No. 18-486

IN THE

Supreme Court of the United States

TOSHIBA CORPORATION,

Petitioner,

v.

AUTOMOTIVE INDUSTRIES PENSION TRUST FUND; NEW ENGLAND TEAMSTERS & TRUCKING INDUSTRY PENSION FUND,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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RULE 29.6 DISCLOSURE STATEMENT

The disclosure made in the Petition remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONER

While the Solicitor General and the Securities and Exchange Commission characterize this case as a "straightforward application" of *Morrison* (U.S. Br. 8, 20-21), this case in fact presents an important question that *Morrison* left unanswered: whether the Exchange Act *always* applies to a fraud claim based on a domestic transaction, even where the foreign defendant was not a party to the domestic transaction and did not engage in any relevant domestic conduct at all. *Morrison* had no occasion to address this question, because there was not even a domestic transaction at issue before this Court (a fact the SG & SEC acknowledge inconspicuously at the end of a footnote (*id.* 11-12 n.5)).

In opposing a writ of certiorari, the SG & SEC advance only insubstantial arguments. *Id.* 18-22. They note the "interlocutory" status of the case, but they do not and cannot maintain that "interlocutory" status has ever stopped this Court from considering an issue that is sufficiently developed and framed for this Court's review; moreover, the SG & SEC affirmatively assert that further development of the record would have "no bearing" on the issue of extraterritoriality. *Id.* 8-9. The SG & SEC also assert that the circuit split is not "square" (*id.* 19-20), but their explanations for why are specious; in fact, their own discussion of the Ninth and Second Circuit decisions *confirms* that those decisions are irreconcilable and that this case would have turned out differently in the Second Circuit. Lastly, the SG & SEC dispute the significance and "adverse effects"

of the Ninth Circuit's decision (*id.* 20-22), but in doing so the SG & SEC show callous insensitivity to the profound concerns expressed by a broad panoply of *amici* supporting certiorari, including various participants in the securities markets as well as foreign regulators who seek to avoid interference from an unwarranted extraterritorial assertion of U.S. securities law.

I. The SG & SEC Ignore That This Court Regularly Reviews Cases In A Similarly "Interlocutory" Posture

The SG & SEC acknowledge that the Ninth Circuit conclusively decided that the Exchange Act applies to Plaintiffs' claims, finding that the presence of a domestic transaction was, by itself, sufficient to defeat Toshiba's extraterritoriality argument. *Id.* 6-7, 12-14. The SG & SEC also acknowledge that the Ninth Circuit's remand was for further proceedings not on extraterritoriality but on subsequent issues, such as whether Toshiba's alleged fraud was "in connection with" the domestic securities transactions. *Id.* 16-18. And the SG & SEC acknowledge that, under the Ninth Circuit's decision, further development of the record on Toshiba's role in the domestic transactions would have "no bearing on the extraterritoriality analysis." *Id.* 8-9. Nonetheless, the SG & SEC maintain that the "interlocutory" status of the case makes it an unsuitable vehicle for certiorari. That position is meritless.

First, the SG & SEC ignore the examples that Toshiba cited (including three from 2018) in which this Court granted certiorari to review "interlocutory"

decisions permitting plaintiffs to amend their complaints. *See* Reply Br. 3-4. In fact, this Court routinely reviews cases where — as here — "further proceedings below would not likely aid [this Court's] consideration of" the question presented. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *see also, e.g.*, *Apple Inc. v. Pepper*, 138 S. Ct. 2647 (2018) (granting certiorari to review dismissal that was reversed); Stephen M. Shapiro et al., Supreme Court Practice 79, 83-85 (10th ed. 2013) (collecting cases).

This Court's recent extraterritoriality precedent, *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), also came to the Court after the court of appeals had reversed a dismissal. *Compare RJR Nabisco*, 136 S. Ct. at 2099 (granting certiorari "[b]ecause of [the circuit] conflict and the importance of the issue"), *with* Brief in Opposition at 13-15, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016) (No. 15-138) (opposing certiorari unsuccessfully, arguing case was "in an interlocutory and fluid posture").

