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 THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE COMPETITIVE ENTERPRISE INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association, which represents the common interests of the world's leading financial and capital market participants. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA has long played an active advocacy role in addressing the potential extraterritorial application of private rights of action under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act" or the "Act"), 15 U.S.C. § 78j(b) (2018), including in *amicus* briefs submitted in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), and other cases, and in comment letters to the U.S. Securities and Exchange Commission (the "SEC").

Founded in 1984, the Competitive Enterprise Institute ("CEI") is a non-profit public policy

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of all *amici* briefs were filed with the Clerk of the Court. Additionally, counsel for *amici* provided to counsel for the parties written notice of their intent to file this brief.

organization dedicated to advancing the principles of free enterprise, limited government, and individual liberty. CEI frequently publishes original research and commentary on business and finance, as well as related government policies and regulations. It also regularly participates in litigation, as both a party and an *amicus curiae*, concerning the scope and application of financial regulations and decisions. For instance, CEI's Center for Class Action Fairness works to reform unfair class action procedures and settlements. As a forum for discussing global financial policies, CEI provides regulation-savvy knowledge and perspective on free enterprise, foreign investment, and global financial transactions.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision turns on its head Section 10(b) of the Exchange Act and this Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), that Section 10(b) does not apply extraterritorially. In *Morrison*, this Court unambiguously held that "there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially." *Id.* at 265. The Ninth Circuit, however, held that the territorial scope of the Act extends against the issuer of a foreign security, without regard to the U.S.-based activity or listing of its securities in the United States, so long as the buyer and seller (and not the issuer) transacted in the United States. In so holding, the Ninth Circuit swings open the doors to U.S. courtrooms to claims by shareholders against foreign companies that are not present in the U.S. securities markets and that did nothing wrong in the United States, but issued shares elsewhere that an opportunistic plaintiff elected on its own (and without company involvement) to transact in the United States.

The decision of the court below, if not reversed, will have a dramatic and pernicious impact on the U.S. securities laws and the worldwide securities markets and will upend *Morrison*'s clear holding that Section 10(b) has no extraterritorial application. This Court has emphasized that the U.S. securities laws provide benefits to investors in the United States, and to companies that access its capital markets, by instituting a "high standard of business ethics in the securities industry." *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963); *see also Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 403 (2014). Those benefits come at a cost. Foremost among those costs are the costs of adhering to U.S. regulatory standards and the risks and burdens of federal securities class actions used to enforce those standards.

This Court's decisions hold that the costs of regulation are appropriately borne by companies that access U.S. securities markets, that choose to issue securities in the United States, that apply to have their securities listed on U.S. domestic exchanges, or that otherwise intentionally avail themselves of the

U.S. securities markets. Such companies may choose to accept the burdens of the U.S. securities laws in exchange for, perhaps, a lower cost of capital.

The Court has also emphasized, however, that other countries have made other choices about the costs and benefits of securities regulation. *See Morrison*, 561 U.S. at 269 (noting other countries' regulations differ "as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation . . . and many other matters"). In light of the differing securities regulations in other countries, not all companies have chosen to accept the costs and burdens of the U.S. capital markets. Where a company has not acted affirmatively to benefit from the U.S. securities markets and has not committed fraud in the United States, therefore, it would undermine the purposes of the U.S. securities laws, principles of comity and fundamental fairness, and the structure of the worldwide securities markets to apply those laws to a foreign company at the unilateral election of unrelated buyers and sellers acting without the company's participation or action. In that instance, all of the costs of the U.S. laws—and the burdens of the U.S. courts—would be imposed on the issuer company without any of the benefits. The diversity of the worldwide securities laws, a benefit this Court lauded in *Morrison*, would be subverted, and a risk of inconsistent regulation by differing regimes would be created.

The facts of this case aptly demonstrate the evils of the decision below. Toshiba does not offer any securities in the United States, none of its securities are listed for trading in the United States, and it has not committed any fraudulent conduct in the United States. It chose to offer and list securities exclusively outside the United States. It has elected not to enjoy the benefits, or incur the costs, of the U.S. capital markets or of the U.S. regulatory system. Nonetheless, as a result of the decision below, it is now subject to protracted and costly litigation in the United States for allegedly including fraudulent financial statements in disclosures in Japan. Moreover, the Ninth Circuit's decision below creates a split from the Second Circuit, providing additional reason for this Court to grant a writ of certiorari.

