No. 08-1191

MAY 1 - 2009

IN THE

Supreme Court of the United States

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

v.

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

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

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BRIEF FOR RESPONDENTS IN OPPOSITION

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

GEORGE T. CONWAY III
Counsel of Record
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

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

Counsel for Respondents

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

QUESTION PRESENTED

Whether the judicially implied private right of action under Section 10(b) of the Securities and Exchange Act of 1934 should, in the absence of any expression of congressional intent, be extended to permit fraud-on-the-market claims by a class of foreign investors who purchased, on a foreign securities exchange, foreign stock issued by a foreign company, when the claims arose under what the court of appeals called a "particular mix" of "novel[]" and "unusual" circumstances, Pet. App. 10a, 22a—namely, that (1) the conduct that was central to the alleged fraud, and that directly caused the alleged foreign losses, occurred in a foreign country, (2) only a lengthy chain of causation linked the alleged domestic conduct to the claimed foreign losses, and (3) there was no meaningful effect on American investors or American capital markets.

RULE 29.6 STATEMENT

Respondent National Australia Bank Limited has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

HomeSide Lending, Inc., which was named as a defendant below and as a respondent in this Court, no longer exists. It was succeeded in interest by Washington Mutual Bank (formerly Washington Mutual Bank, F.A.), which was a wholly owned subsidiary of Washington Mutual, Inc., a publicly traded company. On September 25, 2008, pursuant to Section 5(d)(2)(A) of the Home Owner's Loan Act, 12 U.S.C. § 1464(d)(2)(A), the Office of Thrift Supervision appointed the Federal Deposit Insurance Corporation to be Washington Mutual Bank's receiver. *Receivership of a Fed. Savs. Ass'n*, Order No. 2008-36, OTS No. 08551, 2008 OTS DD LEXIS 19 (Office of Thrift Supervision Sept. 25, 2008).

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

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

1. Founded in 1858, headquartered in Melbourne, Australia, and organized under Australian law, respondent National Australia Bank Limited ("NAB") was Australia's largest bank and financial institution during the period covered by the complaint. The bank's common equity consists of its "ordinary shares." For decades, NAB's ordinary shares have principally traded on the Australian Stock Exchange

("ASX"), now the Australian Securities Exchange; they traded as well on the London, Tokyo, and New Zealand stock exchanges. Australian law requires NAB to file extensive annual and semiannual disclosures with Australia's national securities regulator, the Australian Securities and Investment Commission. As a listed company on the ASX, NAB must also file additional "continuous" disclosures with that exchange. Australian law allows shareholders to sue issuers for securities fraud in Australian courts; it also provides for opt-out class actions as well.

NAB's ordinary shares *never* traded on any exchange in the United States, Pet. App. 2a, and in 1999, during the period covered by the complaint, *99.98* percent of the ordinary shares were held by investors *outside* the United States, C.A. App. 284. NAB issued American Depositary Receipts, or ADRs, that represented indirect interests in the ordinary shares and traded on the New York Stock Exchange. Pet. App. 2a, 25a. ADRs held by Americans represented only a tiny fraction of NAB's equity capitalization: in 1999, only 200 of the ADR holders had addresses in the United States, and their holdings represented only *1.1* percent of the company's ordinary shares. C.A. App. 280; Pet. App. 33a. Because of the ADRs, NAB filed its Australian disclosures with the SEC on Forms 6-K and 20-F. As the district court noted, however, petitioners "do not allege that they were even aware of the SEC filings, much less relied upon them." Pet. App. 42a n.9.[1]

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[1] Indeed, under the fraud-on-the-market theory of reliance that petitioners invoke, *see* p. 6, *infra*, there could not have been reliance upon, or loss caused by, the SEC filings: the filings with the SEC typically took place roughly two weeks *after* the original disclosures were first publicly released in Australia, *see*,

2. Petitioners' allegations of fraud stemmed entirely from disclosures NAB made in Australia about HomeSide Lending, Inc., a wholly owned NAB subsidiary based in Jacksonville, Florida. HomeSide was a mortgage servicer; in exchange for fees, it collected mortgage payments from homeowners and, from these collections, passed on payments to investors in mortgage-backed securities, to insurers, to taxing authorities, and to others. Rights to collect the mortgage servicing fees are called "mortgage servicing rights," or MSRs, and, under applicable accounting principles, were booked as assets of HomeSide and NAB.

As with other kinds of mortgage-related assets, valuing MSRs requires the use of complex models that involve business judgments and predictions about the future—most importantly, predictions about future interest rates and whether, in response to those predicted rates, homeowners will decide to prepay their mortgages. If interest rates fall, then homeowners become more likely to prepay their mortgages, which reduces the fees that the mortgage servicer can expect to receive. Predicting interest rates and prepayments is a treacherous task: not only is it difficult, if not impossible, to predict future interest rates, but there is in fact "no way to accurately anticipate the amount of prepayments that will result from changes in interest rates or other economic conditions."[2] As even the complaint acknowledged, different companies made different predictions

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e.g., C.A. App. 277, 290, 606-07, 622, meaning that the filings could not have affected share prices on an efficient market.

