No. 17-664

IN THE

Supreme Court of the United States

PETRÓLEO BRASILEIRO S.A. – PETROBRAS, ET AL.,

Petitioners,

—v.—

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* ASSOCIAÇÃO BRASILEIRA DE BANCOS INTERNACIONAIS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

Associação Brasileira de Bancos Internacionais ("ABBI") is an association of 83 financial institutions operating in Brazil, including Brazilian banks and other financial institutions with a substantial number of foreign shareholders, Brazilian affiliates of banks headquartered abroad, and foreign-owned banks in Brazil. In the nearly 30 years since its founding in 1988 and on behalf of its members, ABBI has advocated for policies and practices that strengthen the Brazilian banking system and improve its ability to generate investment and financing for Brazil's economic development. To advance its goals, ABBI works closely with various financial organizations, associations, and public and governmental entities both within Brazil and globally.

Brazil's securities market is robust, and is subject to a comprehensive national regulatory regime. In 2011, Brazil "leapfrogged China as the most attractive market" for private equity fund manager dealmaking. Emerging Markets, Private Equity Association & Coller Capital, *Emerging Markets Private Equity Survey* 7 (2011), https://www.collercapital.com/sites/default/files/EMPEA_Coller_2011_Survey_-_final.pdf. In 2016, Brazil had the strongest stock market gains among all emerging markets using the U.S. dollar to compare

[1] This brief is filed with the written consent of all parties. No counsel for a party authored any part of this brief, nor has such counsel, a party, or any other entity or individual aside from ABBI, its members, or its counsel made a monetary contribution to fund the preparation or submission of this brief. The parties were given 10 days' notice of the filing of this brief.

global stock indices. *See* Alexander Jones, *What's Behind Brazil's Massive Stock Market Rally*, Int'l Banker (Mar. 21, 2017), https://internationalbanker.com/brokerage/whats-behind-brazils-massive-stock-market-rally/.

Consistent with its mission, ABBI's primary interest in this case is safeguarding the continued orderly and predictable functioning of the Brazilian capital markets and banking system, both of which the Second Circuit's decision threatens to disrupt.[2] As explained below, the Second Circuit's decision effectively exports U.S. securities laws to ensnare Brazil's public companies—including those with securities primarily listed on a Brazilian, rather than a U.S., exchange—in burdensome, risky, and often crippling class action litigation in the United States based on the mere possibility that their securities may have been traded in secondary market or over-the-counter transactions of which they are completely unaware.

SUMMARY OF THE ARGUMENT

In *Morrison v. National Australia Bank, Ltd.*, the Supreme Court assured a concerned global community that U.S. securities laws did not purport to govern the world. 561 U.S. 247 (2010). In recognition of the right of other sovereigns to regulate

[2] The Petition presents two questions for the Court's review: (1) the level of proof necessary to invoke the presumption of reliance under the Court's decisions in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) *(Halliburton II)*; and (2) whether plaintiffs must prove at the class certification stage that class membership can be ascertained in an administratively feasible manner. This brief addresses only the second of these issues.

their own markets, the Court held that U.S. securities laws would extend only to "securities listed on domestic exchanges, and domestic transactions in other securities." *Id.* at 267. This "transactional test" was meant to avoid "the interference with foreign securities regulation that application of § 10(b) abroad would produce." *Id.* at 269.

On the issue of ascertainability, the Petrobras Defendants and Underwriter Defendants had opposed class certification on the ground that there was no administratively feasible way to determine whether a putative class member had acquired Petrobras notes in a "domestic transaction" under the *Morrison* analysis. App. 86a. The District Court granted class certification, ruling—despite undisputed evidence to the contrary—that the *Morrison* issues could be resolved in a post-verdict "bureaucratic" determination, and thus that the proposed classes were "ascertainable and administratively manageable." *Id.* The Second Circuit ruled that administrative feasibility was not a required element for ascertainability, but vacated and remanded the case to the District Court for consideration of whether plaintiffs had satisfied Rule 23(b)(3)'s predominance requirement. App. 11a.

