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

BRIEF OF *AMICI CURIAE* INSTITUTE OF INTERNATIONAL BANKERS AND SWISS BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Institute of International Bankers ("IIB") is the only national association devoted exclusively to representing and advancing the interests of banking organizations headquartered outside the U.S. that operate in the U.S. The IIB's membership consists of internationally headquartered banking and financial institutions. Collectively, the U.S. branches, agencies, banking subsidiaries, securities affiliates, and other operations of IIB member banks are an important source of credit for U.S. borrowers and enhance the depth and liquidity of U.S. financial markets.

One of the IIB's goals is to ensure that the global operations of its member banks, all of which are highly regulated by multiple jurisdictions, are not unreasonably impeded by the unjustified extraterritorial application of U.S. laws. These laws may conflict or be in tension with the laws or regulations of the home countries of IIB member banks. IIB members have a strong interest in continuing to do business in the U.S., and encouraging their non-U.S. clients to expand their cross-border business in the U.S. If the U.S. legal framework is viewed as drawing essentially home-country disputes into U.S. courts, the interests of IIB members will be adversely affected. The particular question presented here affects IIB members not just as financial institutions (such as when they advise foreign issuers on capital-market issues) but also as foreign issuers themselves (thus, many of the IIB's

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[1] All parties have filed blanket consents to the filing of *amicus* briefs. *Amici* certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief.

members have foreign-issued stock, and some of that stock is referenced in unsponsored ADRs traded in the United States over the counter). The question posed by this case is thus of great significance to the IIB and its members.

The Swiss Bankers Association ("SBA") is the leading professional organization of the Swiss financial center; its members include the vast majority of banks and other financial institutions operating in Switzerland. In consultation with Swiss regulatory authorities, SBA sets standards that govern the operation of banks in Switzerland. It also represents the interests of Swiss banks in dealings with both Swiss and international authorities. The question posed by this case is thus of great significance to the SBA and its members.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court relied on the presumption against extraterritoriality to hold that Section 10(b) of the Exchange Act does not cover foreign securities transactions. But it did not address the question whether the mere presence of a "domestic" securities transaction, without more, is a sufficient basis to apply Section 10(b). The Second Circuit has since held that it is not. The Ninth Circuit held in the decision below that it is — even though, in the case before it, the foreign defendant against which the claim was brought had no role either in the creation of the security that was traded or in the transaction itself.

In holding that the U.S. securities laws govern the conduct of foreign defendants without regard to

whether they have played any role in issuing the security subject to the suit or otherwise availed themselves of the U.S. securities market by engaging in a securities transaction here, the Ninth Circuit strayed from the statute's text and *Morrison*'s teaching that Section 10(b) reaches only fraud with a "*connection*" to domestic securities transactions. That error threatens to visit precisely the ills *Morrison* sought to avoid.

ARGUMENT

I. THE PETITION PRESENTS A CLEAR SPLIT

Morrison held that Section 10(b) covers fraud committed "in connection with" a securities transaction *only if* either (a) the security is registered in the United States or (b) the transaction is otherwise "domestic." Following *Morrison*, therefore, the existence of a domestic transaction is a necessary condition for applying Section 10(b). But *Morrison* did not resolve whether, regardless of the connection between the fraud alleged and the domestic transaction, the mere existence of that transaction is by itself a sufficient condition. That issue, squarely presented on this petition, has divided the Courts of Appeals most familiar with securities cases.

A. Reaffirming 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," *Morrison* construed Section 10(b) to apply only to domestic securities transactions. 561 U.S. at 267. Congress had given "no affirmative indication in the Exchange Act that §10(b) applies extraterritorially," the Court reasoned at *Morrison*'s first step, and, therefore, "it does not" apply extraterritorially. *Id.* at 255. And because

the focus of the statute is to regulate securities transactions, the Court continued, the statute's antifraud proscription applies "*only* [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Id.* at 267; see also *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016) ("At th[e] second step [in *Morrison*], we considered the '"focus" of congressional concern,' asking whether §10(b)'s focus is 'the place where the deception originated' or rather 'purchases and sale of securities in the United States.'").

