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 *AMICUS CURIAE* KEIDANREN (JAPAN BUSINESS FEDERATION) IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Morrison v. National Australia Bank, Ltd.*, 516 U.S. 247 (2010), this Court held that Section 10(b) of the Securities Exchange Act does not apply extraterritorially and reaches fraud only in connection with (i) transactions in securities listed on domestic exchanges and (ii) domestic transactions in other securities.

The question presented here is whether the Exchange Act applies, without exception, whenever a claim is based on a domestic transaction, as the Ninth Circuit held below, or whether in certain circumstances the Exchange Act does *not* apply, despite the claim being based on a domestic transaction, because other aspects of the claim make it impermissibly extraterritorial, as the Second Circuit held. In other words, is a domestic transaction necessary and sufficient for application of the Exchange Act, or is a domestic transaction necessary but, by itself, not sufficient for application of the Act?

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INTEREST OF AMICUS CURIAE[1]

Keidanren (Japan Business Federation) is a non-profit organization representing all branches of economic activities in Japan. As of December 2018, the organization consists of 1,539 members, of which 156 are associations, such as trade associations and regional economic organizations, and the balance are leading Japanese enterprises and foreign companies operating in Japan. The purpose of Keidanren is to maintain close contact with the various economic sectors in Japan and abroad in an effort not only to find practical solutions to economic problems but also to contribute toward the sound development of the economies of Japan and the world.

Among the 1,383-member enterprises of Keidanren, there are many Japanese enterprises whose stocks are the basis for unsponsored ADRs in the United States, such as Toshiba in this case. Other Keidanren members who have unsponsored ADRs traded in the United States include such companies as Mitsubishi Corporation, the East Japan Railway Company, Asahi Group Holdings, and Tokyo Gas Co., Ltd. If these and other Japanese companies are subject to the United States' Securities Exchange Act

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have provided the Clerk letters granting blanket consent to the filing of *amicus* briefs pursuant to Supreme Court Rule 37.2.

("Exchange Act"), although they are not listed on American exchanges and were not involved in issuance or transactions in unsponsored ADRs, it would cause large additional costs to their businesses and inefficiencies in the management of their corporate interests. Under these circumstances, there is a danger of injury to the economic relations between Japan and the United States that directly conflicts with the goal of Keidanren, which is, as a representative of the Japanese economic community, to contribute to the development of the Japanese economy and thus also to the world economy.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Morrison v. National Australia Bank, Ltd.*, this Court listened to the clarion call of numerous international *amici curiae*, all of whom "complain[ed] of the interference with foreign securities regulation that application of § 10(b) abroad would produce, and urge[d] the adoption of a clear test that will avoid that consequence." 561 U.S. 247, 269 (2010). This Court heard that call and adopted a test to "meet[] that requirement"—that the Exchange Act does not apply to transactions occurring outside the United States. *Id.* The Court based this holding in part on a determination that Congress did not intend for the United States to function as a global regulator of securities—indeed, "no one . . . thought the [Exchange] Act was intended to regulate *foreign* securities exchanges [and no one] believed that under established principles of international law Congress had the power to do so." *Id.* at 268 (quotation marks omitted; emphasis in original).

The transaction test adopted in *Morrison*, however, does not by itself protect the significant interests discussed in *Morrison* to guard against the extraterritorial application of the Exchange Act, *see id.* at 255 (noting 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"), and prevent regulation of *foreign* securities exchanges, *id.* at 268.

Relying on this Court's reasoning in *Morrison*—that extraterritorial application of the Exchange Act should be avoided—in *Parkcentral Global Hub Ltd. v. Porche Auto. Holdings SE*, the Second Circuit reasoned that while a domestic transaction was a *necessary* element for a § 10(b) claim, it was not alone *sufficient* to bring a § 10(b) claim when the "claims are so predominantly foreign as to be impermissibly extraterritorial." 763 F.3d 198, 216 (2nd Cir. 2014). The facts in *Parkcentral* dealt with securities-based swaps conducted in the United States regarding Volkswagen stock, which was traded solely in European markets. *Id.* at 206-207. The securities-based swaps which occurred in the United States were "essentially wagers on changes in the price of [Volkswagen stock]" and did "not involve the actual ownership, purchase, or sale of" Volkswagen's European stock." *Id.* at 206.