[2] Edward L. Pittman, *Economic and Regulatory Developments Affecting Mortgage Related Securities*, 64 NOTRE DAME L. REV. 497, 504 (1989).

on what prepayment rates would be. *See* C.A. App. 103 ("Bloomberg shows *each Wall Street firm's* view on prepayments" (emphasis added)). And as articles relied upon in the complaint made clear, MSR values were highly volatile: for example, "a 1 percent cut in [interest rates] would cut the value of the MSRs by 7 percent, [and] a 2 percent drop would slash it by nearly *two-fifths*." C.A. App. 1257 (emphasis added). Petitioners claim that differences between HomeSide's modeling assumptions and those made by other firms amounted to fraud; in fact, those differences resulted from good-faith judgments and a mistake.

At all events, thanks to an unprecedented series of interest rate cuts, 2001 ended up being a very bad year for MSRs: by year-end, rates had reached *40-year* lows. Partly as a result, NAB twice wrote down the carrying value of HomeSide's MSRs. The first write-down, in the amount of AU$888 million, took place on July 5, 2001; NAB's announcement, issued in Melbourne, Australia, stated that the write-down reflected "[u]nprecedented refinancing activity" caused by interest rate cuts in the United States.

The second MSR write-down, which NAB announced in Australia on September 3, 2001, was much larger—AU$3.05 billion. After the first write-down, NAB hired an outside consultant to help it estimate a sale value for HomeSide as a whole. During the course of the consultant's work, HomeSide discovered that it had been using a mistaken interest rate assumption in its MSR valuation model, and that other assumptions in the model had to be changed in light of, as NAB's announcement put it, "continued unprecedented uncertainty and turbulence in the mortgage servicing market." NAB accordingly wrote down AU$755 million for the interest-

rate mistake and AU$1.436 billion for the other changed assumptions. NAB also wrote down AU$858 million in goodwill because it had decided to sell HomeSide and to get out of the mortgage servicing business in the United States.

These losses at the nation's largest bank sparked an uproar in Australia, as the financial press there considered the write-down to be the "biggest investment disaster in Australian corporate history." C.A. App. 1258. On September 3, 2001, the price of NAB's ordinary shares dropped AU$4.30, from AU$33.20 to AU$28.90, on the ASX. The stock soon recovered, however, as NAB quickly moved to recoup its losses by selling HomeSide's assets; by February 2002, the ordinary shares traded as high as AU$34.80, *ibid.*—higher than they traded just before the second write-down was announced.

3. In late 2003, two putative class actions alleging violations of Section 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a), were filed in the Southern District of New York against NAB, HomeSide, and the individual respondents. The actions were consolidated, and the consolidated amended complaint, at issue here, asserted claims on behalf of three Australian named plaintiffs—Russell Leslie Owen, and Brian and Geraldine Silverlock—who purchased NAB ordinary shares on the ASX.[3] No class was ever certified because no motion for class certification was ever made.

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[3] The remaining named plaintiff, Robert Morrison, is an American who purchased ADRs, and although he is listed as a petitioner in this Court, his claims are not at issue. The district court dismissed Morrison's claims on the ground that he had failed to allege any damages, Pet. App. 43a-45a, and in the court of appeals, petitioners "focus[ed] exclusively on the claims of the

The complaint squarely alleged that Australians had committed a securities fraud in Australia upon Australians. It claimed that NAB made false and misleading statements about HomeSide, and that NAB had caused HomeSide's MSR valuations to be inflated. The complaint asserted on page two that HomeSide "used unreasonably optimistic valuation assumptions or methodologies"—but that it did so "*[a]s a result of NAB's conduct* in connection with HomeSide's financial modeling." C.A. App. 71 (emphasis added). And paragraph one on page one summed up the claim: "This action involves the *dissemination of materially false and misleading statements* during the Class Period concerning *fraud by NAB* at its subsidiary, HomeSide Lending, Inc." *Id.* at 70-71 (emphasis added). Relying on the fraud-on-the-market presumption of reliance, *see Basic Inc. v. Levinson*, 485 U.S. 224, 242-47 (1988), petitioners alleged that these "material misrepresentations and omissions" "directly or proximately caused" their losses by "inflating the price of NAB's securities." C.A. App. 112. For the Australian petitioners, of course, this loss-causing price inflation occurred *in Australia*, on the ASX.

