No. 18-486

In The
Supreme Court of the United States

TOSHIBA CORPORATION,

Petitioner,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), this Court held that Section 10(b) of the Securities Exchange Act does not apply extraterritorially and instead applies to (i) transactions in securities listed on domestic exchanges and (ii) domestic transactions in other securities.

The question presented is whether the Securities Exchange Act protects all domestic securities transactions from fraud, or instead, is subject to an undefined exception where the conduct or effects of fraud affecting a domestic transaction are "insufficiently" domestic.

CORPORATE DISCLOSURE STATEMENT

Neither lead plaintiff Automotive Industries Pension Trust Fund nor named plaintiff New England Teamsters & Trucking Industry Pension Fund is a corporation.

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STATEMENT OF THE CASE

Respondents brought suit under Section 10(b) of the Securities Exchange Act and the Japanese Financial Instruments & Exchange Act ("JFIEA"). Respondents alleged that Toshiba engaged in fraud in connection with the sale of its American Depositary Receipts ("ADRs") on an over-the-counter market in the United States, and the sale of its common stock sold in Japan. Consistent with *Morrison*, the claims arising from the domestic transactions were pleaded under the U.S. Exchange Act, and the claims arising from the transactions that took place in Japan were pled under Japanese law.

The Ninth Circuit held that Section 10(b) applies to the sale of securities in the United States, including the sale of ADRs on an over-the-counter market. However, the Ninth Circuit concluded that Respondents had failed to allege specific facts to establish that they had incurred "irrevocable liability" to purchase Toshiba ADRs in the United States. The Ninth Circuit accordingly held that the operative complaint "does not sufficiently allege a domestic violation of the Exchange Act." Pet. App. at 37a. The Ninth Circuit did not reach the Japanese law claims.

A. Statutory Background

As relevant here, Section 10(b) of the Securities Exchange Act makes it unlawful for any person "[t]o use or employ . . . any manipulative or deceptive device or contrivance" in violation of Securities and Exchange

Commission regulations "in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. §78j(b).

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court addressed in detail the reach of Section 10(b) in cases of securities fraud with an international dimension. In that case, three Australian individuals attempted to bring a claim under Section 10(b) on behalf of a class of individuals who had purchased shares of National Australia Bank on the Australian Stock Exchange. *Id.* at 251, 253. Finding "no affirmative indication" that Section 10(b) applies extraterritorially, the Court concluded that only allegations of domestic securities fraud state a claim under Section 10(b). *Id.* at 265. The next question, then, was how to decide if a particular fraud is domestic.

The plaintiffs and the Solicitor General argued in *Morrison* that the Exchange Act was intended to regulate the conduct that caused the securities fraud, as well as the harmful effects of securities fraud. *Id.* at 270-71. And since the plaintiffs alleged that the Bank's fraud involved "conduct" and "effects" in the United States, they argued that the fraud was sufficiently domestic to constitute a violation of the Act. *Id.* at 266, 270.

This Court rejected that approach as lacking "any textual support" and instead adopted a "transactional test." *Id.* at 269-70. Specifically, the Court held that

Section 10(b) focuses "not upon the place where . . . deception originated, but upon purchases and sales of securities in the United States." *Id.* at 266 ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.' ") (quoting §10(b), 15 U.S.C. §78j(b)).

Accordingly, to determine whether Section 10(b) applies to a fraud claim, the Supreme Court directed courts to assess the transaction and ask a simple question: "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 269-70. Stated differently, the Court held that in light of the transactional focus of the Act, Section 10(b) was most naturally read to prohibit fraud "in connection with the purchase or sale [*in the United States*] of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. §78j(b).

B. ADRs

This case involves transactions in American Depositary Receipts. ADRs are receipts for American Depositary Shares, which in turn are "negotiable certificates issued by a United States depositary institution, typically banks [that] represent a beneficial interest in, but not legal title of, a specified number of

shares of a non-United States company." Pet. App. 11a.[1] *See also* Investor Bulletin: American Depositary Receipts, Office of Inv'r Educ. & Advocacy, SEC 1 (Aug. 2012), https://www.sec.gov/investor/alerts/adr-bulletin.pdf.