As this Court observed in *Morrison*, the Second Circuit has some "preeminence in the field of securities law." 561 U.S. at 260. The *Parkcentral* decision—that foreign securities-issuers are not subject to the Exchange Act as a result of manufactured transactions occurring in the United

States (of which they are not a party and may be completely unaware)—thus provided significant comfort and certainty to international businesses.

Such certainty, however, has now been destroyed by the Ninth Circuit's decision in *Stoyas v. Toshiba Corporation*. 896 F.3d 933 (9th Cir. 2018). In *Stoyas*, the Ninth Circuit rejected the Second Circuit's holding that the Exchange Act does not apply extraterritorially to "predominantly foreign" claims, and held that so long as there is a domestic transaction—even one in which the foreign defendant did not participate in any way—the Exchange Act will apply. *Stoyas* was based upon unsponsored American Depository Receipts ("ADRs")[2] but its reasoning applies to any ADR, any securities-based swap, or any transaction touching on foreign securities in any way occurring in the United States—even if the actual connection to such a security is purely notional.

Under *Stoyas*, companies can now be brought into U.S. courts in the Ninth Circuit for violations of U.S. securities law despite never listing their stocks on U.S. exchanges or transacting any shares in the United States. While the Securities and Exchange Commission ("SEC") has disclaimed any interest in being the world's securities police and regulating

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[2] These are a contract between a purchaser and a "depository institution" which holds shares in foreign corporations, with the contractual terms specified in the ADR. *Stoyas*, 896 F.3d at 941. Unsponsored ADRs, however, are "established with little or no involvement of the issuer of the underlying security." *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 367 (3d Cir. 2002).

foreign securities,[3] the *Stoyas* decision allows plaintiffs to conscript U.S. courts into such a role.

Further, due to the circuit split on this issue, companies—including many of the members of Keidanren—are uncertain of how they can possibly avoid application of U.S. securities laws. Simply by listing their stock on the securities market in their own country or any foreign securities market outside of the United States, they may be subject to liability in the United States, and may need to comply with U.S. securities laws. Such a conclusion—and the very real threat that they will be subject to liability in the "Shangri-La of class action litigation," i.e., the United States, *see Morrison*, 561 U.S. at 270—will greatly increase compliance costs and may lead to conflicting and confusing mandates between a company's domestic regulatory requirements, and those required to avoid liability in the United States. Such exposure may result in businesses and governments taking

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[3] *See* Investor Publications, *International Investing*, U.S. SECURITIES AND EXCHANGE COMMISSION, (December 7, 2016), *https://www.sec.gov/reportspubs/investor-publications/investorpubsininvesthtm.html* (last accessed December 4, 2018) (advising international investors that they "may have to rely on legal remedies that are available in the home country, if any" rather than on U.S. courts or the SEC). Instead of regulating foreign securities markets, the SEC works to promote and cooperate with foreign regulators to help protect U.S. market participants who are "active in . . . markets outside the United States." *See* Office of International Affairs, *International Regulatory Policy*, U.S. SECURITIES AND EXCHANGE COMMISSION (May 31, 2018), *https://www.sec.gov/about/offices/oia/oia_regpolicy.shtml* (last accessed December 4, 2018) (describing how the SEC "supports international efforts to raise regulatory standards and promotes cooperation among the world's securities regulators" and noting that the SEC works to "limit conflicting regulations" for "cross-border business").

protective action that would harm international business as well as American investors. Ultimately, keeping the *Stoyas* decision in place—even by means of a denial of certiorari—will have an ongoing and significant negative impact on Japanese-United States economic relations.