And *every single one* of the alleged misstatements and omissions about the value of HomeSide's MSRs was made *in Australia* by NAB itself. The complaint cites and quotes at length no fewer than seven earnings and other market releases issued by NAB's annual reports for 1999 and 2000. *Id.* at 86-91, 93-94. As the documents themselves reflect, NAB's disclo-

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Foreign Plaintiffs and [did] not challenge the dismissal of [Morrison's] claims," *id.* at 5a n.3. In this Court, petitioners state that the claims of ADR holders such as Morrison "are not encompassed within the proposed plaintiff class." Pet. 6 n.2.

sures were prepared and issued *in Australia, e.g., id.* at 190, 277, 496, 606, 1265, and contained financial statements that were audited by an Australian accounting firm, *e.g., id.* at 277, 607. The complaint quotes statements made in these disclosures by NAB's Australia-based chief executive, respondent Frank Cicutto, *id.* at 86-87, 89-91, 93-94, statements made by NAB at an investor lunch in Sydney, *id.* at 94-95, and statements attributed to the company in the *Australian Financial Review*, Australia's leading financial publication, *id.* at 89, 92-94.

4. Respondents moved to dismiss the Australian petitioners' claims on the ground that they exceeded the territorial reach of the federal securities laws; the district court granted the motion. Pet. App. 23a.[4] In addressing the extraterritoriality question, the district court applied a four-decade-old body of case law that, as the court of appeals noted, "largely grew out of a series of opinions [the court of appeals] issued between 1968 and 1983." *Id.* at 11a.[5] These cases established an "effects test" and a "conduct test" to define the territorial scope of the federal securities laws. In general terms, the "'effects test'" looks to

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[4] Respondents also argued that petitioners had failed sufficiently to plead scienter under the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(2), and Fed. R. Civ. P. 9(b), and that petitioners had otherwise failed to state a claim. The district court did not address these contentions.

[5] *See, e.g., Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1044-46 (2d Cir. 1983); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 990-93 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1016-18 (2d Cir. 1975); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333-37 (2d Cir. 1972); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-08 (2d Cir.), *modified en banc on other grounds*, 405 F.2d 215 (1968), *cert. denied*, 395 U.S. 906 (1969).

"whether the wrongful conduct had a substantial effect in the United States or upon United States citizens," and the "'conduct test'" examines "whether the wrongful conduct occurred in the United States." *SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003). The conduct test, in particular, is a standard of direct causation: it holds that the federal securities laws apply to transnational frauds "only when 'substantial acts in furtherance of the fraud were committed within the United States,'" and is met only when "'the defendant's activities in the United States were more than "merely preparatory" to a securities fraud elsewhere' and . . . the 'activities or culpable failures to act within the United States "directly caused" the claimed losses.'" *Id.* at 193 (citations omitted).

The district court held that the Australian petitioners' claims failed both tests. As for the effects test, the court noted that the Australian petitioners "do not appear to contend" that "the alleged fraud had [any] demonstrable effect on the United States market." Pet. App. 33a. As for the conduct test, the court concluded that "a significant, if not predominant, amount of the material conduct in this case occurred a half-world away." *Id.* at 39a. "That the allegedly false statements pertained to NAB's domestically based subsidiary does not change the result," the court added, because "HomeSide's alleged conduct" in the United States "is not in itself *securities* fraud, but amounts to, at most a link in the chain of an alleged overall securities fraud scheme that culminated abroad." *Id.* at 39a, 41a. In particular, the district court emphasized that *all* of the elements of the Australian plaintiffs' claims took place in Australia: "(i) the allegedly knowing incorporation of HomeSide's false information; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv)

who detrimentally relied on the information in purchasing securities abroad." *Id.* at 41a-42a.

5. The court of appeals affirmed. Pet. App. 1a. The court remarked the "novelty" and the "unusual fact-pattern" of the case, which it said was the "first so-called 'foreign-cubed' securities class action"—involving "(1) *foreign* plaintiffs . . . suing (2) a *foreign* issuer . . . based on securities transactions in (3) *foreign* countries"—"to reach this Circuit." *Id.* at 10a-11a. The court nevertheless held that its "usual rules" governing the extraterritorial application of the federal securities laws—the conduct and effects tests—"still apply." *Id.* at 11a. Noting, as did the district court, that petitioners "rel[ied] solely on the conduct component of the test," *id.* at 8a, the court of appeals proceeded to apply that test standing alone.

The court of appeals explained that application of the conduct test required it to "identify which action or actions constituted the fraud and directly caused harm, . . . and then [to] determine if that act or those actions emanated from the United States." *Id.* at 13a-14a. The court stated that the analysis "boils down to what conduct comprises the heart of the alleged fraud." *Id.* at 18a. Petitioners argued that the heart of the fraud took place in Florida, at HomeSide: that "if HomeSide had not created and sent artificially inflated numbers up to its parent company, there would have been no fraud, no harm to purchasers, and no claims under Rule 10b-5." Pet. App. 18a. In essence, petitioners contended that the court of appeals' conduct test could be satisfied by a but-for, and not direct, causal link between the domestic conduct and their foreign losses.