The SEC regulates ADRs and exempts them from the standard registration requirements applicable to other securities. Companies with stock traded outside the United States can create "sponsored" ADRs by entering directly into an agreement with a U.S. bank to arrange for recordkeeping, forwarding of shareholder communications, payment of dividends, and other services. *Id.*

Companies can also allow "unsponsored" ADRs without entering into a direct agreement with a U.S. bank by meeting two conditions. Those conditions are (1) "maintain[ing] a listing of its equity securities in its primary trading market located outside the United States" and (2) translating into English its annual reports, financial statements, and press releases and other communications to security holders. 17 C.F.R. §240.12g3-2(b)(3)(ii). If a company with stock traded on a foreign exchange creates its own ADR program (with or without actually selling ADRs), or does not elect to translate its annual reports, financial statements, and shareholder communications into English, depositary banks will be unable to register

[1] As the distinction between American Depositary Receipts and American Depositary Shares is immaterial in this case, this brief uses ADRs to refer to both instruments collectively.

an unsponsored ADR.[2] When the rules permitting the sale of unsponsored ADRs were under consideration by the SEC, several depositary banks, including one involved in the sale of the ADRs at issue in this case, informed the SEC that practical consent from foreign issuers was typically obtained before an unsponsored program was initiated, either through a non-objection letter or agreements to withdraw unsponsored programs when the issuer objects. *See* Appellants' Opening Brief at 39, *Stoyas v. Toshiba*, No. 16-56058 (9th Cir. Feb. 2, 2017).

C. Toshiba's Accounting Fraud and This Lawsuit

Toshiba is a Japanese corporation with common stock traded on the Tokyo Stock Exchange. Pet. App. 9a. Unsponsored ADRs of Toshiba's common stock are publicly traded on an over-the-counter market called OTC Pink through a domestic trading platform known as OTC Link ("the OTC"). The OTC is a U.S.-based over-the-counter market run by the OTC Markets Group, which provides price and liquidity information for almost 10,000 securities. *See* https://www.otcmarkets.com/about/our-company. Toshiba's listing on the OTC is made possible by the fact that Toshiba translates earnings statements into English, provides

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[2] *See* "American Depositary Receipts," SEC Release No. 274 at *4 (May 23, 1991) ("if a sponsored facility existed, no other depositary could create another facility for the same securities").

shareholder updates in English, and has not created a sponsored listing. *See* Pet. App. 91a-92a.

Over the course of nine months in 2015, Toshiba made a series of disclosures that revealed a massive, multi-year accounting fraud at the company which Toshiba's own internal investigation concluded was "carried out . . . in an institutional manner." Pet. App. 82a. A substantial portion of the fraud involved accounting practices and business operations in the United States. Pet. App. 87a-88a.

After the internal investigation at Toshiba and an outside investigation by an Independent Investigation Committee, Toshiba made a formal restatement of more than six years of reported financial results that eliminated approximately one-third ($2.6 billion) of the profits Toshiba had reported from 2008 to 2014. Pet. App. 83a-84a. The investigations also led to a $1.3 billion write-down of goodwill at Toshiba's U.S. nuclear business, Westinghouse Electric Co. and the termination of nine Toshiba senior executives. Pet. App. 82a-84a, 110a, 120a-133a. Following the disclosure of the fraud, the price of Toshiba's securities —and the ADRs that move in tandem with that price— dropped by more than 40%. Pet. App 85a, 91a.

Respondents brought suit against Toshiba under Section 10(b) of the Exchange Act. As relevant here, the complaint sought damages on behalf of a class of investors who purchased Toshiba ADRs in the United

States and who lost hundreds of millions of dollars as a result of Toshiba's fraud. Pet. App. 85a-86a.[3]

D. The Decisions Below

Toshiba did not contest that it was subject to personal jurisdiction and instead moved to dismiss Respondents' complaint as beyond the domestic reach of Section 10(b). The motion argued broadly that, even where a foreign issuer engages in fraud in connection with a security transaction in the United States, Section 10(b) does not apply if the foreign issuer "did not list its securities on a U.S. exchange or otherwise trade its securities in the United States." Pet. App. 51a.