Morrison affirmed dismissal of the complaint because the plaintiffs failed to allege that there was *either* a security listed on a domestic exchange *or* a domestic transaction. 561 U.S. at 273. *Morrison* thus had no occasion to pass specifically on the question presented in this case: whether Section 10(b) applies whenever there is some "domestic transaction" in an unregistered security, even if the only connection between the transaction and the alleged fraud is that a third-party pegged the security traded here to the price of a foreign-issued security, itself allegedly inflated by a fraud. See *id.*; see also *id.* at 253 n.1 (noting that case did not concern allegations of fraud in connection with the purchase or sale of any American Depository Receipt).

B. Four years later, the Second Circuit addressed the question left open in *Morrison*, holding that the existence of a domestic transaction is not by itself sufficient to trigger application of Section 10(b). *Parkcentral Global Hub* v. *Porsche Auto. Holdings*, 763 F.3d 198, 215 (2d Cir. 2014).

Parkcentral concerned fraud claims against Porsche for allegedly manipulating the value of the

shares of Volkswagen AG (VW), a German Corporation, by making false statements about VW. Although VW's shares "trade[d] only on foreign exchanges," there occurred in the United States transactions in "securities-based swap agreements" pegged to the price of VW stock. *Id.* at 207. The swap agreements did not involve the "actual ownership, purchase or sale of the reference securit[ies]." *Id* at 206-08. Nor was VW or Porsche a party to the swaps or to their creation; the swaps were created by third parties to "bet that VW stock would decline in value." *Id.* at 201.

The Second Circuit rejected the plaintiffs' position that Section 10(b) applied simply because the swap transactions occurred in the United States. "[C]areful[ly] consider[ing] . . . *Morrison*'s words and arguments," the court concluded that, even assuming the swaps qualified as "securities," and even if their purchase and sale were "domestic transactions" within the meaning of *Morrison*, that was not enough. *Id.* at 215. "[M]aking the statute applicable whenever the plaintiff's suit is predicated on a domestic transaction," the Second Circuit reasoned, "would seriously undermine *Morrison*'s insistence that Section 10(b) has no extraterritorial application." *Id.* Indeed, "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." *Id.* at 215–16. To "require courts to apply the statute to wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction" would create an "interference with foreign securities regulation" of the sort "*Morrison* plainly did not contemplate and that the Court's reasoning does not . . . permit." *Id.*

C. Four years after *Parkcentral*, the Ninth Circuit went the other way. In the decision below, the Ninth Circuit held that Section 10(b) applies so long as plaintiffs engaged in a domestic securities transaction, even if the defendant played no role in the issuance of the securities purchased or in the transaction.

In so holding, the court declined to "follow the *Parkcentral* decision" as that case involved swap agreements rather than ADRs (even though *Parkcentral* had assumed that the swaps were "securities"). 896 F.3d 933, 950 (9th Cir. 2018). Like the swap agreements in *Parkcentral*, the securities at issue in the decision below, known as unsponsored American Depository Receipts (or ADRs), are instruments that track a stock traded abroad, instruments that can be created without the participation — or knowledge — of the foreign issuer. *See* Investor Bulletin: American Depositary Receipts, SEC Office of Investor Education and Advocacy (Aug. 2012), http:// https://www.sec.gov/servlet/sec/investor/alerts/adr-bulletin.pdf (last visited Nov. 29, 2018). The ADRs in this case reference the price of Toshiba stock, which is regulated by the Japanese Securities Exchange Surveillance Commission and trades in Japan. Toshiba does not list or sell securities here, did not participate in the creation of the ADRs, and "did not sell the [ADRs] to any Plaintiffs because the [ADRs] were sold by a depositary bank without any connection to Toshiba; therefore, Toshiba had no connection to any domestic transaction." *Stoyas* v. *Toshiba Corp.*, 191 F. Supp. 3d 1080, 1094 (C.D. Cal. 2016).

Despite the attenuated connection between Toshiba and the ADR transactions, the Ninth Circuit held that Toshiba can be sued under Section 10(b) for

alleged fraud affecting the price of Toshiba's Japanese-traded stock, and indirectly affecting the ADRs pegged to that stock, simply because the ADRs were "securities" and plaintiffs bought them in the United States. 896 F.3d at 945-49. The court recognized that its decision "will result in the Exchange Act's application to claims of manipulation of share value abroad." *Id.* But it read *Morrison* to require that result.

* * *

In sum, the two Circuits that bear the heaviest load of securities cases[2] have now provided diametrically opposed answers to an important question left open by *Morrison* — is a domestic transaction in a security not registered in the United States sufficient to trigger application of Section 10(b) to claims of fraud against a defendant that had no role in the creation or issuance of the security or in the transaction itself? One Circuit has said "no," and another "yes" — notwithstanding that Section 10(b) expressly requires a "connection" between the fraud and the securities transactions forming the bases for the suit.