ARGUMENT

I. The Decision Below Improperly Subjects to U.S. Laws Companies That Elected to Stay Out of the United States

A. The Decision Below Improperly Extended the U.S. Securities Laws

In *Morrison*, this Court held that Section 10(b) of the Exchange Act has no extraterritorial application. It then articulated a transactional test to apply that holding. Reasoning that "[t]he Exchange Act's focus is not on the place where the deception originated, but on purchases and sales of securities in the United States," the Court limited the application of Section 10(b) "only [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities," setting a ceiling, not a floor, on Section 10(b)'s scope. *Morrison*, 561 U.S. at 267. In providing a test focused on domestic exchanges and transactions, this Court recognized that U.S. securities laws are intended to regulate U.S. markets.

In providing an outer limit of the Act's application, this Court did not say that a domestic transaction was sufficient in and of itself to establish an Exchange Act violation, but instead described a domestic transaction merely as a necessary element, not a sufficient condition. *Id.* ("And it is in our view *only* transactions in securities listed on domestic exchanges, and domestic exchanges in other securities, to which § 10(b) applies.") (emphasis added). The Court stated, "It is a 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." *Id.* at 255 (citation and quotation marks omitted). The Court rejected the extraterritorial application of Section 10(b) because "[t]he 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.'" *Id.* at 269 (citation omitted). The Court also noted concern that the U.S. securities laws could become a magnet for cases that do not implicate U.S. interests: "While . . . the United States has [not] become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." *Id.* at 270.

The decision below violates precisely those concerns regarding impermissible extraterritorial application of U.S. securities laws. Toshiba, the defendant issuer, has elected not to avail itself of the U.S. capital markets and not to be subject to the U.S. regulatory regime but to be regulated exclusively by regulators outside the United States. Its shares are listed only in Japan, it issues securities exclusively outside the United States, and it is not alleged to have committed fraud in the United States. *See* Petition for Writ of Certiorari at 7, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-486 (U.S. Oct. 15, 2018).

Significantly, the securities at issue are unsponsored ADRs, which were issued by depositary banks, traded in the United States exclusively at the election of investors in the secondary market, without participation or permission by Toshiba. *See* SEC Office of Inv'r Educ. & Advocacy, *Investor Bulletin: American Depositary Receipts* (Aug. 2012), https://www.sec.gov/investor/alerts/adr-bulletin.pdf. The foreign company has no right to review, approve, or even receive notice regarding the unsponsored ADR program. *See* Additional Form F-6 Eligibility

Requirement Related to the Listed Status of Deposited Securities Underlying American Depositary Receipts, 68 Fed. Reg. 54,644, 54,645 (proposed Sept. 17, 2003). An unsponsored ADR program is "established by the depositary acting on its own" and "does not involve the formal participation, or even require the acquiescence of, the foreign company whose securities will be represented by the ADRs." *Id.* at 54,644–45; *see also Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 367 (3d Cir. 2002) ("An unsponsored ADR is established with little or no involvement of the issuer of the underlying security."); Mark A. Sanders, *American Depositary Receipts: An Introduction to U.S. Capital Markets for Foreign Companies*, 17 Fordham Int'l L.J. 48, 54–55 (1993) (stating that "[a]n unsponsored ADR facility. . . is created without active participation from the foreign private issuer of the deposited securities," and that "[t]he ADR certificate acts as a contract between the ADR holder and the depositary").

Unsponsored ADRs are thus comparable to other securities, such as swap agreements, that trade based on an issuer's security but that are created without the participation of the issuer and that the issuer cannot prohibit or restrict. *See, e.g.*, *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 205 (2d Cir. 2014) ("A securities-based swap agreement is a private contract between two parties in which they agree to exchange cash flows that depend on the price of a reference security . . . .") (quotation marks omitted). Secondary sales in the

U.S. over-the-counter ("OTC") market of non-U.S. dollar denominated notes originally issued outside the United States, *see, e.g.*, *In re Petrobras Sec.*, 862 F.3d 250, 258 (2d Cir. 2017), similarly create a domestic transaction without a foreign issuer's involvement.