Against this backdrop of case law demonstrating that "interlocutory" status is no obstacle to this Court granting certiorari in appropriate circumstances, the SG & SEC muster a single citation for the uncontroversial premise that "[t]his Court 'generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction.'" U.S. Br. 18 (quoting *Va. Military Inst. v. United States*, 113 S. Ct. 2431 (1993) [hereinafter "*VMI*"] (Scalia, J., concurring in denial of certiorari)). But that general comment was made in a context where further proceedings below were plainly relevant to the

question presented: remand in *VMI* allowed defendants to implement the injunctive relief that ultimately informed this Court's later review. *See United States v. Virginia*, 518 U.S. 515 (1996).

Notably, Justice Scalia's concurrence in *VMI* has not prevented the SG from frequently recommending certiorari in other "interlocutory" cases. *See, e.g.*, Brief for the United States as Amicus Curiae at 21, *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (No. 17-204) (recommending certiorari to review reversal of dismissal for reasons equally applicable here); Brief for the United States as Amicus Curiae at 9, *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707 (2018) (No. 17-571) (recommending certiorari to review affirmance of dismissal without prejudice); Brief for the United States as Amicus Curiae at 20, *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009) (No. 07-543) (recommending certiorari because "the interlocutory posture of the case" is not "a sufficient basis for denying certiorari" where court of appeals has decided "a controlling question of law" that has "divided the circuits" and remand "would in no way refine the question presented"); Brief for the United States as Amicus Curiae at 21, *Pac. Bell Tel. Co. v. LinkLine Commc'ns, Inc.*, 555 U.S. 438 (2009) (No. 07-512) (recommending certiorari "[n]otwithstanding the interlocutory posture of the case . . . to correct the Ninth Circuit's erroneous decision on an important legal issue and to resolve the conflict among the circuits").

Not only is there no impediment to this Court granting certiorari here to resolve the circuit conflict over the question presented, but denial of certiorari

because Plaintiffs' "claims could fail" on other grounds on remand (U.S. Br. 18) would be antithetical to *Morrison*. *Morrison* made clear that the increased likelihood of intrusive and costly *litigation* — not only liability — interferes with foreign securities regulation and risks harm to securities markets, as the United Kingdom, Japan, and the other *amici* here have warned. *See Morrison*, 561 U.S. at 269-70 (explaining that foreign litigation procedure "often differs" from U.S. litigation, raising the risks of "interference with foreign securities regulation" and forum shopping that makes the United States "the Shangri-La of class-action litigation" for plaintiffs' lawyers); *see, e.g.*, U.S. Chamber Amicus Br. 6-7, 15-21; SIFMA and CEI Amicus Br. 22-23. Indeed, the SG & SEC themselves argued in *Morrison*, at the merits stage, that the harms of applying Section 10(b) extraterritorially would materialize just by allowing "private actions [to] *go forward*." Brief for the United States as Amicus Curiae Supporting Respondents at 27 n.5, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (No. 08-1191) [hereinafter "U.S. *Morrison* Br."] (emphasis added).

II. The SG & SEC Effectively Acknowledge An Irreconcilable, On-going, And Dispositive Circuit Conflict

Oddly, the SG & SEC simply ignore that the Ninth Circuit emphatically stated its purposeful divergence from the Second Circuit's *Parkcentral* decision. *See* App. 33a ("[T]he principal reason that we should not follow the *Parkcentral* decision is because it is contrary to Section 10(b) and *Morrison*

itself."). In a considerable understatement, the SG & SEC reluctantly admit that "the understanding of *Morrison* reflected in the decision below is inconsistent with" the Second Circuit's *Parkcentral* decision. U.S. Br. 20.

While the SG & SEC are unwilling to admit that the circuit conflict is "square" (*id.* 19), their own description of the Ninth Circuit's split from the Second Circuit makes that fact obvious. *Id.* 6 ("The [Ninth Circuit] concluded that, under *Morrison*, the existence of such a 'domestic transaction' would be a *sufficient* ground for finding Section 10(b) to be applicable" (emphasis added) (quoting App. 32a)); *id.* 20 ("*Parkcentral* . . . state[d] that a domestic securities transaction is '*not alone sufficient*' to establish a domestic application of Section 10(b)" (emphasis added) (quoting *Parkcentral*, 763 F.3d at 215)).

