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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

REPLY BRIEF FOR PETITIONER

Plaintiffs are mistaken both in arguing that Toshiba "prevailed" in the Ninth Circuit and in disputing that the Ninth Circuit genuinely split from the Second Circuit.

I. Plaintiffs Were The Prevailing Parties In The Ninth Circuit

The Ninth Circuit "reversed" and "remanded" the district court's order that dismissed the claims against Toshiba. App. 37a. Oddly, Plaintiffs characterize this outcome as a "victory" for Toshiba, calling Toshiba a "prevailing party." Opp'n 9-10, 12-15. In fact, Toshiba was the losing party under the Ninth Circuit's judgment, and this Court's general practice against granting review to prevailing parties does not have any relevance here.

Toshiba prevailed *in the district court*, which granted Toshiba's motion to dismiss and accepted Toshiba's argument, based on *Morrison* and *Parkcentral*, that § 10(b) could not be applied extraterritorially to Toshiba, which did not have any involvement in Plaintiffs' indisputably domestic transactions in the unsponsored ADRs. The Ninth Circuit upended Toshiba's victory, reversing the district court's judgment of dismissal and remanding with leave for Plaintiffs to file an amended complaint.

Any uncertainty about who won and who lost in the Ninth Circuit is resolved by consideration of the parties' briefs in that court. Plaintiffs asked that the dismissal of the claims against Toshiba be "reversed."

Appellants' Opening Brief at 55, ECF No. 11; Appellants' Reply Brief at 19, ECF No. 28. Toshiba asked the Ninth Circuit to "affirm." Answering Brief of Defendant-Appellee Toshiba Corporation at 60, ECF No. 23-1.

Plaintiffs' counsel understand full well who prevailed in the Ninth Circuit, for they issued a press release trumpeting their victory: "On July 17, 2018, the United States Court of Appeals for the Ninth Circuit ruled in plaintiffs' favor in *Stoyas v. Toshiba Corporation*, reversing the district court's prior dismissal of the action." Robbins Geller Rudman & Dowd LLP, Press Release, *Robbins Geller Wins Ninth Circuit Appeal for Toshiba Investors* (July 17, 2018), https://www.rgrdlaw.com/news-item-Robbins-Geller-Wins-Ninth-Circuit-Appeal-for-Toshiba-Investors.html (last visited on Dec. 20, 2018).

Plaintiffs are incorrect in asserting that "if this Court were to grant review and agree in full with Toshiba on the question presented, that would not alter the disposition ordered by the Ninth Circuit." Opp'n 12-13. In fact, agreement with Toshiba (and adoption of a rule like *Parkcentral*'s) would have the effect of affirming the district court's dismissal instead of reversing it.

Plaintiffs point out that, in reversing and remanding, the Ninth Circuit questioned whether the Plaintiffs had sufficiently alleged that they had purchased their ADRs in a domestic transaction. Opp'n 1, 6-7. But the Ninth Circuit added that any deficiency in the pleading could be readily cured, App. 31a, and, more importantly, that Toshiba *did not*

contest the sufficiency of the allegation of domestic transactions: "Rather than challenging whether the transactions were domestic, Toshiba argues that the existence of a domestic transaction is necessary but not sufficient under *Morrison*, relying on the Second Circuit case *Parkcentral* . . . ." App. 31a. The Ninth Circuit then proceeded to analyze that issue, ultimately rejecting Toshiba's argument premised on *Parkcentral*. App. 31a-33a.

Plaintiffs are off-base in arguing that the Ninth Circuit's tangential comments on Plaintiffs' pleading of a "domestic transaction" somehow transform the Ninth Circuit's reversal into a "victory" for Toshiba. Plaintiffs' own authorities confirm that this Court reviews "judgments, not statements in opinions." Opp'n 13 (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956))). Here, the "judgment" was reversal of the district court's dismissal and remand for further proceedings. Furthermore, there is nothing interlocutory about the Ninth Circuit's categorical rejection of *Parkcentral*; the Ninth Circuit has expressed its position with finality, and its decision stands as precedent. Plaintiffs certainly do not identify any new allegations they could raise on remand that would have any impact on the Ninth Circuit's legal ruling. *See* Opp'n 14-15.

Unsurprisingly, this Court frequently grants certiorari where there has been a dismissal without prejudice (allowing leave to amend the complaint). *See, e.g.*, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S.

656, 660 (1993) (recounting that court of appeals had "vacated the District Court's judgment, and remanded the case with instructions to dismiss petitioner's complaint without prejudice"); *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 52 (2018) (granting certiorari where court of appeals had affirmed dismissal of complaint without prejudice); *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 138 S. Ct. 2707 (2018) (same); *Knick v. Twp. of Scott*, 138 S. Ct. 1262 (2018) (same).

Plaintiffs rely upon *Camreta v. Greene*, 563 U.S. 692 (2011), but there the petitioners won dismissal in the district court (on summary judgment) and then won *affirmance* of the dismissal in the court of appeals. 563 U.S. at 699. Under those circumstances, this Court stated that petitioners "are, without doubt, prevailing parties" in the court of appeals. *Id.* at 700. The petitioners nonetheless sought certiorari because the court of appeals, in affirming the dismissal on the basis of qualified immunity, found that petitioners had violated respondent's constitutional rights. *Id.* In this context, this Court reiterated its general policy of declining to consider cases at the request of a prevailing party. *Id.* at 703-09 (holding ultimately that certain qualified immunity cases are exempt from this general policy).