None of this is necessary. As this Court has recognized, foreign regulators are far better positioned than American courts to regulate foreign securities, and investors such as the Plaintiffs in this matter may look to their depository banks and have them sue the foreign issuers under the relevant foreign securities laws, in order to assert their rights.

Moreover, § 30(b) of the Exchange Act itself specifically states that its provisions "shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States." 15 U.S.C. § 78dd. Thus, in enacting the Exchange Act, Congress explicitly stated that the act should not apply to persons—like Toshiba—whose only business in securities is "without the jurisdiction of the United States"—in this case in Japan.

Accordingly, for these reasons, this Court should grant the petition for certiorari and reverse the decision of the Ninth Circuit.

ARGUMENT

I. THE UNITED STATES' COURTS SHOULD NOT BE THE WORLD'S POLICEMAN ENFORCING U.S. SECURITIES LAWS WORLDWIDE.

Prior to the stock-market crash of 1929, there was little federal regulation of the securities market in the United States. But following that calamity, Congress investigated and passed both the Securities Act of 1933 and the Securities Exchange Act of 1934.[4] The key theme embraced by Congress in crafting a new federal securities law was disclosure, and there are extensive rules and regulations about what issuers and traders in securities in the United States must disclose. *See, e.g.*, 15 U.S.C. § 78m (requiring every issuer of a covered security to issue regular reports pursuant to SEC rules).

But just as the United States may pass rules to govern the transaction in securities in the United States, other nations may—as is their sovereign right—choose to establish their own securities laws and regulations to govern the actions of companies issuing securities in those countries. In Japan, for example, the Japanese Diet passed the Securities and Exchange Act in 1948, which was reformed in 2006 to establish the Financial Instruments and Exchange Act ("FIEA"). The FIEA provides, *inter alia*, disclosure obligations for public companies in Japan.[5] The Japanese Government has also established the Financial Services Agency ("FSA") and the Securities and Exchange Surveillance Commission ("SESC")

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[4] *See* U.S. Securities and Exchange Commission, *What We Do: Creation of the SEC*, SEC (June 10, 2013), *https://www.sec.gov/Article/whatwedo.html* (last accessed December 4, 2018).

[5] Financial Services Agency, *Financial Instruments and Exchange Act*, FINANCIAL SERVICES AGENCY (2017), *https://www.fsa.go.jp/en/policy/fiel/index.html* (last accessed December 4, 2018).

which both have roles in monitoring and regulating the markets to protect investors.[6] Other countries similarly have their own securities laws and government regulators.[7]

Each of these countries have reached their own balance between disclosure and other investor protections and companies' freedom to engage in commercial activities. And prior to the *Stoyas* decision, companies could generally assume that so long as their securities actions took place solely within their home nation, they need only concern themselves with their own national laws and regulator.

Indeed, in determining what conduct to regulate, the SEC has firmly embraced the fact that the SEC should not be the world's policeman, and that so long as companies comply with their own nation's

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[6] *See* Securities and Exchange Surveillance Commission, *The SESC's Efforts*, SESC, *https://www.fsa.go.jp/sesc/english/aboutsesc/actions.htm* (last accessed December 4, 2018).

[7] *See, e.g.*, Bank of England, *The PRA's Statutory Powers*, BANK OF ENGLAND (July 26, 2018), *https://www.bankofengland.co.uk/prudential-regulation/pra-statutory-powers* (last accessed December 4, 2018); BaFin Federal Financial Supervisory Authority, *Functions and History*, BAFIN (May 28, 2013), *https://www.bafin.de/EN/DieBaFin/AufgabenGeschichte/aufgabengeschichte_node_en.html* (last accessed December 4, 2018); Securities and Exchange Commission of Brazil, *Brazilian Financial Sector Regulatory Structure*, COMISSÃO DE VALORES MOBILIÁRIOS *http://www.cvm.gov.br/subportal_ingles/menu/about/jurisdiction.html* (last accessed December 4, 2018); China Banking Regulatory Commission, *About the CBRC*, CBRC, *http://www.cbrc.gov.cn/showyjhjjindex.do* (last accessed December 4, 2018).