The divergent outcomes in the Ninth and Second Circuits cannot be justified by any purported "distincti[on]" (*id.* 19) between the financial instruments at issue here (unsponsored ADRs created by third parties referencing foreign-listed securities) and those in *Parkcentral* (security-based swaps created by third parties referencing foreign-listed securities). By its express terms, Section 10(b) forecloses any such distinction, providing that the rules and judicial precedents under Section 10(b) shall apply to security-based swaps "to the same extent as they apply to securities." Pet. 27-28 (quoting 15 U.S.C. § 78j (App. 263a)).

Furthermore, contrary to the SG & SEC's suggestion, recent Second Circuit decisions do not in any way undermine the vitality of *Parkcentral* as controlling law in the Second Circuit. *See* U.S. Br. 20 (citing *Choi v. Tower Research Capital LLC*, 890 F.3d 60 (2d Cir. 2018), as a decision not citing *Parkcentral*, and *Giunta v. Dingman*, 893 F.3d 73 (2d Cir. 2018), as a decision "relying on *Parkcentral*"). As Toshiba has pointed out, but the SG & SEC ignore, *Choi* had no reason to address *Parkcentral* because the claims in *Choi* were against domestic parties to domestic transactions (Reply Br. 8; Pet. 25-26), and the Second Circuit's later decision in *Giunta* expressly characterized *Parkcentral* as the "Applicable Law" — which the court then applied (Reply Br. 7 (quoting *Giunta*, 893 F.3d at 82); Pet. 23-26).

The SG & SEC's speculation that the Second Circuit "may revisit" *Parkcentral* in light of this Court's statements in *RJR Nabisco*, followed in *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018), (U.S. Br. 20), ignores that both *Choi* and *Giunta* were decided *after RJR Nabisco*, and neither questioned *Parkcentral*'s authority on that (or any other) basis.

III. As In *Morrison*, The SG & SEC Fail To Recognize The Importance Of The Question Presented On The Extraterritorial Reach Of Section 10(b)

This Court granted certiorari in *Morrison* over the opposition of the SG & SEC. The Court then, at the merits stage, expressly responded to the concerns of various *amici* — the same concerns raised by many of

the same *amici* in this case — over the extraterritorial application of U.S. securities laws. *Morrison*, 561 U.S. at 269-70 (acknowledging that *amici* "urge the adoption of a clear test that will avoid" causing "interference with foreign securities regulation," and concluding that "[t]he transactional test we have adopted . . . meets that requirement"). The SG & SEC now rightly acknowledge that *amici*'s concerns in this case are "significant," "weighty," and to be taken "seriously." U.S. Br. 9, 21 (citing METI of Japan Amicus Br. 2; U.K. Amicus Br. 4-14). Yet the SG & SEC attempt to sideline those concerns as "disagreements with *Morrison*," contending that the decision below was "a straightforward application of *Morrison*." *Id.* 20-21; *see id.* 8, 18.

But the SG & SEC ultimately are forced to acknowledge, as the Ninth Circuit did below, that *Morrison* did *not* address claims involving domestic transactions. *Id.* 11-12 n.5 (quoting *Morrison*, 561 U.S. at 273 ("This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States.")); App. 27a-28a (same). Because *Morrison* dealt only with foreign plaintiffs' foreign transactions in foreign-issued securities, its holding cannot be construed as more than that such *foreign* transactions are *excluded* from the reach of Section 10(b). *See Morrison*, 561 U.S. at 250-51 ("We decide whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges.").

The SG & SEC note that the defendant in *Morrison* conceded that domestic purchases of its ADRs would be subject to the Exchange Act, and they add that this Court, in deciding *Morrison*, was careful to point out that those ADR purchases were not at issue. U.S. Br. 11 n.5. The SG & SEC fail to note that those ADRs in *Morrison* were *sponsored* by the defendant; this failure regrettably creates the misimpression that *Morrison*'s treatment of ADRs is relevant here, where the ADRs are indisputably *unsponsored*.

The SG & SEC, like the Ninth Circuit in the decision below, incorrectly assume that *Morrison*'s *exclusion* of foreign securities transactions from the reach of the Exchange Act necessarily meant that all claims based on domestic securities transactions were *included* within the statute's reach, even if all of the defendant's conduct took place outside the United States. Justice Scalia's opinion for the Court in *Morrison* could not have intended this "fallacy of the inverse (otherwise known as denying the antecedent): the incorrect assumption that if P implies Q, then not-P implies not-Q." *NLRB v. Canning*, 573 U.S. 513, 589 (2014) (Scalia, J., joined by Roberts, C.J., Thomas, J., and Alito, J., concurring). In other words, *Morrison*'s holding that private actions under Section 10(b) involving foreign transactions are impermissibly extraterritorial does not mean that all actions involving *non*-foreign transactions are *non*-extraterritorial applications of the statute.