The district court granted the motion, concluding that Respondents had failed to allege "[s]ome affirmative act in relation to the purchase or sale of securities." Pet. App. 65a. Believing that leave to amend would be futile, the court dismissed with prejudice. Pet. App. 76a-77a.

The Ninth Circuit agreed on appeal that the complaint "d[id] not sufficiently allege a domestic violation of the Exchange Act." Pet. App. 37a. But the court disagreed that amendment would be futile and remanded to allow Respondents to file an amended complaint. *Id.*

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[3] Observing the "transactional" approach of *Morrison*, plaintiffs who had purchased Toshiba common stock on the Tokyo Stock Exchange brought claims under Japanese law rather than the Securities Exchange Act. Pet. App. 7a.

The Ninth Circuit reasoned that Toshiba's ADRs fit comfortably within the Exchange Act's definition of a "security" because they carry all significant features of "stock." Pet. App. at 10a-15a. Accordingly, under the plain text of the Act, Toshiba's ADRs on the OTC qualified as "any security" not registered on a national securities exchange. 15 U.S.C. §78j(b); *see also Morrison*, 561 U.S. at 269-70 (noting that the Act applies to domestic transactions in securities on "over-the-counter markets").

The court further reasoned that Respondents' purchases of Toshiba ADRs would count as a domestic transaction if Respondents incurred irrevocable liability for the purchases in the United States. In so holding, the Ninth Circuit explicitly adopted the same test as the Second and Third Circuits. That test originated in the Second Circuit's decision in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012). Applying this standard, the Ninth Circuit concluded that Respondents' complaint had failed to include "specific factual allegations regarding where the parties to the transaction incurred irrevocable liability." Pet. App. at 30a. The court therefore agreed with the district court (and Petitioner) that the complaint failed to plead a domestic transaction covered by Section 10(b), but it disagreed that amendment would be futile. Pet. App. at 31a.

Petitioner had also argued that even if the court concluded that Respondents purchased Toshiba ADRs in the United States, that was not enough to establish that Section 10(b) applied. Citing *Parkcentral Global Hub v. Porsche Automobile Holdings*, 763 F.3d 198 (2d

Cir. 2014), Petitioner argued that "because the Funds did not allege any connection between Toshiba and the Toshiba ADR transactions, *Morrison* precludes the Funds' Exchange Act claims." Pet. App. at 31a.

Although the Ninth Circuit had already held that Respondents' complaint failed to state a claim, it went on to reject Petitioner's argument based on *Parkcentral*, reasoning that "[t]his turns *Morrison* and Section 10(b) on their heads." Pet. App. 31a. As the court explained, this confused the application of the Act to the ADR transactions with the separate question of whether the fraud was made in connection with those transactions: "For the Exchange Act to *apply*, there must be a domestic transaction; that Toshiba may ultimately be found not liable for causing the loss in value to the ADRs does not mean that the Act is inapplicable to the transactions." Pet. App. 32a.

REASONS FOR DENYING THE PETITION

The petition in this case improperly seeks certiorari review of the reasoning under which Petitioner *prevailed* on its request to dismiss the complaint below. It also fails to identify a genuine split of authority and offers policy reasons for this Court's review that rest on wholly unfounded hyperbole.

I. "As a matter of practice and prudence, [this Court has] generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed [it] to do so." *Camreta v. Greene*,

563 U.S. 692, 703-04 (2011). The Ninth Circuit held below that Respondents' complaint failed to state a claim. Petitioner is now asking this Court to grant review so that it can obtain dismissal on a broader theory. But as this Court has made clear:

> [T]hat the Court of Appeal reached its decision through an analysis different than this Court might have used does not make it appropriate for this Court to rewrite the [lower] court's decision, or for the prevailing party to request [the Court] to review it.

California v. Rooney, 438 U.S. 307, 311 (1987) (*per curiam*).

Review of Petitioner's victory is doubly inappropriate because the petition is interlocutory. The Ninth Circuit directed the district court to dismiss the complaint, but allowed Respondents to file an amended complaint. If Respondents are unable to state a claim on remand, review by this Court now will have no impact on this case. On the other hand, if Respondents are able to state a claim on remand, the operative complaint will contain allegations that materially inform the Court's consideration of the question presented. Petitioner is not only seeking review of the manner in which it prevailed, but is also seeking review in a posture that would deprive the Court of important context to answer the question presented.