The Second Circuit's holding that administrative feasibility need not be established at the class certification stage leads to the very problems that *Morrison* and subsequent decisions sought to prevent: it effectively exports U.S. securities laws by compelling Brazilian and other foreign issuers to settle claims based on non-domestic transactions; it creates confusion among foreign investors and issuers regarding whether their rights and obligations have

been or are being affected by a proceeding in the United States; it amounts to a *de facto* application of U.S. law to foreign transactions through the imposition of class proceedings on disputes that ultimately cannot and will not be governed by U.S. law; and it conflicts with and undermines the securities laws and regulatory schemes of other sovereign nations. As a result, the absence of an administrative feasibility requirement permits U.S. policy decisions to usurp those of foreign sovereigns.

Therefore, this Court should grant certiorari, reverse the Second Circuit's administrative feasibility ruling, and hold that Rule 23 requires proponents of class certification to establish that their proposed class can be feasibly ascertained.

ARGUMENT

I. BRAZIL'S COMPREHENSIVE SECURITIES REGULATORY REGIME REFLECTS PUBLIC POLICY CHOICES THAT DIFFER SIGNIFICANTLY FROM THE PUBLIC POLICY CHOICES UNDERLYING U.S. SECURITIES LAW.

Brazil's securities regulatory regime reflects national policy decisions that differ in fundamental ways from the decisions reached by the United States. These differences include a greater role for the government in enforcement, stricter limitations on private rights of action, including class actions, and policies favoring the use of arbitration to resolve shareholder disputes. These policies were designed in part to attract foreign investment to Brazil, and have been instrumental in doing so: Brazil has the

largest securities market in Latin America in terms of trading volume, a fact that is at least partly attributable to "the development of the [country's] regulatory framework of the capital markets." 10B Int'l Cap. Markets & Sec. Reg. § 35B:1 (Oct. 2017 update).

In 2001, Brazil amended its Corporation Law, a central component of this regulatory framework, by, among other things, expanding the authority of the country's principal regulator, the Comissao de Valores Mobiliários ("CVM"), enhancing protections for minority shareholders, and strengthening the disclosure and registration requirements applicable to issuers. Law No. 6,404, of Dec. 15, 1976, as amended by Law No. 9,457, of May 5, 1997 and Law No. 10.303, of Oct. 31, 2001. Notably, these amendments also enabled corporations to include provisions in their bylaws requiring shareholders to arbitrate securities disputes. *Id.* This measure was a logical outgrowth of the Brazilian Arbitration Act, Law No. 9.307/96, enacted Sept. 23, 1996, which actively encourages the use of arbitration to resolve disputes relating to securities.

The 2001 amendments to the Corporation Law came shortly after the creation by Brazil's BM&FBOVESPA ("Bovespa"), the largest stock exchange in Latin America, of a special listing segment known as the Novo Mercado. Between 2004 and 2010, the vast majority of new listings on Bovespa were made by Novo Mercado companies. *See* Alan S. Gutterman, Business Transactions Solutions §352:8 (2016). To be eligible to list on the Novo Mercado, companies must adopt certain corporate governance provisions, including a mandatory

arbitration provision.[3] Novo Mercado's stringent corporate governance requirements are credited with enabling the robust growth of the Brazilian equity markets over the past 15 years. *See id.* (calling Brazil's financial sectors "one of the most developed and sophisticated . . . in Latin America" and attributing "the recent success of the Brazilian equity capital markets . . . to the credibility engendered by the Novo Mercado regulations.").

Brazilian shareholder disputes subject to mandatory arbitration, such as disputes involving Novo Mercado-listed companies, are resolved by the Market Arbitration Chamber ("CAM"). CAM provides for the efficient resolution of shareholder disputes, including securities fraud claims, arising under Brazilian Corporate Law, the Brazilian Civil Code, CVM regulations, and Bovespa rules. The putative class in the present case at one point included investors who both purchased Petrobras shares on the Bovespa and also purchased Petrobras securities on the New York Stock Exchange, "or pursuant to other domestic transactions." *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368, 375 (S.D.N.Y. 2015). The district court below recognized, when it dismissed Brazilian law claims asserted on behalf of these investors, that those claims were governed by a mandatory arbitration provision and could be brought only in CAM. *See id.* at 386-89.

In combination, these rules and regulations have helped attract foreign capital to Brazil by

[3] CVM vests Bovespa with self-regulating powers, enabling it to enact rules and supervise compliance by its member trading companies, its listed companies, and investors who agree to be bound by its rules.

establishing a clear, efficient, and predictable means of resolving investment disputes. *See, e.g.*, Daniella Tavares, Using Brazil's Regulatory System as Thoughtful Experience, Aspatore, 2009 WL 2511990, at *4 (Aug. 2009) ("The Arbitration Law, together with a few supportive judicial decisions, has favorably affected the confidence levels of foreign lenders because it established clear rules supporting arbitration in Brazil.").