disclosure regulations and publish such disclosure in English, they need not register with the SEC. *See* 17 C.F.R. § 240.12g3–2 (providing an exemption to SEC registration if the foreign security is owned by less than 300 persons resident in the United States or if the shares are traded on a foreign exchange and the issuer publishes in English the documents it has "been required to make public pursuant to the laws of the country of its incorporation, organization, or domicile"). Similarly, in considering amendments to the securities laws, Congress noted that "[a]s a practical matter . . . enforcement of the registration and reporting requirements . . . against foreign issuers outside the jurisdiction of the United States who do not voluntarily seek funds in the American capital markets or listing on an exchange would present serious difficulties." S. Rep. No. 379, at 29 (1963).

This decision not to enforce U.S. securities law worldwide has been made despite the fact that, as of December 31, 2017, "U.S. investors held approximately 13 percent of the common stock issued by foreigners" worldwide.[8] Overall, U.S. investors hold more than $12.4 trillion in international securities and debt instruments,[9] including $895 billion in Japanese common stock, or approximately 14% of the entire Japanese market capital.[10] Indeed, in passing the Securities Act Amendments of 1964,

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[8] *See* DEPARTMENT OF THE TREASURY, FEDERAL RESERVE BANK OF NEW YORK, AND BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, U.S. PORTFOLIO HOLDINGS OF FOREIGN SECURITIES 13 (2018), *http://ticdata.treasury.gov/Publish/shca2017_report.pdf* (last accessed December 4, 2018).

[9] *Id.* at 4.

[10] *Id.* at 14.

Pub. Law 88-467 (Aug. 20, 1964), Congress specifically amended the securities laws so that the SEC can exempt from registration requirements "any security of a foreign issuer," *see* 15 U.S.C. § 78l. The legislative history specifically discussed the use of ADRs, and noted that "[f]or the purposes of the securities laws, ADR's are considered a security *separate from the underlying shares* . . . ." S. Rep. No. 379, at 29 (1963) (emphasis added). Congress recognized that ADRs would be governed by American securities laws, but that the underlying shares would not be, and that any attempt at regulation or enforcement of foreign issuers that did not voluntarily seek funds from the U.S. capital markets would result in "serious difficulties." *Id.*

In addition, international privity and the important principle of reciprocity—i.e., not having foreign governments attempt to regulate United States companies whose securities are traded on U.S. markets—is also critical, as foreigners hold some 14.1% of U.S. equities and own a total of $18.4 trillion in U.S. equity and debt.[11] As this Court recognized in *Kiobel v. Royal Dutch Petroleum Co.*, there is a significant threat that in allowing foreigners to be haled into U.S. courts based on conduct occurring in other sovereign nations, that "other nations . . . could hale our citizens into their courts for alleged violations of the law . . . occurring in the United States." 569 U.S. 108, 124 (2013). *Kiobel* explained

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[11] *See* DEPARTMENT OF THE TREASURY, FEDERAL RESERVE BANK OF NEW YORK, AND BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FOREIGN PORTFOLIO HOLDINGS OF U.S. SECURITIES 7, 13 (2018), *http://ticdata.treasury.gov/Publish/shla2017r.pdf* (last accessed December 5, 2018). Japanese citizens own $490 billion in U.S. equities. *Id.* at 13.

that "[t]he presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches." *Id.*

Yet the Ninth Circuit's decision in *Stoyas* throws this careful policy determination made by Congress and the SEC under the bus, and contrary to this Court's guidance in *Kiobel* and *Morrison*, engages U.S. courts as global-securities enforcers, applying U.S. law regarding securities fraud to foreign corporations. Under *Stoyas*, a foreign corporation may have no involvement in the U.S. securities market, and may restrict their securities trading to foreign exchanges, yet still be dragged into U.S. courts by plaintiffs who purchased interests, created by third parties, in the corporation's shares, wholly unbeknownst to the corporation. It violates basic notions of fairness and international comity that a foreign corporation can be subject to liability in the United States based on acts by third parties undertaken without the corporation's knowledge or consent.