The court of appeals rejected these arguments. "The actions taken and the actions not taken by NAB

in Australia," the court concluded, were "significantly more central to the [alleged] fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida." *Id.* at 19a.

The court cited three factors in support of its conclusion. The first was the fact that, as was reflected on the face of the lengthy NAB disclosures in the record, there was extensive activity in Australia involved in preparing the documents and statements that allegedly caused petitioners harm. It was NAB in Australia, not HomeSide in Florida, that was "the publicly-traded company," the court observed, and accordingly it was NAB's Australian "executives—assisted by lawyers, accountants, and bankers—[who took] primary responsibility for the corporation's public filings, for its relations with investors, and for its statements to the outside world." *Ibid.* These facts were critical to the causation analysis, the court concluded, because "Rule 10b-5(b)," upon which petitioners relied, "focuses on the accuracy of *statements* to the public and to potential investors," and "[l]iability [thus] requires a false or misleading statement" to investors. *Id.* at 20a.[6]

The second "significant factor" cited by the court was "the striking absence of any allegation that the alleged fraud affected American investors or America's capital markets." *Id.* at 20a. The fact that the petitioners "do not contend that what [respondents] allegedly did had any meaningful effect on America's investors or its capital markets," the court of appeals held, "weighs against our exercise of subject matter jurisdiction." *Id.* at 20a-21.

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[6] The court of appeals held that petitioners had waived their claims under Rules 10b-5(a) and (c), 17 C.F.R. §§ 240.10b-5(a), (c). Pet. App. 20a n.7.

The third and final factor was "the lengthy chain of causation between the American contribution to the [alleged] misstatements and the harm to investors." *Id.* at 21a. "HomeSide sent allegedly falsified numbers to Australia," the court of appeals observed, but "numbers had to pass through a number of checkpoints manned by NAB's Australian personnel before reaching investors," and petitioners did not "contend that HomeSide sent any falsified numbers directly to investors." *Ibid.* Indeed, the court of appeals noted that, given the absence of any domestic statements or acts communicated to Australian investors, the alleged domestic conduct could not have supported a finding of reliance, and thus liability, under this Court's decision in *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 769 (2008). Pet. App. 21a.

"This particular mix of factors," the court of appeals concluded, "add[s] up to a determination that we lack subject matter jurisdiction." *Id.* at 22a.[7]

[7] The courts of appeals and the district courts have consistently treated issues involving the territorial reach of the securities laws as questions of "subject matter jurisdiction." These "drive-by jurisdictional rulings" should have been rulings on the merits, *e.g.*, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-16 (2006), but this makes no difference to the outcome here. *See also AVC Nederland B.V. v. Atrium Inv. P'ship*, 740 F.2d 148, 153 (2d Cir. 1984) (acknowledging that treatment of conduct test as jurisdictional may be incorrect).

REASONS FOR DENYING THE PETITION

The decision of the court of appeals does not conflict with any decision of another court of appeals. Nor does it conflict with any decision of this Court; in fact, it reaches the only result permissible under this Court's precedents governing the extraterritorial application of federal law. At most, petitioners challenge the fact-bound application of a fact-sensitive standard to what the court of appeals called a "particular mix" of "novel[]" and "unusual" circumstances. Pet. App. 10a, 22a. Further review is not warranted.

1. The courts of appeals are not, as petitioners and their amicus contend, "deeply fractured" and in "entrenched" conflict on the territorial scope of Section 10(b). Pet. 10, 14; *see also* NASCAT Br. 6-7. Indeed, the claim of a circuit split is refuted by the fact that the *only* case petitioners specifically identify as "reaching [a] different result[] on essentially identical facts" is a *district court* settlement approval that relies exclusively on *Second Circuit* authority and is now on appeal in the Eleventh Circuit. Pet. 4n.1, 16 (citing *In re CP Ships Ltd. Sec. Litig.*, No. 8:05-MD-1656-T-27TBM, 2008 WL 4663363, at *1-*2 (M.D. Fla. Oct. 21, 2008) (citing and quoting *SEC v. Berger*, 322 F.3d 187, 192-95 (2d Cir. 2003)), *appeal docketed*, No. 08-16334 (11th Cir. Nov. 7, 2008)).