II. Apart from the fatal procedural posture of the petition, Petitioner is also incorrect when it asserts a split of authority between the Ninth Circuit and

Second Circuit. The Ninth Circuit expressly applied the standard adopted by the Second Circuit in *Absolute Activist*, which remains the governing standard in the Second Circuit today. Moreover, the actual holdings of the Ninth Circuit in this case and the Second Circuit in *Parkcentral* do not conflict. This case would have been decided the same way in the Second Circuit. To be sure, the Ninth Circuit expressly disagreed with the reasoning of *Parkcentral*. But the *Parkcentral* panel cautioned that it was not setting forth a general rule applicable beyond the highly unusual facts of that case. And the Second Circuit has not subsequently applied the language in *Parkcentral* on which Petitioner relies. Indeed, after *Parkcentral*, the Second Circuit reiterated that "*Morrison* clearly provided that the 'domestic transaction' prong is an independent and sufficient basis for application of the Securities Exchange Act to purportedly foreign conduct." *Myn-Uk Choi v. Tower Research Capital LLC*, 890 F.3d 60, 67 (2d Cir. 2018).

The Second Circuit's refusal to apply the language in *Parkcentral* on which Petitioner relied is not surprising, because that language is directly contrary to the text of Section 10(b) and this Court's holding in *Morrison*.

This Court's review is not warranted to address a single flawed statement in a *per curiam* opinion that the panel expressly limited to the case at hand and that the Second Circuit has subsequently and properly ignored.

III. Finally, while Petitioner asserts that the Ninth Circuit's decision will invite a flood of improper claims against foreign issuers, those warnings are unfounded hyperbole.

The hypothetical abuses posited by Petitioner and its amici—in which foreign issuers with no connection to the United States are dragged into U.S. courts—would all be precluded by the absence of personal jurisdiction over such defendants. Toshiba did not contest or seek dismissal for lack of personal jurisdiction here. Where a defendant has purposefully directed harmful conduct into the United States, and where a plaintiff can plead all the other elements of a Section 10(b) violation, the defendant cannot claim unfairness in being held to account when its fraud is shown to have caused injuries in U.S. securities transactions.

I. THE PETITION IMPROPERLY SEEKS REVIEW OF THE MANNER IN WHICH PETITIONER PREVAILED BELOW

The Ninth Circuit in this case held that Respondents *failed* to plead a domestic transaction. On remand, Respondents will have an opportunity to amend, but the operative complaint will be dismissed. Accordingly, if this Court were to grant review and agree in full with Petitioner on the question presented,

that would not alter the disposition ordered by the Ninth Circuit.[4]

Petitioner's desire for an advisory decision addressing the standard that should be applied to a yet-unfiled complaint does not warrant this Court's review. This Court "reviews judgments, not statements in opinions." *California v. Rooney*, 438 U.S. 307, 311 (1987) (*per curiam*), quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). Accordingly, "[a]s a matte of practice and prudence, [this Court has] generally declined to consider cases at the request of a prevailing party, even when the Constitution allowed [it] to do so." *Camreta v. Greene*, 563 U.S. 692, 703-04 (2011).

While this maxim is a prudential rule rather than a limit on the Court's jurisdiction, this Court has departed from it only in rare cases. *See Camreta v. Greene*, 563 U.S. 692, 704 (2011). For example, in *Camreta*, this Court decided that it would review constitutional standards governing the conduct of public officials even if the defendant officials would be protected by qualified immunity. *Id.* at 704-05. But the Court emphasized that this exercise of discretion turned on the unique context of qualified immunity. *Id.* at 706-07. Denying review in *Camreta* would have imposed "an unenviable choice" on a public official:

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[4] The only way this Court's review could alter the disposition below would be to order a dismissal with prejudice instead of with leave to amend. But this Court does not typically grant review to wade into the highly fact-bound question of whether the amendment of a complaint would be futile in an individual case, which is presumably why Petitioner does not ask it to.