The significant differences between the U.S. and Brazilian enforcement regimes magnify the impact of the Second Circuit's decision. That decision, as explained below, fosters uncertainty about the size, scope, and impact of U.S. class actions involving Brazilian-traded securities, thereby threatening the stability of the Brazilian financial system and securities market.

II. *MORRISON* AND RELATED DECISIONS WERE INTENDED TO UPHOLD INTERNATIONAL COMITY AND PREVENT THE EXPORT OF U.S. SECURITIES LAWS—CONCERNS THAT ARE DIRECTLY IMPLICATED BY THE RULING BELOW.

In *Morrison*, this Court reassured other sovereigns and the concerned global financial community that Section 10(b) of the Exchange Act applies only to domestic securities transactions. 561 U.S. at 267. The Court's ruling was based on the longstanding legal principle that U.S. legislation is meant to apply only within the United States, absent contrary Congressional intent. *Id.* at 255. This presumption against extraterritorial application of U.S. law serves important interests, "most notably

. . . to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016); *see also New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925) ("interference with the authority of another sovereign" is a matter the "other state concerned justly might resent"); *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

The concerns for international comity and non-interference with foreign laws are especially compelling in this case, for several reasons. *First*, the Court has recognized that the risk of conflict between U.S. and foreign law is particularly acute in the context of the securities laws, which are inherently complex, vary significantly from one country to the next, and embody innumerable policy considerations that are within the purview of each nation's sovereign power to regulate its own financial markets. As the Court noted in *Morrison*:

> [l]ike the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from [that of the United States] as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.

561 U.S. at 269 (citing *amici curiae* briefs of concerned foreign sovereigns and organizations).

Consequently, application of U.S. securities laws to foreign conduct almost always creates conflicts with the laws of other nations. *Id.* And the Court made clear that where the risk of such conflicts is evident, "the need to enforce the presumption [against extraterritoriality] is at its apex." *RJR Nabisco*, 136 S. Ct. at 2107; *see also EEOC v. Arabian Am. Oil Co. ("Aramco")*, 499 U.S. 244, 248 (1991) (noting that the presumption against extra-territoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.") (citation omitted), *superseded by statute on other grounds*.

Second, the extraterritorial application of U.S. law raises additional concerns in the class action context, particularly in class action securities litigation. The Court has cautioned that overly broad standards for discerning domestic from foreign applications of the securities laws could turn the U.S. into "the Shangri–La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." *Morrison*, 561 U.S. at 270.

Third, *Morrison* sought to establish a "clear" rule for avoiding impermissible "interference with foreign securities regulation" by limiting the application of § 10(b) to "domestic transactions." *Id.* at 269. In worldwide securities class actions, however, it is often far from clear whether a transaction was "domestic," even to the participants in the transaction.

A transaction is "domestic" for purposes of the *Morrison* standard if "the purchase or sale is made in the United States, or involves a security listed on a

domestic exchange." 561 U.S. at 269-70. For securities not traded on a U.S. exchange, determining whether a given transaction was domestic or foreign requires a complex, fact-intensive, and individualized analysis that "does not admit of an easy answer." *Id.* at 281 (Stevens, J. & Ginsburg, J., concurring in judgment but disagreeing with transactional test). *See, e.g., Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings Se.*, 763 F.3d 198, 217 (2d Cir. 2014) (holding that courts must pay "careful attention to the facts of each case" to determine whether each transaction involves a domestic sale or purchase). As the Second Circuit recognized below, absent "class-wide evidence of domesticity, the fact-finder would have to look at every class member's transaction documents to determine who did and who did not have a valid claim." App. 52a (internal alterations and quotation marks omitted). Among other things, courts must review "facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money" for each transaction. *Absolute Activist v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012).

The inquiry is further complicated by the fact that "many investment transactions involve touches with multiple countries or are executed by electronic or other means to which it is difficult to assign a location at all," Hannah L. Buxbaum, *Remedies for Foreign Investors Under U.S. Federal Securities Law*, 75 Law & Contemp. Probs. 161, 167-68 (2012), and that the securities at issue are traded internationally following the initial offering, including in secondary aftermarket and off-the-counter transactions.