This, of course, is the precise issue on which the circuits are split, because the Second Circuit expressly rejects such an inverse reading of *Morrison*:

> [W]hile that case unmistakably made a domestic securities transaction (or transaction in a domestically listed security) necessary to a properly domestic invocation of § 10(b), such a transaction is not alone sufficient to state a properly domestic claim under the statute. . . .
>
> If the domestic execution of the plaintiffs' agreements could alone suffice to invoke § 10(b) liability with respect to the defendants' alleged conduct *in this case*, then it would subject to U.S. securities laws conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchanges, in the absence of any congressional provision addressing the incompatibility of U.S. and foreign law nearly certain to arise. That is a result *Morrison* plainly did not contemplate and that the Court's reasoning does not, we think, permit.

Parkcentral, 763 F.3d at 215-16. The Ninth Circuit held this reasoning to be "contrary to Section 10(b) and *Morrison* itself." App. 33a.

Toshiba does not question *Morrison*'s replacement of the conduct and effects tests with a categorical exclusion as to foreign transactions. Rather, Toshiba and the *amici* supporting its position seek national uniformity on the question of whether a domestic transaction alone is sufficient, without exception, to

apply Section 10(b). Clarification is critical to prevent forum shopping and to ensure that courts avoid the foreign interference that *amici* describe and that *Morrison* explains Congress could not have intended. 561 U.S. at 269 ("The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'").

In *Morrison*, the SG & SEC took the position at the merits stage that: "Private securities actions . . . present a *significant risk of conflict with foreign nations* because the United States affords private plaintiffs litigation procedures and remedies that other countries often do not provide." U.S. *Morrison* Br. at 27 (emphasis added); *see id.* at 18 (warning of "international friction that might result if the United States attempted to apply its laws to securities-related conduct that has little relationship to this country" (citing *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004))). And, while the SG & SEC now attempt to minimize the potential for "practical effects" (U.S. Br. 18), at the merits stage in *Morrison* they articulated concrete risks: "If private actions could go forward based on an attenuated connection between United States conduct and the plaintiff's loss, the costs of doing business in the United States would increase, not only damaging domestic businesses, but also deterring '[o]verseas firms with no other exposure to our securities laws . . . from doing business here.'" U.S. *Morrison* Br. at 27 n.5 (quoting *Stoneridge Inv.*

Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 164 (2008)).

The SG & SEC also disregard the reciprocal litigation risk that U.S. issuers now may face in foreign jurisdictions. *See* Pet. 35-36; SIFMA and CEI Amicus Br. 18-19; *see also* Transcript of Oral Argument at 14, *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129 (2018) (No. 16-1011) (Justice Breyer expressing concern about "the chaos that would ensue" if other countries instituted reciprocal damages rules). Although the SG & SEC acknowledge that the enforcement powers of the DOJ and SEC under U.S. law will not be affected by this case (U.S. Br. 5 n.3, 15-16), the SG & SEC fail to account for the resulting interference with foreign regulators, who now may be "apt to resist [U.S.] enforcement efforts and perhaps to retaliate with counter-measures of their own" (U.K. Amicus Br. 10).

Finally, the SG & SEC have no basis to suggest that the Ninth Circuit's ruling is of "limited practical scope." U.S. Br. 21. Since the decision below, plaintiffs' lawyers already have begun soliciting plaintiffs for several new lawsuits against foreign issuers whose stock is referenced in unsponsored ADRs. *See* Reply Br. 12.

Over the last decade, this Court has consistently granted certiorari over the opposition of the SG & SEC in private securities actions. *See Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014); *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011); *Morrison*, 561 U.S. 247; *Trainer Wortham & Co. v. Betz*, 559 U.S. 1103 (2010). The

Court should do the same here, as the SG & SEC fail to appreciate that the Ninth Circuit decision squarely departs from the Second Circuit and risks profound consequences for foreign and domestic issuers as well as for foreign regulators.

CONCLUSION

For the foregoing reasons and those stated in the Petition and the Reply Brief, the Court should grant certiorari.

Respectfully submitted,

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