"[h]e must either acquiesce in a ruling he had no opportunity to contest in this Court" or "defy the views of the lower court" and risk new suits and potential punitive damages. *Id.* at 708.

This petition does not fall into any "special category when it comes to this Court's review of appeals brought by winners." *Id.* at 704. Petitioner does not face any dilemma such that accepting victory now will preclude it from raising a separate defense to damages later. Petitioner obtained dismissal of the complaint below, but would apparently have liked the Ninth Circuit to order dismissal on broader grounds.[5] This Court's review is not warranted where the Petitioner won below but would prefer to have won under different reasoning.

Review of Petitioner's victory is doubly inappropriate because the petition is interlocutory. The Ninth Circuit directed the district court to grant Petitioner's motion to dismiss, but allowed Respondents to file an amended complaint. If Respondents are unable to state a claim on remand, immediate review by this Court would have no impact on the case. On the other hand, if Respondents are able to state a claim on remand, the operative complaint will contain allegations that materially inform the Court's consideration of the

[5] To the extent Petitioner argues that it was not the prevailing party below because the Ninth Circuit held that allowing Respondents leave to amend would not be futile, that argument is a red herring. Petitioner does not seek review on that highly fact-bound and case-specific question, so its disappointment on that issue is no basis for obtaining review either.

question presented. In addition, many of the facts assumed by Petitioner and its amici could be contradicted by allegations in an amended complaint or through discovery, thereby making application of the Exchange Act proper even under Petitioner's view of the law. Thus, Petitioner not only is seeking review of the manner in which it prevailed, but also is seeking review in a posture that would deprive the Court of important context to answer the question presented.

For these reasons alone, the petition should be denied.

II. THE SPLIT ALLEGED BY THE PETITION IS ILLUSORY

Petitioner builds its entire claim of a circuit split on the Second Circuit's *per curiam* decision in *Parkcentral*. But that alleged split is illusory for three reasons. First, the Ninth Circuit properly applied the Second Circuit's decision in *Absolute Activist* and the actual *holdings* of the Ninth Circuit in this case and the Second Circuit in *Parkcentral* do not conflict. Second, while the Ninth Circuit rejected some of the *reasoning* in *Parkcentral*, that reasoning was expressly cabined by the *Parkcentral* panel and has not been applied since by the Second Circuit. It is not the law of the Second Circuit. Third, there is little reason to fear that the flawed reasoning of *Parkcentral* will become the law of the Second Circuit in the future, as it plainly conflicts with the text of Section 10(b) and this Court's holding in *Morrison*.

A. There is no conflict between the holding of the Ninth Circuit in this case and holdings of the Second Circuit.

As a threshold matter, it bears emphasis that the Ninth Circuit expressly adopted and applied the Second Circuit's *Absolute Activist* test, which holds that a securities transaction is subject to the Exchange Act when a party incurs irrevocable liability for the security in the United States. Pet. App. 29a-30a. The Second Circuit continues to apply *Absolute Activist* as binding authority. *E.g.*, *S.E.C. v. Amerindo Inv. Advisors*, 639 F. App'x 752, 753 (2d Cir. 2016) (noting that "*Absolute Activist* clearly defined 'domestic transactions' in the wake of *Morrison*" and "[t]here is no basis for us to reconsider our decision in *Absolute Activist*").

Petitioner argues that the Ninth Circuit's decision conflicts with the Second Circuit's decision in *Parkcentral*. But this Court's review is warranted to resolve conflicting *holdings*, not merely to referee differences in *reasoning*. *Rooney*, 438 U.S. at 311. And the holdings of the decisions below do not conflict for two reasons.

First, at a most basic level, both decisions held that the complaints should be dismissed for failure to state a claim within the domestic reach of Section 10(b). *Compare* Pet. App. 37a (holding that the complaint "does not sufficiently allege a domestic violation of the Exchange Act") *with Parkcentral*, 763 F.3d at 216 ("[T]he complaints fail to invoke §10(b) in a manner consistent with the presumption against

extraterritoriality."). There is obviously no conflict between those holdings.