In other words, unsponsored ADRs are meaningfully different from securities that reflect the issuer's decision affirmatively to enjoy the benefits of the U.S. securities markets. These could include, for example, sponsored ADRs created with the issuer's participation and traded through a U.S. OTC platform pursuant to an arrangement with the issuer. In such event, the issuer enters into a contract with the depositary bank under which ADR holders are third-party beneficiaries, files a registration statement with the SEC, and arranges for the securities to trade through a platform in the United States. *See* Additional Form F-6 Eligibility, 68 Fed. Reg. at 54,645. As their name reflects, unsponsored ADRs are far different.

The Ninth Circuit nonetheless held that Section 10(b) applies to transactions in unsponsored ADRs. *Stoyas v. Toshiba Co.*, 896 F.3d 933, 939 (9th Cir. 2018). It disagreed with Toshiba that "the existence of a domestic transaction is necessary but not sufficient under *Morrison*," stating that a lack of "connection between Toshiba and the Toshiba ADR transactions" mattered not. *Id.* at 949 ("[B]ecause we are to examine the location of the transaction, it does not matter that a foreign entity was not engaged in the transaction . . . ."). Mechanically applying this Court's transactional test as a floor to extraterritorial application of Section 10(b), the court rendered *Morrison*'s test for domesticity a necessary *and* sufficient condition. *Id.* But as the Second Circuit put it in a directly contradictory decision, "a rule making the statute applicable whenever the plaintiff's suit is predicated on a domestic transaction, regardless of the foreignness of the facts constituting the defendant's alleged violation, would seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application." *Parkcentral*, 763 F.3d at 215.

B. The Court's "In Connection With" Option Is Not an Effective or Proper Alternative to a Correct Interpretation of Section 10(b)'s Extraterritorial Application

Seemingly recognizing that its decision would result in numerous foreign defendants being hauled into U.S. courts for conduct that the Exchange Act was never intended to address, the Ninth Circuit held that courts should use the Exchange Act's "in connection with" requirement to limit application of the U.S. laws to foreign companies that did not issue securities or list them in the United States. *Stoyas*, 896 F.3d at 951. The "in connection with" requirement, however, is a crude, and arguably improper, instrument to address concerns regarding the scope of U.S. law.[2]

The "in connection with" requirement, like any other element of Section 10(b), applies only after a court has determined the scope of the federal securities laws. *See id.* at 950–51 ("*Morrison* delineates the transactions to which the Exchange Act can theoretically apply without being impermissibly extraterritorial, but while applicability is necessary, it is not sufficient to state an Exchange Act claim."). But it is not a substitute for an adjudication as to whether those laws apply at all. Moreover, that requirement arguably looks to the wrong issues and thus cannot reliably separate out cases that are truly extraterritorial and to which Section 10(b) should not apply from those that should be considered domestic.

Specifically, as this Court has interpreted it, the "in connection with" requirement is satisfied by evidence that the fraud and securities transaction coincide. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006); *SEC v. Zandford*,

[2] It is no answer to say that a foreign company would be protected against the exercise of personal jurisdiction by the due process clause. Personal jurisdiction can be established when the defendant company is at home in the United States at the time of suit even if it was not a U.S. issuer at the time of the alleged fraud. *See* 4 Charles Alan Wright, Arthur R. Miller et al., *Federal Practice and Procedure* § 1051 (4th ed. 2015) ("[E]stablishing the date of commencement [of a suit] can be important for determining . . . whether personal jurisdiction . . . exist[s].").

535 U.S. 813, 825 (2002). According to one prominent treatise, "[a]ny statement that is reasonably calculated to affect the investment decision of a reasonable investor will satisfy the 'in connection with' requirement." Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 12:20 (6th ed. 2009).

On its face, the "in connection with" requirement thus does not turn upon the identity of the defendant (and whether it is foreign or domestic). Nor does it require that the fraud necessarily relate to securities the defendant issued. *See, e.g*, *Zandford*, 535 U.S. at 815–16; *SEC v. Rana Research Inc.*, 8 F.3d 1358, 1362–63 (9th Cir. 1993) (holding financial consultant's press releases were "[s]tatements 'calculated' to influence investors [and thus met] the 'in connection with' requirement"). The requirement must be satisfied whether the defendant is a U.S. corporation who elected to issue shares in the United States and made fraudulent statements in the United States, or whether it is a company, like Toshiba, that elected not to avail itself of the benefits of the U.S. securities markets. Consequently, the "in connection with" analysis cannot adequately address the question of whether Section 10(b) applies extraterritorially. It fails to differentiate between allegedly deceptive conduct by *domestic* actors and allegedly deceptive conduct by *foreign* actors who have never benefitted from the U.S. securities markets and cannot address any of the extraterritoriality and comity concerns that drove this Court's decision in *Morrison*.