The transaction documents needed to determine class membership may well be inaccessible to the parties. As Respondents admitted first in SEC filings and then in this litigation, "investors typically do not know which exchange their order is directed through, assuming it even occurs on an exchange." Joint Appendix (hereinafter "A-") A-3533-34, No. 16-1914 (2d Cir. July 21, 2016); *see also* A-4872. Even if transactional records are available, they are often held by third parties and intermediaries, and can be costly and difficult to obtain. The difficulty in acquiring this information is even higher for the defendant issuer, which is not a party to those secondary market transactions and would not necessarily know the third parties from whom to seek the relevant documentation or testimony.

In short, it may be impossible for even the parties to determine which investors are in the certified class without extensive discovery of third parties located around the world. The ruling below postpones this analysis until after a verdict. As a result, foreign issuers such as Petrobras and similarly situated institutions in Brazil, as well as potential class members themselves, must guess about the extent of their rights or obligations in a U.S. class action, if any. Neither will the parties know the size of the class or the identity of its members until after mini-hearings take place or a case is finally adjudicated. Such prolonged uncertainty undermines the "clear test" for avoiding interference with foreign securities regulation that *Morrison* intended to impose.

III. THE SECOND CIRCUIT'S RULING CONTRAVENES *MORRISON* AND UNDERMINES FOREIGN SECURITIES LAWS.

The Second Circuit's ruling directly undercuts the clear boundaries that *Morrison* sought to define by holding that plaintiffs need not show at the certification stage that class membership can feasibly be ascertained. When the size, scope, and composition of the certified class are completely unknown even to the parties themselves, foreign issuers will face undue pressure to settle liabilities of uncertain (and, at least temporarily, unknowable) magnitude; a settlement or defense verdict will leave all parties uncertain as to their rights; and foreign issuers and investors will be subject to U.S. laws, including potential discovery, even with respect to non-domestic transactions that fall outside the reach of U.S. securities law.

Accordingly, the Court should grant certiorari to resolve the split among the federal courts of appeal and hold that putative class representative plaintiffs must show at the certification stage that the members of a proposed class can be feasibly identified.

A. The Second Circuit's Decision Requires Issuer Defendants to Litigate Against a Class of Unknown Size and Scope, Forcing Defendants into Unduly High Settlements.

In large securities class actions, class certification places "hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially

ruinous liability." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (internal quotation marks omitted); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (any order certifying a large plaintiff class "may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); *In re Rhonepoulenc Rorer Inc.*, 51 F.3d 1293, 1297-98 (7th Cir. 1995) (Posner, J.) (defendants in large class actions "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."). For this reason, "very few securities class actions are litigated to conclusion. . . ." *West v. Prudential Securities, Inc.*, 282 F.3d 935, 937 (7th Cir. 2002).

Although such settlement pressure is a fact of life in class action litigation, the Second Circuit's ruling badly distorts the risk calculus by permitting certification of a worldwide class without any showing that class membership can feasibly be ascertained. Class counsel can be expected to assert settlement demands on behalf of a broad worldwide class of purchasers, encompassing transactions that have any domestic connection, however attenuated. As a result, issuers will be forced to value potential settlements without any idea of the size and scope of the class.

It is of no comfort to a Brazilian issuer that some indeterminable number of those purchasers may be culled from the class after the case has been litigated to verdict. Most cases settle. And, with respect to those cases that do not settle, the Second Circuit's approach deprives defendants of the ability to enforce a defense judgment. The inevitable effect of the

Second Circuit's rule thus is to ensure that Brazilian companies facing bet-the-company class action litigation will be pressured to enter settlements that are higher than the number of legitimate plaintiffs would warrant to "avoid[] the risk, however small, of potentially ruinous liability." *Hevesi*, 366 F.3d at 80. In entering into such inevitable settlements, Brazilian issuers will effectively be subjecting themselves to U.S. class action liability for non-domestic transactions, a result that *Morrison* specifically sought to avoid.

B. The Second Circuit's Decision Sows Uncertainty About the Impact of a Settlement or Defense Verdict on the Rights of Issuers and Investors.

With no feasible means to assess whether a particular investor is or is not a class member, foreign issuers and investors, including certain members of ABBI, will find it difficult to know whether their rights and obligations are being affected or have been affected by a U.S. proceeding. The certification of broadly defined, worldwide securities classes, such as those in the instant case, will leave foreign investors guessing as to whether they are actually class members (and whether they may forgo claims in other jurisdictions) or not.