Second, even if the Ninth Circuit were to hold (following remand, district court consideration of an amended complaint, and a subsequent appeal) that Respondents properly alleged a domestic claim based on their purchase of Toshiba's ADRs, that hypothetical holding would still be distinguishable from the result in *Parkcentral*. As both the Second and Ninth Circuits noted, *Parkcentral* involved unusual facts not present in this case. Pet. App. 32a. The securities in *Parkcentral* were security-based swap agreements rather than ADRs. 763 F.3d at 205-06. Unlike ADRs, "those entirely private agreements do not constitute investments in the company on whose securities they are based nor do they confer any ownership interest in those reference securities." Pet. App. 32a. The value of the swap agreements was "wholly unconstrained by the amount of reference security available and [wa]s not directly pegged to the value of the reference security." *Id.* By contrast, an ADR conveys a direct beneficial interest in specific shares of stock issued by the foreign company. Pet. App. 11a. An ADR cannot be sold unless the depositary institution owns, or has the right to obtain, the underlying shares of stock that support its sale. *Id.* In addition, the purchaser of an ADR has a right to receive the foreign shares on demand by tendering its ADR to the selling bank. Pet. App. 15a. Thus, unlike the securities that were at issue in *Parkcentral*, the ADRs at issue in this case do not present the risk of exposing an issuer to liability that exceeds the bounds of the shares it has authorized and issued.

Parkcentral is further distinguishable because the false statements central to the alleged fraud were not made by the foreign issuer of the referenced security (Volkswagen), but were instead made by a third party (Porsche). 763 F.3d at 207-08. Accordingly, the panel concluded that "the relevant actions in th[e] case [we]re so predominantly German" as to compel the conclusion that the fraud alleged was insufficiently domestic. *Id.* at 216.

In short, even accepting Petitioner's view of the law, nothing in *Parkcentral* requires the dismissal of a claim based on fraud in connection with the sale of ADRs on the OTC. If this case were filed in the Second Circuit and Respondents established that they purchased Toshiba ADRs in the United States, there is every reason to believe that the Second Circuit would conclude that Respondents had pleaded a properly domestic claim. But even if Petitioner takes issue with that argument, there is certainly no holding from the Second Circuit that would *require* dismissal of Respondents' claims. There is accordingly no conflict between the holdings in this case and *Parkcentral*, or between the general rule in the Second and Ninth Circuits.

B. The language in *Parkcentral* on which Petitioner relies is not the law of the Second Circuit.

While the Ninth Circuit expressly rejected part of the reasoning of *Parkcentral*, the criticized portion of

Parkcentral was carefully limited and has not been applied subsequently by the Second Circuit.

The panel in *Parkcentral* went out of its way to emphasize that it was not setting forth a generally applicable rule for other cases. It explained that its decision was tied to "the particular character of the unusual security at issue," and should not be "perfunctorily applied to other cases based on the perceived similarity of a few facts." 763 F.3d at 202. It cautioned that it "did not purport to proffer a test that will reliably determine when a particular invocation of §10(b) will be deemed appropriately domestic or impermissibly extraterritorial." *Id.* at 217. And it opined that:

> [C]ourts must carefully make their way with careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases, so as eventually to develop a reasonable and consistent governing body of law on this elusive question. . . . While over time a series of judicial opinions may collectively result in one or more such standards, we do not think it appropriate in this case of first impression to attempt to set forth a comprehensive rule or set of rules that will govern all future cases to come before this Court.

Id. at 217.

The Second Circuit has not applied *Parkcentral* to dismiss a single claim since then and has instead

either distinguished it or ignored it entirely. *See Giunta v. Dingman*, 893 F.3d 73, 82 (2d Cir. 2018) (declining to apply *Parkcentral* because that case "involved securities-based swap agreements and the foreign company defendant was not a party to the agreements"); *In re Petrobras Sec.*, 862 F.3d 250, 262 (2d Cir. 2017) (stating that "[t]his Court's decision in *Absolute Activist* elaborated on" the applicable standard and held that "a transaction is considered 'domestic if [1] irrevocable liability is incurred or [2] title passes within the United States.' ") (quoting *Absolute Activist*, 677 F.3d at 67); *S.E.C. v. Amerindo Inv. Advisors*, 639 F. App'x 752, 753 (2d Cir. 2016) (noting that "*Absolute Activist* clearly defined 'domestic transactions' in the wake of *Morrison*" and "[t]here is no basis for us to reconsider our decision in *Absolute Activist*").