II. The Decision Below Undermines the Purposes of *Morrison* and Would Have Pernicious Effects on the U.S. Regulatory System and Worldwide Securities Markets

This Court has applied the U.S. securities laws appropriately to companies that have elected to benefit from the U.S. securities markets or that have committed fraud in the United States when there is a transaction that also takes place in the United States. "The basic purpose of the 1934 and 1933 regulatory statutes is to insure honest securities markets and thereby promote investor confidence." *Chadbourne & Parke LLP*, 571 U.S. at 390 (quotation marks omitted). The theory of those laws is that by providing enhanced disclosure, and an enforcement mechanism in the form of a class action, the laws enforce a "high standard of business ethics in the securities industry." *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). As a result, the cost of capital is reduced for companies that elect to avail themselves of the U.S. capital markets and to benefit from those markets. *See* Brief of the U.K. of Great Britain and Northern Ireland as Amicus Curiae Supporting Respondents at 25–26, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191) [hereinafter U.K. Amicus Brief in *Morrison*] ("Application of U.S. securities laws to foreign issuers engaged in foreign transactions raises the cost of doing business in the U.S. and could deter corporations from operating within the U.S. or participating in U.S. financial markets.");

Brief of the Government of the Commonwealth of Australia as Amicus Curiae Supporting Respondents at 22, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191) [hereinafter Australian Amicus Brief in *Morrison*] ("[G]enerally broader discovery available to plaintiffs in the United States will tend to drive up the non-reimbursable litigation costs that defendants will have to bear.").

The Court also emphasized, however, that the choice made by the United States and by companies that desire to benefit from U.S. markets is not the choice that every country has made or the right choice for every company that chooses to raise capital by issuing securities. *See Morrison*, 561 U.S. at 269. Other companies—Toshiba here—may believe that the confidence conveyed by U.S. securities laws is not worth the cost of complying with their extensive regulatory and disclosure standards nor the expense and risk of their enforcement mechanism.

The decision below effectively permits buyers and sellers in the secondary market to unilaterally inflict all of the costs of U.S. regulation on foreign issuers without conferring on such issuers any of the benefits and possibly despite the issuers' conscious efforts to steer clear of U.S. markets. That election might be in the economic interest of the secondary market buyers and sellers. By opting into the U.S. regulatory regime, the buyer and seller in the secondary market can enjoy all of the benefits of its insurance scheme fraud without themselves paying any of the costs. The costs all will be borne by the foreign corporation. By inflicting those costs on the foreign corporation, such election (and the decision below that sanctions it) creates damages to the fabric of U.S. law and to the worldwide securities markets as a whole, implicating the chief concerns underlying *Morrison*.

A. Extraterritorial Application of Section 10(b) to Actions Based on Mere References to Foreign Securities Cannot Be Reconciled with the Principles of International Comity

As this Court observed in *Morrison*, extraterritorial application of U.S. securities laws to foreign issuers based on mere self-created references to the issuers' foreign securities tramples principles of comity and undermines foreign governments' efforts to regulate their own securities markets. 561 U.S. at 269. First, extraterritorial application of U.S. law poses the "obvious" risk of incompatibility with applicable foreign laws. *Id.*; *see also Parkcentral*, 763 F.3d at 216 ("[T]he application of § 10(b) to [foreign issuers that have not entered the U.S. securities markets] would so obviously implicate the incompatibility of U.S. and foreign laws that Congress could not have intended it *sub silentio*."). Foreign sovereigns take different approaches to the regulation of their securities markets, with different policy values underlying their regulation. *See, e.g.*, Australian Amicus Brief in *Morrison* at 22–23 ("Adopting appropriate legal processes is a basic sovereign function on which reasonable sovereigns can differ.”).

