indeed, this understanding of the proper scope of the private cause of action is fully consistent with the aim of the Exchange Act, which, as noted above, protects the “*national* public interest” by safeguarding the “*national* market system for securities.” 15 U.S.C. § 78b (Exchange Act) (emphasis added).

2. In addition to the jurisprudential limitations on Section 10(b)’s private cause of action, “the Court has considered [it] appropriate to examine” “[t]he practical consequences of an expansion” of the private right. *Stoneridge*, 552 U.S. at 163. See also *id.* at 164 (a primary concern is whether a liability rule would deter “[o]verseas firms with no other exposure to our securities laws * * * from doing business here”).

As we have explained, the adverse practical consequences of Petitioners’ proposed rule are substantial. The rule would have a significantly negative impact on the ability of U.S. economy and its capital markets to attract foreign direct investment (see pages 5-7, *supra*), it would drastically undermine non-U.S. nation’s attempts to police domestic securities fraud (see pages 18-29, *supra*), and it would severely impair the willingness of non-U.S. governments to cooperate with the SEC (see pages 21-29, *supra*). There is no justification for expanding Section 10(b) civil liability so enormously, particularly where plaintiffs have recourse to the laws of the countries where the fraud actually occurs.

3. Moreover, in determining the scope of the implied private action under Section 10(b), this Court has been cognizant of the difference between the

SEC, cabined by prosecutorial discretion that includes consideration of comity concerns, and the plaintiffs' securities bar, which has no such check and in fact is obliged by its duty of loyalty to its clients to ignore broader societal concerns. *Cent. Bank*, 511 U.S. at 183 (fact that private civil cause of action for aiding and abetting would eliminate check of prosecutorial discretion weighed against allowing such liability); *Stoneridge*, 552 U.S. at 162 (noting that Congress responded to *Central Bank* by allowing SEC, but not private parties, to sue aiders and abettors); cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (judicial caution in creating a private cause of action under the Alien Tort Statute is warranted, because it entails "permit[ting] enforcement without the check imposed by prosecutorial discretion").

In sum, this Court should not construct an extraordinarily expansive private cause of action that would be inconsistent with settled jurisprudential principles, important policy concerns, and weighty comity interests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2010

APPENDIX A

Note No. 17 / 2010

The Embassy of Switzerland presents its compliments to the U.S. Department of State and has the honor of communicating that Switzerland wishes to draw to the attention of the United States the case *Morrison v. National Australia Bank* (No. 08-1191), which is currently pending before the U.S. Supreme Court. The *Morrison* case is a class action lawsuit initiated on behalf of non-U.S. investors in an Australian corporation whose shares trade on an Australian stock exchange. The plaintiffs assert that allegedly fraudulent information was reported by a U.S. subsidiary to its Australian parent, that the Australian parent used the information in preparing its financial reports, and that those reports ultimately misled investors participating in securities transactions in Australia. The plaintiffs argue that the reporting of false data by the subsidiary from the United States to its parent would provide a sufficient basis for a private claim against the Australian parent under Section 10(b) of the U.S. Securities Act of 1934. Both the U.S. District Court and the Court of Appeals for the Second Circuit ruled that the connection between the activities that occurred in the United States and the allegedly fraudulent statements by the Australian parent was too remote to allow a private right of action to proceed under Section 10(b).

Switzerland wishes to highlight two points relating to this case, concerning (i) maintaining judicial limits on the extraterritorial application of U.S. law and (ii) Switzerland's own protections for Swiss investors and investors in Swiss companies.

The extraterritorial assertion of jurisdiction requested by the plaintiffs in this case would be inconsistent with established principles of international law. The United States should not purport to provide civil remedies for alleged securities law violations committed by non-U.S. corporations against non-U.S. persons on non-U.S. securities exchanges. Allowing U.S. courts to assert such extraterritorial jurisdiction under the circumstances of the *Morrison* case would interfere with the sovereignty of foreign nations, which have the right to regulate securities-related activities within their own territory without interference from U.S. civil lawsuits.

As many other nations, Switzerland asserts its own jurisdiction over securities fraud, namely through comprehensive legislation prohibiting securities offenses. Swiss law provides for criminal sanctions for such offenses as insider trading (Penal Code Art. 161), price manipulation (Art. 161^{bis}), and false statements regarding commercial businesses (Art. 152). Both the federal government and the Swiss cantons can prosecute such offenses.

The Swiss Financial Market Supervisory Authority (FINMA) has broad authority to supervise, *inter alia*, stock exchanges, securities dealers and collective investment schemes. Among other responsibilities, FINMA enforces through administrative measures the Federal Act on Stock Exchanges and Securities Trading (SESTA) and prosecutes cases of insider trading, price manipulation and other violations of the Act (SESTA Art. 6). FINMA conducts investigations and has the authority to order injunctive relief, suspend or revoke licenses and confiscate illegal gains from supervised entities. Such orders can be enforced in the federal courts. When there are

grounds for suspecting criminal activity, FINMA is required to refer cases for prosecution (SESTA Art. 35 VI).

Swiss law also provides for private rights of action for financial loss resulting from violations of the duties of corporate managers (Code of Obligations Art. 754). There are specific provisions establishing liability for misleading prospectuses for initial offerings (Art. 752) and misconduct by auditors (Art. 755). Private actions potentially may also be brought as general tort claims based on Code of Obligations Art. 41.

Thus, there is no need to augment the Swiss system through the extraterritorial application of civil remedies under U.S. law. Even more important, providing non-U.S. investors in Swiss companies with a private right of action for securities fraud in U.S. courts may result in conflicting judicial decisions, as U.S. and Swiss law may differ. It is not in the interest of Nations to have different regulations apply to the same case and thus invite plaintiffs to forum shop.

Switzerland notes that there is a long history of mutually beneficial cooperation between the Swiss and United States governments in criminal and administrative investigations and prosecutions of securities law violations. That cooperation has been achieved in a manner that respects the sovereignty and enforcement priorities of both countries. Switzerland reaffirms its view that international mutual assistance is the most effective mechanism for combating instances of genuinely transnational securities fraud schemes.

Switzerland is confident that the United States Government shares Switzerland's concern, and that it will take the necessary steps to encourage the Supreme Court to affirm the results of the decisions of the lower courts in this matter.

The Embassy of Switzerland avails itself of this opportunity to renew to the U.S. Department of State the assurances of its highest consideration.

Washington, D.C., 23 February 2010

United States Department of State
Washington, D.C.