Meanwhile, certification of classes incapable of feasible ascertainment will also leave Brazilian issuers that prevail against or settle with such classes unsure which claims have been thereby extinguished. In the event of a defense verdict following trial, disappointed investors will have every incentive to claim that they were not U.S. domestic

purchasers, diminishing the benefit to a Brazilian issuer of a favorable resolution.

This mutual confusion between Brazilian issuers and investors as to their legal rights and obligations in a U.S. class action will thus inject uncertainty into Brazil's financial system. Such interference with foreign securities regimes contravenes the principles underlying *Morrison*.

C. The Second Circuit's Ruling Undermines the Brazilian Regulatory Regime.

The Second Circuit's decision also opens the door for Brazilian citizens to eschew Brazil's remedial scheme in favor of that offered by the United States, effectively permitting U.S. policy decisions to trump Brazilian ones. Investors in Brazilian companies generally do not have standing to bring class actions. Generally speaking, shareholders in Brazilian companies are required to submit securities fraud claims to arbitration on an individual basis. *See* Part I *supra*; A-921-28. Under the Second Circuit's ruling, however, Brazilian investors who find themselves ostensibly included in a successful U.S. class action—because there is no evidence readily available to show otherwise—will have every reason to submit a claim in the hope of reaping benefits that they could not receive under Brazil's carefully legislated remedial scheme. Such a result "would unjustifiably permit [foreign] citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own" laws embody. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004).

The Court has recognized that this precise risk justifies the strict application of the presumption against extraterritoriality. *See RJR Nabisco*, 136 S. Ct. at 2107 (noting that the *Morrison* decision was premised in part on the risk that extraterritorial application of U.S. securities laws would "upset th[e] delicate balance" struck by securities laws in other countries). "[M]ost foreign countries proscribe securities fraud but have made very different choices with respect to the best way to implement that proscription." *Id.* Many countries "prefer[] state actions, not private ones for the enforcement of law," and countries that do permit private rights of action for securities fraud "often have different schemes for litigating them." *Id.* (internal alterations, quotation marks, and citations omitted).

Such is the case with Brazil. The enforcement of national securities laws is principally conducted by government agencies such as the CVM and various self-regulatory organizations; although a private right of action exists, nearly all private securities disputes are resolved through individual arbitration rather than litigation. Law No. 6,404, of Dec. 15, 1976, as amended by Law No. 9,457, of May 5, 1997 and Law No. 10.303, of Oct. 31, 2001 (Braz.); *see also In re Petrobras Sec. Litig.* , 116 F. Supp. 3d at 386-89. As discussed, key components of this legal framework, including mandatory arbitration of investor claims, were adopted in recent decades specifically in order to foster stability and predictability in Brazil's securities markets. *See* Part I, *supra*. The Second Circuit's ruling directly conflicts with this regulatory regime, jeopardizes the underlying policy decisions and goals, and usurps

Brazil's sovereign authority to regulate its own markets.

D. The Class Definition Approved by the Second Circuit Does Not Avoid the Conflict with *Morrison*.

The fact that the class that may be certified in this case would be limited to purchasers in "domestic transactions" does not bring the Second Circuit's ruling into line with *Morrison* and related decisions. By permitting class certification without a showing that class membership can feasibly be ascertained, the ruling below effectively tables the class membership *Morrison* analysis until after discovery and, potentially, summary judgment, trial, and a judgment as to liability. At that point, the damage to international comity and to foreign securities regulations—the harms that the presumption against extraterritoriality is meant to prevent, *RJR Nabisco*, 136 S. Ct. at 2100—will already have been done.

Indeed, as a practical matter, the ruling below will often mean that the *Morrison* analysis is never applied as to class membership, given the extraordinary settlement pressure that class certification exerts on defendants. At best, the determination of whether putative class members are (or are not) entitled to relief under U.S. law will be relegated to post-hoc "mini-hearings" or review by claims administrators. Even if this process were the appropriate way to ascertain class membership (it is not, as demonstrated by Respondents' Petition and Reply Brief), a bureaucratic claims procedure cannot plausibly serve as the steadfast "watchdog" that the Court has deemed necessary to guard against

prohibited extraterritorial application of U.S. law. *Morrison*, 561 U.S. at 266.

CONCLUSION

For the reasons set forth herein, ABBI respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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