Further, the type of extraterritorial application of U.S. securities laws adopted by the Ninth Circuit creates duplicative regulation of foreign securities transactions and exchanges.[3] *See Morrison*, 561 U.S. at 269; *see also Parkcentral*, 763 F.3d at 216 (“The potential for regulatory and legal overlap and conflict would have been obvious to any legislator who considered the possibility that the statute would result in such an application.”). In effect, the court’s ruling requires foreign issuers to comply with U.S. securities laws and make provision for the possibility of being subjected to U.S. law the moment they issue foreign securities on a foreign market for fear that two unrelated parties would conduct a transaction in the secondary market in the United States. Different disclosure requirements, pleading standards, and discovery requirements would multiply costs for the foreign company as it would work to implement different legal strategies in each jurisdiction. Thus, extraterritorial application of Section 10(b) to predominantly foreign securities claims creates confusing and duplicative legal regimes, possibly incompatible outcomes, and a significant risk and

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[3] *See, e.g.*, *Stoyas*, 896 F.3d at 937 n.1 (noting that there had been “a series of internal investigations prompted by a Japanese government order” related to the fraudulent accounting claims made in the case).

burden now borne by any foreign company that issues securities in any market.

Second, extraterritorial application of Section 10(b) to predominantly foreign transactions of the sort sanctioned by the Ninth Circuit would also disrupt harmonious international regulatory efforts. *See* Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 Ala. L. Rev. 927, 929 (1994) ("Institutionally, courts are poorly equipped to balance and resolve the difficult market efficiency concerns and political sensitivities inherent in questions of extraterritorial application of the U.S. securities laws."). International regulatory cooperation depends on mutual respect of the policy choices of foreign nations, both of which are threatened by forcing U.S. regulatory regimes onto foreign securities issuers. *See* U.K. Amicus Brief in *Morrison* at 22–23 ("U.S. judicial interference in [regulatory] decisions risks damaging the mutual respect that comity is meant to protect and could be perceived as an attempt to impose American economic, social and judicial values."). Recognizing this concern, this Court in *Morrison* made clear its intent to avoid interference in the regulation of foreign securities markets, which extraterritorial application of Section 10(b) would inevitably create. *Morrison*, 561 U.S. at 269 (noting that foreign governments and trade associations have "complain[ed] of the interference with foreign securities regulation that application of § 10(b) abroad would produce" and that its test was adopted to avoid such interference). Subjecting corporations such as Toshiba to U.S. securities regulations holds them doubly liable given Japanese regulators have already taken action. *See* Atsuko Fukase, *Toshiba Accounting Scandal Draws Record Fine From Regulators*, Wall St. J. (Dec. 7, 2015), https://www.wsj.com/articles/toshiba-accounting-scandal-draws-record-fine-from-regulators-1449472485.

Third, the Ninth Circuit's approach makes it more likely that foreign regulators—emboldened by U.S. courts' application of U.S. law to predominantly foreign transactions—will apply foreign securities laws to transactions in U.S. securities without regard to whether these transactions are substantially connected to foreign markets. Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 Harv. L. Rev. 1310, 1321 (1985) ("It is . . . important that other nations consider United States jurisdictional policy to be fair. If other nations believe that American policy unfairly disadvantages their citizens or that it proceeds from fiat rather than principle, they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own."). In effect, U.S. exchange-listed companies may become open to expanded international liability, facing the same risk of duplicative legal and financial liabilities as foreign companies that have not entered the U.S. markets but can now be hauled into U.S. courts under the Ninth Circuit's standard.

Finally, foreign courts may choose not to recognize or enforce U.S. court orders applying Section 10(b) on the grounds that the U.S. court improperly asserted jurisdiction over the foreign defendant. *See, e.g.*, *Foreign Proceedings (Excess of Jurisdiction) Act 1984* (Cth) pt II div 3 s 9(1)(b)(ii) (Austl.) (statute allowing defendants in foreign cases to claw back all or a portion of a foreign-court-issued antitrust judgment collected from the defendant if the Australian Attorney General finds that the foreign court's "assumption of jurisdiction . . . was contrary to international law or inconsistent with international comity or international practice"); Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 328(1), para. 1 (Ger.), *translation at* Andreas F. Lowenfeld, *International Litigation and Arbitration* (1993) (prohibiting German courts from enforcing a foreign court's judgment "[i]f the courts of the foreign state do not have jurisdiction according to German law"); Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 26, 1969, 52 BGHZ 31, 1970 (Ger.), *translation at* Lowenfeld, *supra* (finding that the U.S. court lacked jurisdiction and thus, under § 328.1 of the German Civil Procedure Code, refusing to enforce the U.S. court's judgment); *see also* Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common-Law*