The court of appeals decisions cited by petitioners and their amicus do not conflict with the decision below. All apply the conduct test, and all rely upon Second Circuit authority in doing so. The material differences among these cases arise not from the slightly varying verbal formulations they use, but from the fact that the conduct test, by its nature, is highly fact-intensive, and in its application, is highly fact-bound. As the court of appeals put it below,

applying the conduct test is "an involved undertaking," Pet. App. 15a, and, as the district court noted, the "complexity of the required analysis means that individual cases are decided on very fine distinctions," *id.* at 32a. As three courts of appeals have observed, in any given case "the presence or absence of any single factor which was considered significant in other cases dealing with the question of federal jurisdiction in transnational securities cases is not necessarily dispositive." *Cont'l Grain (Austl.) Pty. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 414 (8th Cir. 1979), *quoted in IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980), and *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 175 (5th Cir. 1980).

a. Far from conflicting with the decision below, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987), save for one immaterial point, conforms to it. *Zoelsch* involved precisely the sort of "lengthy chain of causation" that is at issue here, Pet. App. 21a, and reached the same result for essentially the same reasons. The defendant, an American accounting firm, allegedly gave inaccurate information to a German accounting firm. The information concerned the United States assets of a German investment partnership. The German accounting firm, in turn, incorporated the information into a report that was provided in Germany to the German plaintiffs, who relied to their detriment upon misstatements and omissions in the report when they invested in the German partnership. 824 F.2d at 28-29.

In affirming the dismissal of the complaint, the District of Columbia Circuit expressly "defer[red] to *Bersch* and later Second Circuit cases and adopt[ed] the Second Circuit's approach." *Id.* at 32. The D.C. Circuit correctly noted that, under the Second Cir-

cuit's approach, courts "decline[] jurisdiction over alleged violations of the securities laws based on conduct in the United States when the conduct here was 'merely preparatory' to the alleged fraud, that is, when the conduct here did not 'directly cause' the losses elsewhere." *Id.* at 30 (citing *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 992-93 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975), and *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975)). The court concluded that the American accounting firm's activities "were 'merely preparatory' to any fraud perpetrated on West German investors, . . . did not 'directly cause' their losses, [and were] relatively small in comparison to those abroad." *Id.* at 35 (quoting *Bersch*, 519 F.2d at 987, 992-93).

To be sure, as the court below noted, the D.C. Circuit may have made "'a bit of an overstatement'" when it "hypothesized" that, under the Second Circuit standard, "'jurisdiction will lie [only] 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.'" Pet. App. 11a n.6 (quoting *Robinson v. TCI/US W. Commc'ns*, 117 F.3d 900, 905 n.10 (5th Cir. 1997), and *Zoelsch*, 824 F.2d at 31). But the overstatement made no difference to the result in *Zoelsch*: what controlled were the fact that the American firm's "statements were not themselves made for distribution to the public, and were not transmitted to the public," and the fact that it was the *foreign* firm that, in a foreign country, "alone" "prepared and certified" the "report [that] was circulated to investors" in that foreign country, 824 F.2d at 34—which happen to be *precisely* the circumstances the Second Circuit deemed controlling here, *see* Pet. App. 19a-21a. There is no conflict.

b. Nor does the decision below conflict with the Third, Eighth, and Ninth Circuit decisions cited by petitioners and their amicus. *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977), involved far more extensive and significant domestic conduct than was alleged here. The case involved "a 'ponzi'-like scheme" in which the American defendants, while operating *in the United States*, had fraudulently induced a foreign investor to buy shares in two *New Jersey-based* companies that the defendants looted and bankrupted. The Third Circuit noted that "various negotiations" with the foreign investor had occurred *in the United States*, that "execution of a key investment contract" took place "*in New York*," that defendants had maintained *in the United States* "records that were crucial to the *consummation* of the fraud," and that they had used "the *New York* office of a Swiss bank as a conduit for moneys received from [the victim]." *Id.* at 111, 115 (emphasis added).

The Third Circuit held that this more than sufficed to support the application of the federal securities laws. In so holding, the court discussed, approved, followed, and applied the Second Circuit's decisions in *Bersch* and *Vencap*, which it described as "leading opinions" issued by "'the Mother Court'" of securities law, "a court with especial expertise in matters pertaining to securities." *Id.* at 113, 115 & n.29 (citation omitted). Given the critical fraudulent conduct that had occurred in the United States, the Third Circuit concluded that "the conduct of the defendants here cannot be deemed to be 'mere[ly] preparatory' to fraudulent acts committed outside this country," and "question[ed] whether it can be convincingly maintained that such acts within the United States did not directly cause any extraterritorial losses." *Id.* at

115 (quoting *Vencap*, 519 F.2d at 1018, and discussing *Bersch*, 519 F.2d at 993). As a consequence, the court concluded that the Second Circuit's "prior pronouncements . . . len[t] great support" to its conclusion that the federal securities laws applied. *Id.*

The Eighth Circuit's decision in *Continental Grain*, 592 F.2d 409, likewise involved a straightforward application of the Second Circuit's conduct test to far more significant domestic conduct than was alleged here. The Australian plaintiff there purchased all of the stock of an Australian company from the defendant sellers, who included a corporation and an individual from California; the alleged fraud was that the defendants had failed to disclose the imminent termination of a material contract of the company they were selling. *Id.* at 411-12. In contrast to the case at bar, the critical failure to disclose occurred *in the United States*: the contract of sale was executed by two of the defendants in California, *id.* at 412, and the defendants, while "*in the United States*," wrote "letters and [made] telephone calls [that] in fact, constituted the organization *and completion* of the fraud," *id.* at 420 (emphasis added).