II. THE CASE PRESENTS AN IMPORTANT QUESTION

The Court should grant the petition to resolve the conflict between the Second and Ninth Circuits. This case concerns an important question affecting international commerce, and additional time is likely to exacerbate rather than redress the harm the decision below threatens to visit. Indeed, if the Court does not

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[2] Stanford Law School, Securities Class Action Clearinghouse, Filings Database, Heat Maps & Related Filings, http://securities.stanford.edu/circuits.html?page=10 (last visited Nov. 29, 2018).

resolve the split of authority, foreign entities will be well advised to govern themselves as if the Ninth Circuit's ruling is the law of the land, as plaintiffs will presumably have the ability to launch litigation there. That would be to the detriment of international markets and contrary to international comity concerns.

A. *Morrison* recognized the need to avoid unnecessary "interference with foreign securities regulation," given that "the regulation of other countries often differs from ours 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. For that reason, *Morrison* held that it was sensible to advise foreign issuers when their conduct would be subject to regulation in the United States, and decided to "adopt[]" and announce a "clear rule." *Id.*

The Ninth Circuit's decision, if permitted to stand, will undermine that clarity. It will subject foreign issuers to potential suit in the United States for their conduct abroad simply because a third-party may have decided, unbeknownst to them, to issue a U.S.-based security without the foreign issuers' involvement or consent, even when the issuers have expressly decided not to enter the U.S. securities markets the securities laws were designed to protect.

The resulting uncertainty imperils a broad range of economic activity. To order their affairs, parties involved in cross-border commerce must understand whether and in what circumstances they are subject to the U.S. securities laws. If they do not, then beneficial economic activity may be deterred altogether, or undertaken only at a higher cost.

B. As a result of the Ninth Circuit's decision, foreign issuers might decide that it is advisable to try to prevent the issuance of unsponsored ADRs. For example, SEC rules only allow unsponsored ADRs to issue if the referenced foreign issuer makes available certain specified non-U.S. disclosure documents in English. *See* Deutsche Bank, Unsponsored ADRs: 2017 Market Review (2017) ("DB Report"), at 3 (discussing exemption to Rule 12g3-2(b)). Thus, to try to avoid the expanded reach of Section 10(b), foreign issuers may cease providing those disclosures, making their shares ineligible to be referenced in unsponsored ADRs. Ultimately, though, that effort may prove ineffective — or, for issuers in the United Kingdom, Australia, and other English-speaking countries, impossible — because foreign issuers can do little to prevent *all* transactions in the U.S. that make some reference to their foreign-traded shares.

The net result is not sensible. Indeed, a regime in which foreign companies are unable to avoid the application of U.S. law by avoiding contact with the country is the definition of a regime in which U.S. law "rules the world" — the opposite of what the presumption against extraterritoriality teaches. *RJR Nabisco*, 136 S. Ct. at 2100.

C. The uncertainty also threatens to injure international financial institutions, including *Amici*'s members. International financial institutions are involved at every stage of the unsponsored ADR market, acting as local custodian banks, depositary banks, and brokers for ADRs. They can also function as advisors who wish to solicit their bankers' views as to modes of access to capital. Their activities in all those roles are heavily regulated under a number of foreign legal re-

gimes, any one of which may be in tension or open conflict with the terms of the Exchange Act. To the extent the Ninth Circuit's expansion of Section 10(b) in this case causes a contraction in the ADR market, its decision will deprive *Amici*'s members of the ability to participate in this beneficial economic activity, while imposing uncertainty and additional compliance costs on those ADR transactions that continue despite the ruling below.

* * *

Morrison's core teaching is that courts should not regulate foreign conduct unless Congress clearly intended that result. Consistent with that teaching, this Court should grant certiorari and reverse the Ninth Circuit's judgment. If a defendant accused of fraud under Section 10(b) had no role at all in the securities transaction (or the creation of the underlying securities) that is the supposed basis of the suit, then pointing to a domestic securities transaction is an empty bootstrapping device. For it cannot be said that the alleged fraud targeted in such a lawsuit has a "connection with" a domestic purchase or sale, as mandated by the text of Section 10(b) and *Morrison* itself.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision of the Ninth Circuit.

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