As one issuer of unsponsored ADRs, Citibank, explains, because there is "no direct involvement of the non-U.S. company" in the creation of an unsponsored ADR, "the determining factor for the establishment of unsponsored ADR programs is investor demand."[12] The SEC does not allow for

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[12] *See* CITIBANK ISSUER SERVICES, UNSPONSORED AMERICAN DEPOSITORY RECEIPTS (ADRS), (2018), *https://depositaryreceipts.citi.com/adr/common/file.asp?idf=1117* (last accessed December 4, 2018).

unsponsored ADRs to be traded on any domestic stock exchange, so any trades must occur in the over-the-counter (OTC) market.[13] All that is needed for the creation of an unsponsored ADR is for an investor to request one, after which "their broker can . . . purchase ordinary shares in the respective non-U.S. company and then deposit the shares in custody with the depository bank for the creation of the ADR instrument."[14] Some unsponsored ADRs are traded OTC, but others are simply "issued"—with the foreign shares purchased and deposited in the depository bank—and "cancelled"—where the underlying ordinary shares are sold on the home market and the proceeds remitted to the investor. *Id.* An unsponsored ADR can thus act as a way to purchase foreign securities abroad while having the depository bank take care of all international reporting and taxation requirements.

There is no restriction on the type of companies that may have unsponsored ADRs, and there is no requirement whatsoever to let those companies know that transactions based on their shares may be taking place in the United States. Toshiba is a well-known company whose securities trade only on the Tokyo and Nagoya Stock Exchanges, but whose operations span the globe. It expects that it will be subject to U.S. law, but only on issues where it has engaged in business in

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[13] *See* Office of Investor Education and Advocacy, *Investor Bulletin: American Depositary Receipts*, U.S. SECURITIES AND EXCHANGE COMMISSION (August 2012), *https://www.sec.gov/investor/alerts/adr-bulletin.pdf* (last accessed December 4, 2018).

[14] *See* CITIBANK ISSUER SERVICES, UNSPONSORED AMERICAN DEPOSITORY RECEIPTS (ADRS), (2018), *https://depositaryreceipts.citi.com/adr/common/file.asp?idf=1117* (last accessed December 4, 2018).

the United States. Toshiba, and other companies whose shares are used as the basis for unsponsored ADRs, swaps, or other secondary or notional transactions, do not expect that they will be subject to U.S. securities laws.

But unsponsored ADRs can be taken out on businesses that work solely in their home markets and have no expectation whatsoever of any foreign law being applied to their business. For example, Tokyo Gas Company is a Keidanren member and is the largest municipal natural gas provider in Japan, serving more than 11 million Japanese customers in the Tokyo metropolitan area.[15] Its stock is listed only on the stock exchanges in Tokyo and Nagoya.[16] Tokyo Gas conducts some business overseas, mainly natural gas exploration and development,[17] but at its heart, it is a domestic gas utility incorporated in Japan. It has no reason to believe that it should be subject to U.S. securities law, but millions of dollars' worth of its shares are nonetheless held by American investors in unsponsored ADRs through Deutsche Bank, Bank of New York, Citibank, and J.P.

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[15] Tokyo Gas, *About Us: Profile*, TOKYO GAS (March 31, 2018), *https://www.tokyo-gas.co.jp/en/aboutus/profile.html* (last accessed December 4, 2018).

[16] Tokyo Gas, *FAQ: On What Stock Exchange is Tokyo Gas Listed?,* TOKYO GAS (Sept. 30, 2013), *https://www.tokyo-gas.co.jp/IR/english/qa/index_e.html* (last accessed December 4, 2018).