Suits, 38 Vand. J. Transnat'l L. 679, 725 (2005) ("Foreign courts, however, sometimes refuse to enforce judgments of U.S. courts . . . if they think the court extended its net of jurisdiction too widely."). By sanctioning extraterritorial application of Section 10(b) to foreign issuers, the Ninth Circuit has run afoul of traditional principles of international comity.

B. Extraterritorial Application of Section 10(b) Imposes Significant Risks on Helpless Foreign Defendants

By expanding the list of foreign issuers who can be sued in the United States, the decision below creates a class action landscape that this Court in *Morrison* sought to prevent. Now that buyers and sellers in the secondary market can create a U.S. claim by transacting in the United States without any action by the foreign issuer to facilitate the domestic transaction, the Ninth Circuit risks becoming a global "Shangri-La" for securities class actions, and anyone operating in any securities market worldwide is potentially subject to the risk of U.S. litigation. *Morrison*, 561 U.S. at 270.

Private securities class actions present a uniquely dangerous potential for vexatious litigation, including "strike suits[] and protracted discovery, with little chance of reasonable resolution by pretrial process," *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105 (1991), such that "if not adequately contained, [private securities fraud actions] can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007); *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) ("[T]he potential for uncertainty and disruption . . . allow[s] plaintiffs with weak claims to extort settlements from innocent companies."). The Ninth Circuit's misapplication of *Morrison* extends the list of potential foreign defendants to include those that have not taken steps to enter the U.S. market. And in the case of unsponsored ADRs or swaps referencing foreign stock issued solely on a foreign exchange, or secondary trading of non-U.S. currency denominated bonds that the foreign company never offered in the United States, these foreign issuers can do nothing to block the domestic transaction. Indeed, investors, easily able to distinguish between sponsored and unsponsored ADRs, for instance, by using Bloomberg's ticker look-up or from the depositary's website, are left better positioned to avoid entanglement with unsponsored ADRs than foreign issuers are to avoid entanglement with U.S. securities laws.

In such cases, the foreign issuer, like Toshiba, has made no effort to access U.S. securities markets, and in fact may have chosen not to issue securities in the United States specifically to avoid being subject to U.S. law. Such concerns are particularly salient where, as here, the foreign issuer is not even alleged to have a role in the relevant security's creation (e.g., a swap or unsponsored ADR). Under the Ninth Circuit's standard, unless a foreign company refrains from issuing securities at all, it will be at risk of extraterritorial application of Section 10(b). *Morrison* does not compel such an absurd result.

Commentators have noted the increasing rate at which federal securities class actions are filed. *See* Cornerstone Research, *Securities Class Action Filings: 2017 Year in Review* 5, http://securities.stanford.edu/research-reports/1996-2017/Cornerstone-Research-Securities-Class-Action-Filings-2017-YIR.pdf (last visited Nov. 7, 2018) ("The number of [federal class action securities cases] in 2017 was 52 percent higher than in 2016 and more than double the 1997–2016 average."); *id.* at 15 ("From 1997 to 2016, 50 percent of filings settled . . . ."). By permitting a buyer and seller in the secondary market to manufacture a U.S. claim by the expedient of transacting in the United States without any conduct by the defendant company to permit that trading or to commit fraud in the United States, the decision below will accelerate the filing of class action lawsuits in the United States.

C. Extraterritorial Application of Section 10(b) Undermines the Competitiveness of Global Capital Markets

Under the decision below, Section 10(b) liability can reach potentially any foreign issuer in any part of the world. It casts a wide, inescapable net of potential legal liability, creating a chilling effect on global capital markets. Toshiba, like many other foreign companies, has not entered the U.S. securities markets, yet was hauled into a U.S. court in connection with an unsponsored ADR program that required neither its involvement nor its consent. Turning U.S. securities law into a global securities law has broad repercussions for international business planning, including that it would lessen competition among various nations' anti-fraud regimes.