Quoting *Vencap* and *Bersch*, the Eighth Circuit held that, for the federal securities laws to apply, "[t]he conduct in the United States cannot be 'merely preparatory,' and must be material, that is, 'directly cause the losses.'" *Ibid.* (quoting *Vencap*, 519 F.2d at 1018, and *Bersch*, 519 F.2d at 993). The court held that this standard had been met because "the failure to disclose" was not only "*directed* from the United States," it was "*completed* in the United States," and the "defendants' conduct in the United States . . . was significant to [the] *accomplishment*" of the "'scheme of nondisclosure' [that] is *the heart of* Continental's al-

legation of securities fraud." *Id.* at 412, 420-21 (emphasis added). That is entirely consistent with Second Circuit case law, which has looked to whether "the fraudulent scheme was *masterminded and implemented* . . . in the United States," *Berger*, 322 F.3d at 194 (emphasis added),[8] to whether "conduct material to the *completion* of the fraud occurred in the United States," *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1046 (2d Cir. 1983) (emphasis added), and, in general, "to what conduct comprises *the heart of* the alleged fraud," Pet. App. 18a (emphasis added).

Nor, finally, does any conflict exist with *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983). There, as petitioners note, the Ninth Circuit adopted the standard set out in *Continental Grain*: "'The conduct in the United States cannot be merely preparatory . . . and must be material, that is, directly cause the losses.'" *Id.* at 424 (quoting *Cont'l Grain*, 592 F.2d at 420). Again, that language came straight out of *Bersch* and *Vencap*, the leading Second Circuit cases. And the application of the law to the facts was entirely consistent with the Second Circuit authorities as well: although *Grunenthal* involved the sale by the foreign defendants to the foreign plaintiff of all the stock of a Mexican corporation, the meeting "at which the agreement was signed, was held *in Los Angeles*, California." *Id.* at 422 (emphasis added). Not only that, it was during the meeting *in Los Angeles* that

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[8] Cases like the Second Circuit's decision in *Berger*, which involved a fraudulent transnational investment scam controlled, masterminded, and implemented from New York, make clear that frauds such as the "alleged Madoff and Stanford Ponzi schemes," NASCAT Br. 8; *see also* Pet. 5, 17, fall well within the scope of the conduct test in any of the circuits. *See, e.g., Berger*, 322 F.3d at 188-91, 194-95; *Kasser*, 548 F.2d at 110-12, 114-15.

the critical misrepresentation—that one of the defendants controlled the Mexican corporation—was "confirmed" by that defendant's "silence" and by his "signing of th[e] agreement." *Id.* at 425.

So the fraud in *Grunenthal* was consummated, and the critical misrepresentation was made, *in the United States.* These facts led the court to apply the federal securities laws. *Id.* at 425-26. More to the point here, the Ninth Circuit noted that its "[a]ssertion of jurisdiction under the facts of this case is not inconsistent with the approach taken by the Second Circuit," and observed that the Second Circuit had previously quoted language from *Continental Grain* "with approval." *Id.* at 426 (citing *Bersch*, 519 F.2d at 993; *Vencap*, 519 F.2d at 1018; and *Cornfeld*, 619 F.2d at 918). There is no split among the courts of appeals.

2. Even if a circuit split could be said to exist, this case would be a poor vehicle to resolve it. Given the facts, this case would come out the same way no matter which circuit's law were applied. That is most obviously so with the D.C. Circuit: if the standard there is that the domestic conduct must "comprise[] all the elements of a defendant's conduct necessary to establish a violation of section 10(b) and Rule 10b-5," Pet. App. 11a n.6 (quoting *Zoelsch*, 824 F.2d at 31), the complaint here would fail that standard. Not only is it true that *not all* of the elements of the fraud took place in the United States, but it is also a fact that *none* of the elements occurred here. The allegedly fraudulent statements to investors, the allegedly fraudulent intent in making those statements, the purchase and sale of securities, the asserted reliance or causation, and the claimed losses—*all of the elements of the Australian petitioners' claims* took place,

as the courts below recognized, *in Australia*. *See* Pet. App. 19a-22a, 41a-42a.

The other circuits would reach the same result here as well. The Ninth Circuit, in fact, has affirmed the dismissal of a case quite like this one. *Butte Mining PLC v. Smith*, 76 F.3d 287 (9th Cir. 1996), though not a class action, was a "foreign-cubed" case like this one: it had foreign plaintiffs, foreign defendants, and an alleged fraud involving purchases on a foreign exchange. "The sale occurred outside the United States . . . . The fraud alleged was a fraud committed by foreign individuals on a foreign corporation in a foreign country." *Id.* at 290. As with HomeSide in the case at bar, the only connection to the United States was that the underlying business was located here: the foreign company conducting the offering was formed to engage in mining in Montana, and the "assets underlying [the] stock" consisted of "mining property in Montana." *Id.* at 288-91.