[17] Tokyo Gas, *Overseas Business*, in TOKYO GAS ANNUAL REPORT 2016 29-30, *https://www.tokyo-gas.co.jp/IR/english/library/pdf/anual/16e10.pdf* (last accessed December 4, 2018).

Morgan.[18] Subjecting such a company to securities litigation in the United States would be wholly unfair.

And while the focus in this case is on unsponsored ADRs, there is nothing in the Ninth Circuit's reasoning that so limits the *Stoyas* ruling. Under *Stoyas*, any transaction which occurs in the U.S. involving foreign securities, regardless of the foreign company's participation in or knowledge about the U.S. transaction, permits applicability of the Exchange Act. This holding thus applies to the securities-based swaps considered in *Parkcentral*, and also applies to exchange traded funds, and other funds held by U.S. investors that invest internationally. Trillions of dollars of U.S. transactions every year are tied, frequently indirectly, to foreign securities, and each of these foreign securities issuers will now be subject to suit in the United States under U.S. law.

In *Morrison*, this Court looked at the possibility that U.S. courts would become the global securities enforcer and recoiled. Yet with the *Stoyas* ruling, the same possibility has resurfaced, and if the decision is allowed to stand, there is no doubt that plaintiffs' attorneys will beat a swift path to the Ninth Circuit to adjudicate every stock-drop case with regard to international securities. This will result in significant problems for foreign companies and governments.

II. LETTING THE NINTH CIRCUIT DECISION STAND WILL RESULT IN SIGNIFICANT PROBLEMS AND

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[18] *See* Deutsche Bank Depositary Receipt Services, *Depositary Receipt Directory*, *https://www.adr.db.com/drwebrebrand/dr-universe/dr_universe_type_e.html* (last accessed December 4, 2018).

UNCERTAINTY FOR BUSINESSES AROUND THE WORLD.

International companies have a problem with *Stoyas* and with the U.S. securities regulation system that it creates. With the divergence between *Parkcentral* and *Stoyas*—in the two key jurisdictions of the Second and Ninth Circuit—companies simply do not know if they will be subject to liability in the United States or what they can do to prevent such liability. *Morrison* and *Parkcentral* provided certainty for Japanese and foreign companies: the Exchange Act does not apply to them if they do not list their securities on American exchanges and do not participate in securities transactions in the United States. Now there is significant concern among Japanese businesses that simply by listing their stock on the Tokyo Stock Exchange (or other Japanese exchanges), they expose themselves to securities regulation and enforcement by the United States, and potentially other nations who may follow the example of the United States in applying their securities laws extraterritorially.

U.S. securities laws and liabilities are very different than foreign securities laws. As this Court observed in *Morrison*, "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. Indeed, many of the enormous litigation expenses attendant to U.S. litigation simply do not exist under Japanese law, which provides for more

limited discovery and no class actions in securities cases, and the Japanese court proceedings tend to end up with lower damages awards.

Applying U.S. securities law to secondary transactions as *Stoyas* does results in two separate absurdities. First, because under *Morrison* the Exchange Act does not apply to foreign transactions, it is indisputable that the depository institutions' purchase of securities for unsponsored ADRs is not covered by the Exchange Act. But under *Stoyas* the purchase of those unsponsored ADRs from the depository institutions by investors *is* covered by the Exchange Act. Thus, depository banks give their customers *more rights* regarding the underlying foreign shares than they themselves possess. Nowhere else in the law does an unintended secondary purchaser gain more rights than the initial purchaser.

The second absurdity is that both the depository institution and the unsponsored ADR investor may both sue the foreign issuer—the investor in U.S. courts and the depository institution in the foreign courts. Thus, a single sale by a foreign issuer may result in at least two litigations in two separate countries against two separate parties—with all of the attendant risks of inconsistent judgments, repetitive and vexatious litigation before numerous courts, and double damages to two different parties based on the same conduct. Applied to securities-based swap transactions, *Stoyas* would have a foreign issuer sued based on no actual transaction in its stock whatsoever, but instead based on a purely synthetic transaction occurring in an entirely different jurisdiction.