The global reach of Section 10(b) liability seriously undermines the competitiveness of global capital markets by imposing both legal and financial burdens on foreign companies and by ultimately decreasing capital liquidity. Because any foreign company can be sued in the Ninth Circuit under the ruling below, based on trading in the United States, companies will budget for increased legal liability, allocating funds that could otherwise be used for, among others, legal counsel, compliance, and insurance. This increased cost of doing business may in turn affect the value of stocks, whether in the form of fewer dividends paid to shareholders, or less capital for research and development and investment, and lead to less liquidity in the global capital markets. Such negative effect on corporate financial situations would cause foreign companies to become less active in capital markets, leading to fewer transactions, less competition, and less investment information.

III. The Conflict Between the Circuit Courts Can Be Resolved Only by This Court's Review

The decision below directly conflicts with a decision by the other leading circuit in the area of securities litigation, the Second Circuit, and thus the Court should review this case to resolve the circuit split. *See Pub. Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972, 987 (8th Cir. 2012) (describing the Second Circuit's and Ninth Circuit's preeminence in the field of securities regulation); *see also Morrison*, 561 U.S. at 260 (recounting D.C. Circuit decision, despite its doubts, to "defer[] to the Second Circuit because of its 'preeminence in the field of securities law'") (citation omitted).

In *Parkcentral*, plaintiffs, who were parties to swap agreements referencing the foreign issuer, brought a Section 10(b) claim against the issuer alleging that its false and misleading statements outside the United States involving conduct outside of the United States subjected it to suit under the Exchange Act because the purchaser and seller transacted in the swap agreement in the United States. The Second Circuit rejected that claim. It held that "the claims in this case are so predominantly foreign as to be impermissibly extraterritorial," *Parkcentral*, 763 F.3d at 216, confirming that while *Morrison* "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." *Id.* at 215. The court explained that allowing domestic execution of a transaction referencing a foreign issuer's securities alone to warrant application of Section 10(b) to the issuer would be to "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." *Id.* at 215–16. The Second Circuit concluded that to allow such a result would violate *Morrison*, *id.* at 216, which importantly did not address the circumstances presented in *Parkcentral* (or below) because *Morrison* did not involve a domestic transaction at all, let alone one not created by the defendant.

Recognizing that its holding departed directly from *Parkcentral*, the Ninth Circuit below held to the contrary: as long as the transaction at issue took place in the United States, the U.S. securities laws applied, regardless of any other factors. *Stoyas*, 896 F.3d at 950 ("[W]e should not follow the *Parkcentral* decision . . . ."). Under its approach, the question of whether a claim lay against a foreign issuer for a security that it did not issue turned upon whether the alleged fraud here was "in connection with." In so doing, the Ninth Circuit seemingly offered a test that turned on a different question than the Second Circuit's, permitting the two leading circuits to reach different outcomes under the same set of facts. *Compare Stoyas*, 896 F.3d at 950 ("And it may very well be that the *Morrison* test in some cases will result in the Exchange Act's application to claims of manipulation of share value from afar."), *with Parkcentral*, 763 F.3d at 216 ("[W]e think that the relevant actions in this case are so predominantly [foreign] as to compel the conclusion that the complaints fail to invoke § 10(b) in a manner consistent with the presumption against extraterritoriality."). This can be corrected only by clarification from this Court. That the two leading circuits in securities regulation have reached diametrically opposite results in itself justifies granting Toshiba's Petition for Writ of Certiorari, even apart from the Ninth Circuit's error. The circuit split will have severe consequences if not settled, including legal ramifications such as abusive litigation and forum shopping, and administrative consequences, such as regulatory conflicts with foreign governments and agencies. The heightened legal uncertainty created by the circuit split translates into an overall increase to the cost of doing business for foreign companies in the form of increased necessity for legal advice, implementation of preemptive compliance programs, and higher insurance expenses.

This Court has repeatedly seen fit to grant certiorari to resolve conflicts involving the Ninth and Second Circuits, *see, e.g.*, *Salman v. United States*, 137 S. Ct. 420, 425 (2016) (granting certiorari in securities case involving split between Ninth and Second Circuits only), and should do so here.

CONCLUSION

For the foregoing reasons, the amici respectfully request that the Court grant the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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