Indeed, just this year, the Second Circuit reaffirmed that the existence of a domestic transaction "is an independent and sufficient basis for application of the Securities Exchange Act to purportedly foreign conduct." *Choi*, 890 F.3d at 67. In sum, the standard in the Second Circuit for determining whether Section 10(b) applies to an international transaction is the irrevocable liability test of *Absolute Activist*—the same decision expressly adopted and applied by the Ninth Circuit.

Orphaned reasoning from a *per curiam* opinion that is expressly limited to highly unusual facts, that declines to offer a rule of any general application, and that has been subsequently ignored, is not evidence of an entrenched circuit split.

C. The language in *Parkcentral* on which Petitioner relies has been ignored for a good reason: it is plainly wrong.

There is a good reason for the Second Circuit's failure to repeat or apply the reasoning in *Parkcentral* on which Petitioner relies. Petitioner's attempt to create an amorphous exception to *Morrison*'s transactional test would ignore the plain text of Section 10(b), conflict with the holding of *Morrison*, and revive all the unpredictability this Court identified as the reason for rejecting the Second Circuit's previous "conduct and effects" test.

The petition would have this Court grant review in order to hold that "a domestic transaction [is] necessary but, by itself, not sufficient for [domestic] application of the Act." Pet. i. But while the petitioner repeatedly asserts that a domestic transaction is *not* sufficient, it is telling that the petition never offers any clear definition of what *would be* sufficient. The best the petition can offer is to suggest that the Act should sometimes not apply to protect domestic transactions "because other aspects of the claim make it impermissibly extraterritorial." *Id.*

Petitioner cannot offer a test to determine what additional showing would be "sufficient" because doing so would reveal what Petitioner is really seeking: a free-floating "comity" requirement with no connection to the text of the Act or the transactional test of

Morrison.[6] Section 10(b) prohibits the use of "any manipulative or deceptive device or contrivance . . . in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. §78j(b). The essential teaching of *Morrison* is that Section 10(b) focuses on protecting *domestic transactions* from fraud. *See Morrison*, 561 U.S. at 267 ("It is those transactions that the statute seeks to 'regulate.' "). Accordingly, the text is most naturally read to prohibit fraud "in connection with the purchase or sale [*in the United States*] of any security registered on a national securities exchange or any security not so registered." 15 U.S.C. §78j(b).

Where a plaintiff properly pleads a domestic transaction and the other elements of a violation—*i.e.*, a false and material statement in connection with the transaction that causes a loss—the plaintiff has pleaded a domestic violation. There is no textual basis to argue that the statute contains a separate, amorphous exception for otherwise actionable fraud because "other aspects of the claim make it impermissibly extraterritorial." Pet. i.

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[6] Indeed, one of the amicus curiae briefs filed in support of Petitioner argues that the Ninth Circuit's transactional approach is wrong by citing regulatory comments filed with the SEC in support of "the possible restoration of the conducts and effects tests in private actions under Section 10(b) of the Exchange Act." Brief of EuropeanIssuers et al. at 21. According to amicus, the arguments offered to support the revival of the conducts and effects test "ring equally true in the present case." *Id.*

Because it ignores the text of Section 10(b) and the central logic of *Morrison*, Petitioner's approach would revive the same sort of uncertainty that caused this Court to reject the Second Circuit's prior "conduct and effects" test. As this Court observed in *Morrison*:

> There is no more damning indictment of the "conduct" and "effects" tests than the Second Circuit's own declaration that "the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases."