Foreign corporations may be exposed to such lawsuits despite their full compliance with their own foreign securities law obligations. It is not uncommon for securities lawsuits to be brought in the United States whenever news is issued that negatively impacts a company's stock price. And because it is an allegation that the Exchange Act has been violated, U.S. law will apply to such an allegation. Under the *Stoyas* reasoning, U.S. courts may be called on to deal with the very real possibility that what is allegedly a violation of the Exchange Act under U.S. law is not a violation at all under the law applicable to the foreign issuer, or in the worst case, that the disclosures required under U.S. law are illegal under the foreign law. The Ninth Circuit's ruling thus raises complex issues of potential conflict between U.S. and foreign law that can and should be avoided by U.S. courts, but that will cause tremendous uncertainty for foreign corporations as to which law they should comply with.

As a result of the Ninth Circuit's ruling, international businesses and governments may be forced to take protective measures to keep themselves out of U.S. courts. The increased compliance costs of adhering to both U.S. and their host nation law—as well as the threat of possible litigation in the United States—may discourage companies from listing securities at all. This could discourage international investment, accountability, and transparency. Another option for governments—lobbied by businesses concerned with the threat of American litigation—would be to make it illegal for the owners of shares to conduct certain transactions in the United States, including unsponsored ADRs. This would serve to protect foreign businesses, but would run directly contrary to the U.S. Government's policy of

encouraging the ability for U.S. investors to invest overseas.[19] Such protective actions could lead to severe economic detriments both domestically and abroad.

Another harmful consequence to the Ninth Circuit's ruling could be that international regulators and courts may follow the *Stoyas* court's lead and require U.S. corporations to be governed by their own securities laws in litigation brought in the foreign country. Such a race to the bottom could require U.S. companies to comply with numerous foreign laws even if those companies do not list their shares in the foreign country. Japanese citizens, for example, own some $490 billion in U.S. equities,[20] and the use of Japanese Depository Receipts (JDRs) to reflect international shares on the Tokyo Stock Exchange is a new but growing trend.[21]

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[19] *See* SEC Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, 17 C.F.R. pt. 239, 240 and 249 (Sept. 5, 2008), *https://www.sec.gov/rules/final/2008/34-58465.pdf* (last accessed December 4, 2018) (adopting new rules to make it easier to have unsponsored ADRs to "foster the increased trading of a foreign private issuer's securities in the U.S. over-the-counter market.").

[20] *See* DEPARTMENT OF THE TREASURY, FEDERAL RESERVE BANK OF NEW YORK, AND BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, U.S. PORTFOLIO HOLDINGS OF FOREIGN SECURITIES 13 (2018), *http://ticdata.treasury.gov/Publish/shca2017_report.pdf* (last accessed December 4, 2018).

[21] *See* CITIBANK ISSUER SERVICES, JAPANESE DEPOSITORY RECEIPTS (JDRS), (2018), *https://depositaryreceipts.citi.com/adr/common/file.aspx?idf=1251* (last accessed December 4, 2018).

Ultimately, if the Ninth Circuit's decision is upheld, Japanese-U.S. economic relations will undoubtedly suffer. Japan is the third-largest economy in the world.[22] Japanese companies are very concerned by their exposure to American lawsuits, and will likely be exceedingly weary of engaging in opportunities to promote American investment in Japan if such transactions may—without the knowledge or consent of the Japanese company—subject them to liability in the United States. More broadly, in order to attempt to prevent the reach of the Exchange Act and litigious American Plaintiffs, Japanese companies may limit their contact with the U.S. This would lead to immeasurable loss for the U.S. and Japanese economies as collaboration between two of the most powerful allied economies in the world diminishes.