In language very much like that used by the district court about NAB and HomeSide here, the Ninth Circuit in *Butte Mining* distinguished the Eighth Circuit's decision in *Continental Grain* and held that the federal securities laws did not apply:

> As far as the securities laws of the United States are concerned, the land transaction in Montana and the formation of the [subsidiary] corporations in Montana were not acts of securities fraud. They merely, at most, were steps that the Defendants allegedly took before bringing off the transaction in the United Kingdom said to have defrauded Butte. These preparatory actions did not furnish the district court with jurisdiction. The alleged facts are sharply distinguishable from those alleged in *Continental Grain* . . . We

> are not to be a haven for scoundrels; nor should we be a host for the world's victims of securities fraud.

Id. at 291; *cf.* Pet. App. 41a. This case would thus come out no differently in the Eighth and Ninth Circuits.

As for the Third Circuit, that court has not addressed a case like this one—but district courts in that circuit have dismissed two. *Blechner v. Daimler-Benz AG*, 410 F. Supp. 2d 366 (D. Del. 2006); *Tri-Star Farms Ltd. v. Marconi, PLC*, 225 F. Supp. 2d 567 (W.D. Pa. 2002). Both cases involved foreign-cubed fraud-on-a-foreign-market class actions like this one; both involved foreign investors' claims that they had purchased shares of a foreign company on a foreign exchange at prices allegedly inflated because of the foreign company's misstatements or omissions about events or operations in the United States; and both courts, applying Third Circuit law (which they understood to be substantially the same as that in the Second Circuit), held that the federal securities laws did not apply. *See Daimler-Benz*, 410 F. Supp. 2d at 367-68, 370-74; *Marconi*, 225 F. Supp. 2d at 576-81. As one of the district courts put it: "Simply making fraudulent statements about what is happening in the United States does not make those statements 'United States conduct' for purposes of the conduct test." *Marconi*, 225 F. Supp. 2d at 578. These cases and *Butte Mining* refute petitioners' conclusory claim that they "would prevail" under the standards used in the Third, Eighth, and Ninth Circuits, Pet. 15, and make clear that this case would not serve as a good vehicle to resolve the conflict they assert.

3. Petitioners and their amicus make no suggestion that the decision below conflicts with any

decision of this Court; indeed, the petition cites not one case decided by this Court. It is easy to see why.

Petitioners and their amicus concede, as they must, that the Securities Exchange Act of 1934 "furnish[es] no specific indications of when American federal courts have jurisdiction over securities law claims arising from extraterritorial transactions." *Zoelsch v. Arthur Andersen*, 824 F.2d at 30, *quoted in* Pet. 10; *see also* NASCAT Br. 5. For decades, the courts of appeals have recognized that there is no evidence of congressional intent to support the conduct test: "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." *Bersch*, 519 F.2d at 993. The conduct test thus reflects a "dubious" effort to "discern[] a purely hypothetical legislative intent." *Zoelsch*, 824 F.2d at 30. Indeed, to the extent there is any relevant evidence of legislative intent, it indicates that Congress "chose to protect *only* those investors whose trades occur inside the United States." Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 681 (1990) (emphasis added).

At the very least, this means that the conduct test must not be read generously—and that the decision below unquestionably reached the right result. This Court has consistently upheld 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) (emphasis added; quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). Here, not

only is the relevant statute, Section 10(b) of the Securities Exchange Act of 1934, "silent as to its extraterritorial application," *Alfadda v. Fenn*, 935 F.2d 475, 478 (2d Cir. 1991), but it also may be said to be *doubly* silent. Even as applied domestically, the private right of action under Section 10(b) is entirely "a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008). And since implied rights "'run[] contrary to the established principle that "[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation,"'" this Court has now made clear that "[t]he decision to extend [an implied] cause of action is for Congress, not for us," and that "[t]hough it remains the law, the § 10(b) private right should not be extended beyond its present boundaries." *Id.* at 772-73 (citations omitted).

As a result, there is even *less* of a basis here for extraterritorial application of federal law than there was in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007). The relevant statutes in those cases not only provide explicitly for private rights, but, as this Court noted, they also *expressly* provide for *some* degree of extraterritorial application; the question was how much.[9] Indeed, the Court

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[9] The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") expressly places "within the Sherman Act's reach" extraterritorial conduct that "has a 'direct, substantial, and reasonably foreseeable effect'" on American commerce, where the effect "'giv[es] rise to a [Sherman Act] claim.'" *Empagran*, 542 U.S. at 162 (quoting 15 U.S.C. §§ 6a(1), (2)). The Patent Act expressly provides that anyone who "'supplies or causes to be supplied in or from the United States all or a portion of the components of a patented invention . . . in such manner as to actively

noted in *Empagran* that arguably "the more natural reading" of the FTAIA was the one that would have sustained the foreign plaintiffs' claims, 542 U.S. at 174, and observed in *Microsoft* that "[p]lausible arguments can be made both for and against" the parties' constructions of 35 U.S.C. § 271(f), 550 U.S. at 442.