561 U.S. at 258-59 (quoting *IIT v. Cornfeld*, 619 F.2d 909, 918 (2d Cir. 1980)).

This Court's "damning indictment" of the Second Circuit's old test applies with full force to the *Parkcentral* "test" that Petitioner supports. The *Parkcentral* panel itself conceded that it "did not purport to proffer a test that will reliably determine when a particular invocation of §10(b) will be deemed appropriately domestic or impermissibly extraterritorial." 763 F.3d at 217. Rather, under the approach Petitioner endorses, "[w]hile over time a series of judicial opinions may collectively result in one or more such standards," there is no "comprehensive rule or set of rules that will govern all future cases." *Id.* at 217. Given the clear instructions of this Court in *Morrison* and the subsequent decisions of the Second Circuit, there is no basis to conclude that the Second Circuit will accept the standardless and free-floating exception to Section 10(b) that Petitioner seeks.

III. THERE IS NO NEED FOR THIS COURT'S REVIEW

That Petitioner (1) prevailed on its request for dismissal below and (2) fails to allege a genuine split both provide independent and sufficient grounds to deny review. But it is also worth noting that the policy arguments offered by Petitioner and its amici are built on unfounded hyperbole.

Petitioner and its amici claim that the Ninth Circuit's decision will open U.S. courts to a flood of lawsuits alleging wholly foreign claims of securities fraud. Pet. 2 ("The Ninth Circuit's holding subjects foreign issuers to Exchange Act claims whenever third parties bring the issuer's securities into the United States and transact in those securities, or any derivatives thereof, here."); Pet. 4 ("[T]he Ninth Circuit in effect has opened a new forum for U.S. class-action litigation against any foreign issuer in the world."); Pet. 4-5 ("Regardless of whatever efforts it undertakes to avoid being subject to U.S. securities laws and litigation, a foreign issuer is now exposed in the Ninth Circuit to class-action lawsuits under the Exchange Act. . . .").

Nonsense. A plaintiff alleging securities fraud must plead more than a domestic transaction to remain in court. Most notably, any plaintiff suing a foreign issuer must establish personal jurisdiction over the defendant. To satisfy this requirement, a plaintiff must establish three conditions for the exercise of specific jurisdiction over a nonresident defendant.

First, the plaintiff must show that the defendant "'purposefully avail[ed] itself of the privilege of conducting activities within the forum State.'" *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877 (2011) (plurality opinion) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

Second, the plaintiff must establish that its claim "is related to or 'arises out of' a defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

Third, the exercise of jurisdiction must be reasonable under the circumstances. *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113-14 (1987). In assessing this third factor, courts consider:

> "[T]he burden on the defendant," "the forum State's interest in adjudicating the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies."

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (quoting *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

The wholly foreign claims that Petitioner and its amici assert will flood the U.S. courts would be barred at the threshold by a lack of personal jurisdiction.

Moreover, for those suits in which a plaintiff establishes personal jurisdiction over the defendant, the plaintiff must still plead the remaining elements of the Section 10(b) claim. Namely, the plaintiff must prove a false statement, that is material and made with scienter, in connection with the domestic transaction, and that causes a loss to the plaintiff. *E.g.*, Pet. App. 34a. Failure to properly plead any of these elements will likewise cause invalid claims to be dismissed at the threshold.

But where a defendant has purposefully directed a material falsehood into the United States, where an assertion of personal jurisdiction is reasonable in light of the interests of the United States, and where the falsehood has caused injury in connection with a domestic securities transaction, Petitioner's assertion that it would be unfair or improper to hale that defendant into U.S. courts rings hollow.[7]

That may well be why Petitioner has not described any flood of "foreign" securities fraud cases in the wake of *Morrison*. As explained above, the transactional approach established by *Morrison* mandates that any injury caused by a fraud affecting a domestic securities transaction gives rise to a claim under Section 10(b). Thus, the standard that Petitioner complains of was already established prior to the Ninth Circuit's

[7] Indeed, where a foreign issuer inflicts injury on domestic purchasers of securities such as ADRs, the greater risk of unfairness is that imposing an amorphous "insufficiently domestic" exception to the Exchange Act could leave the domestic purchasers without any remedy at all.

decision in this case. But Petitioner has identified no deluge of improperly foreign claims being filed following *Morrison*. If no such flood existed before the Ninth Circuit's decision in this case, there is no reason to expect one now. Indeed, Petitioner won a dismissal in this case in the Ninth Circuit. That is hardly a green light inviting the filing of meritless claims from abroad.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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