As the world becomes more and more interconnected, courts must take care to avoid inappropriate extraterritorial application of their securities laws to avoid conflicts and allow for the proper national regulation of securities markets. This court should take up the *Stoyas* case to further its directive from *Morrison* that the Exchange Act does not apply extraterritorially, and that such conflicts with foreign law and courts should be avoided.

III. FOREIGN LAW PROTECTS INTERNATIONAL INVESTORS, WHILE U.S. LAW SPECIFICALLY PROHIBITS

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[22] *See* Rob Smith, *The World's Biggest Economies in 2018*, WORLD ECONOMIC FORUM (April 18, 2018). *https://www.weforum.org/agenda/2018/04/the-worlds-biggest-economies-in-2018/* (last accessed December 4, 2018).

APPLICATION OF THE EXCHANGE ACT TO FOREIGN STOCK EXCHANGES.

Applying U.S. law to unsponsored ADR transactions is unnecessary, as even the Plaintiffs in *Stoyas* surely recognize. They knew, in purchasing the ADRs, that they were indirectly purchasing shares in a Japanese corporation, that those shares were governed by Japanese law, and that any recovery might be had under Japanese law. They even attempted to assert their right to a recovery under Japanese law before the U.S. District Court in this case. *See Stoyas*, 896 F.3d at 938 (noting that the plaintiffs alleged a claim under Article 21-2 of the FIEA, which was dismissed by the district court on the basis of comity and *forum non conveniens*).

International investors, particularly ADR investors, may recover under the securities laws governing the exchange that their stock is present on. Toshiba is subject to numerous lawsuits in Japan based on the alleged fraudulent conduct at issue in this case, *see* Pet. at 10, and the appropriate remedy for an international investor who wishes to allege securities fraud against Toshiba is to look to the depository banks to sue Toshiba where its securities are actually traded: in Japan. They may do so by having their depository banks sue on their behalf. Thus, this is not a case where either American law applies or there is no recovery. Plaintiffs are protected by the law that they understood governed the corporation whose shares they were indirectly purchasing an interest in.

That U.S. law should not apply to the issuers of foreign securities on foreign stock exchanges is also inescapable based on the text of the Exchange Act

itself. Section 30(b) of the Exchange Act explicitly states that "[t]he provisions of this chapter [the Exchange Act] or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States . . . ." 15 U.S.C. § 78dd. The only exception to this is if "he does so in violation of regulations promulgated by the Commission to prevent the evasion of the Act." *Morrison*, 561 U.S. at 268.[23]

Toshiba, by issuing shares in Japan, has transacted its business in securities "without the jurisdiction of the United States." While there may be secondary transactions taken without its knowledge, including ADR contracts or securities-based swaps undertaken in the United States on the basis of Toshiba's securities, because Toshiba conducted its business in securities wholly outside of U.S. jurisdiction, it is specifically excluded from being subject to the Exchange Act.

As the Second Circuit explained in *Schoenbaum v. Firstbrook*, § 30(b) is "designed to take the Commission out of the business of regulating foreign security exchanges unless the Commission deems regulation necessary to prevent evasion of the domestic regulatory scheme. The exemption relieves the Commission of the impossible task of enforcing American securities law upon persons whom it could not subject to the sanctions of the Act for actions upon which it could not bring its investigatory powers to

[23] The SEC has never enacted any applicable regulations under this provision.

bear." 405 F.2d 200, 207–08 (2d Cir. 1968), *modified on other grounds en banc*, 405 F.2d 215 (1968).

While § 30(b) has been successful in keeping the SEC out of the business of regulating foreign security exchanges, it should similarly be applied by this Court to keep U.S. courts out of the business of regulating foreign exchanges.

CONCLUSION

For the foregoing reasons, *amicus curiae* Keidanren (Japan Business Federation) supports Petitioner's petition for certiorari, and respectfully requests that the petition be granted.

Respectfully submitted,

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