Yet in both cases, the Court held that the presumption against extraterritoriality required that the statutes not be applied extraterritorially. *Empagran*, 542 U.S. at 164-69; *Microsoft*, 550 U.S. at 454-56. The Court so held in *Microsoft* even though a domestic plaintiff had sued a domestic defendant for what was, in substantial part, domestic conduct (supplying components of a patented invention from the United States to places abroad). *Microsoft*, 550 U.S. at 445-47. And it so held in *Empagran*—which upheld the dismissal of what could be called a "foreign-cubed" antitrust case (foreign plaintiffs, foreign defendants, and foreign purchases and damages)—even though the foreign plaintiffs had alleged a global conspiracy in which "some of the anticompetitive price-fixing conduct alleged here took place in *America*." *Empagran*, 542 U.S. at 165 (emphasis in original).

The fact that petitioners' claims are securities-fraud claims offers no escape from the presumption against extraterritoriality. Contrary to the suggestions made below by petitioners, the SEC, and the court of appeals, the presumption is not suspended by

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induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination had occurred within the United States, shall be liable as an infringer.'" *Microsoft*, 550 U.S. at 445 (quoting 35 U.S.C. § 271(f)(1)). "Congress enacted § 271(f) specifically to extend the reach of United States patent law to cover certain activity abroad." *Id.* at 455.

the fact that "anti-fraud enforcement objectives are broadly similar" because governments throughout the world "are generally in agreement that fraud should be discouraged." Pet. App. 17a. This Court rejected just such a contention in *Empagran*, where the respondents pointed out "that many nations have adopted antitrust laws similar to our own." 542 U.S. at 167. The Court answered that "even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies." *Ibid*. That is no less true of securities fraud than price-fixing: establishing securities-fraud enforcement or compensation schemes involves a myriad of substantive and procedural choices about which nations can, do, and will, disagree. "The presumption that United States law governs domestically but does not rule the world," *Microsoft*, 550 U.S. at 454, applies with full force here.

4. Finally, the emphasis petitioners and their amicus place upon the SEC's invitation brief below only confirms that this case is unworthy of certiorari. As petitioners observe, the agency's thesis was that "the Second Circuit's case law on the 'conduct test' can be read to set forth a series of 'diverse formulations' of the applicable legal standard." Pet. 17 (quoting Pet. App. 49a (citation omitted)). The SEC complained that there was some "'tension' in the case law" *within* the circuit on the conduct test, and that district judges had been deciding cases by "engaging in . . . case-by-case comparison[s] of . . . specific fact patterns" and by making "'very fine distinctions.'" Pet. App. 49a (citations omitted).[10]

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[10] The SEC suggested that the court of appeals could solve the supposed problem and "bring needed clarity" to the conduct test, not by overruling any cases, but by emphasizing the words

The SEC's concerns about the Second Circuit's precedents do not justify further review here. This Court, of course, does not sit to review intra-circuit splits. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties," *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (dismissing certificate), and the proper device to resolve any "conflict of views which has arisen among the judges of [a court of appeals]" is "to apply for a hearing before the court en banc," *United States ex rel. Robinson v. Johnston*, 316 U.S. 649, 649 (1942) (per curiam), something petitioners chose not to do. When all is said and done, what petitioners complain of here is a court of appeals' fact-bound application of a fact-sensitive standard to what the court considered to be a "particular mix" of "novel[]" and "unusual" facts. Pet. App. 10a, 22a. That does not warrant review by this Court.

"material" and "substantial" instead of the phrases "merely preparatory" and "directly caused." Pet. App. 48a, 63a-66a, 68a-73a. But the proposed formulation would not have solved the problem the agency perceived. It would be no easier to determine what is "material" and "substantial" conduct in complex cases as it is to identify "direct" causes and "preparatory" activities. Indeed, oblivious to the inconsistency, the SEC's amicus brief actually *praised* its proposed standard *precisely because* the standard would give courts the "flexibility . . . to address the 'numerous combinations and permutations of, for example, the parties and the types, places, timing and effects of relevant conduct,'" *id.* at 72a (citation omitted)—in other words, because the standard would allow judges to continue to make case-by-case comparisons and fine distinctions. The proposed standard's claimed virtue was that it would still allow the vice. In any event, the agency greatly overstated the degree of "tension" in the Second Circuit's cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GEORGE T. CONWAY III
Counsel of Record
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019
(212) 403-1000

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

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

Counsel for Respondents

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