The circumstances here are diametrically opposite. Here, the Ninth Circuit "reversed" and "remanded" the district court's dismissal. Toshiba was not a "prevailing party" in the Ninth Circuit. It may seek certiorari unconstrained by the general practice operating against prevailing parties.

II. The Conflict Between The Second And Ninth Circuits Is Express, Genuine, And Irreconcilable

Plaintiffs cannot obscure, distinguish, or minimize *Parkcentral*. Far from being "illusory," Opp'n 15, the conflict between the Second and Ninth Circuits is real and unavoidable.

A. The Ninth Circuit Expressly Rejected *Parkcentral*

Plaintiffs misdirect focus toward the Ninth Circuit's adoption of the Second Circuit's *Absolute Activist* test for finding the *existence* of a domestic securities transaction. Opp'n 16 (citing App. 29a-30a (adopting *Absolute Activist*'s "irrevocable liability" test)). But alignment on this test, which was not disputed by the parties here, does not negate the express conflict between the circuits on the subsequent issue of whether the existence of a domestic transaction is *sufficient* for application of the Exchange Act. If anything, alignment on the antecedent test for the *existence* of a domestic transaction only serves to squarely frame the express conflict as to the *sufficiency* of a domestic transaction.

Plaintiffs simply cannot avoid that the Ninth Circuit's decision conflicts with *Parkcentral* as to whether the existence of a domestic transaction is sufficient. Opp'n 16-17. The Ninth Circuit expressly stated that it was rejecting *Parkcentral*. App. 31a-32a (stating *Parkcentral* "turns *Morrison* and Section 10(b) on their heads: because we are to examine the location of the transaction, it does not matter that a foreign entity was not engaged in the transaction").

And, contrary to Plaintiffs' assertion, the *holdings* of the two circuits — not just their "reasoning" — conflict: In *Parkcentral*, the Second Circuit held § 10(b) *in*applicable, whereas here the Ninth Circuit held § 10(b) applicable (reversing the district court that held otherwise).

Nor can Plaintiffs distinguish *Parkcentral* on its facts. Opp'n 17-18. None of the distinctions between ADRs and swaps, Opp'n 17, had any bearing on *Parkcentral*'s holding. *See* 763 F.3d at 206 n.8 (declining to address unique characteristics of swap agreements); *see also* Pet. 27 (discussing § 10(b)'s applicability to "'any securities-based swap agreement'" (quoting 15 U.S.C. § 78j(b))). Nor was it relevant that the defendant in *Parkcentral* was not the issuer of the stock referenced in the swaps at issue. Opp'n 18.

This case presents the same features that the Second Circuit found decisive in *Parkcentral* — none of which Plaintiffs dispute: the Amended Complaint "concerns statements made primarily in [Japan] with respect to stock in a [Japanese] company traded only on exchanges in [Japan]"; the claims are based on "an agreement independent from the reference securities"; and "the fraudulent acts alleged in the [Amended Complaint] have been the subject of investigation by the [Japanese] regulatory authorities and adjudication in [Japanese] courts." 763 F.3d at 216; *see* Pet. 21. Just as in *Parkcentral*, "[t]he 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" application to Toshiba. 763 F.3d at 216.

This case and *Parkcentral* thus present an express and irreconcilable conflict.

B. *Parkcentral*'s Rule — That The Mere Existence Of A Domestic Transaction Is Insufficient To Apply § 10(b) — Is Binding And Followed In The Second Circuit

Plaintiffs' suggestion that *Parkcentral* is not controlling law in the Second Circuit is foreclosed by *Parkcentral*'s progeny in the Second Circuit, including *Giunta v. Dingman*, 893 F.3d 73 (2d Cir. 2018), which unequivocally confirms the authoritative force of *Parkcentral* in the Second Circuit.

Rather than "declining to apply" *Parkcentral*'s purportedly "orphaned reasoning," Opp'n 20, the Second Circuit in *Giunta* recently set out *Parkcentral* as the "Applicable Law," stating:

> In *Parkcentral* [ ], we qualified the scope of the *Absolute Activist* decision. . . . We held that while the presence of a 'domestic transaction' in a security is a necessary element of a *section 10(b)* claim . . . it is not necessarily sufficient to make the invocation of section 10(b) appropriately domestic.

Giunta, 893 F.3d at 82 (citing *Parkcentral*, 763 F.3d at 215). *Giunta* concluded that the claims there were not impermissibly extraterritorial because they "do not present nearly the same level of foreign entanglement as presented in *Parkcentral*." *Id.* In light of *Giunta*, Plaintiffs are demonstrably incorrect

in asserting that *Parkcentral* has been subsequently "ignored" in the Second Circuit. Opp'n 11, 19-20. On the contrary, *Parkcentral* continues to be recognized as controlling.

The Second Circuit, moreover, has repeatedly relied on *Parkcentral* as authoritative law when applying the presumption against extraterritoriality generally, *see Mastafa v. Chevron Corp.*, 770 F.3d 170, 187 (2d Cir. 2014); *Microsoft Corp. v. United States*, 829 F.3d 197, 210 (2d Cir. 2016), as well as when construing the scope of § 10(b), *see United States v. Litvak*, 808 F.3d 160, 177 (2d Cir. 2015).

Plaintiffs misplace reliance upon *Choi v. Tower Research Capital LLC*, 890 F.3d 60 (2d Cir. 2018). The later-decided *Giunta* correctly reads *Choi* as an application of *Absolute Activist*'s test, not as a "refusal to apply" *Parkcentral*. Opp'n 11, 20; *see Giunta*, 893 F.3d at 80-81; Pet. 25-26. *Choi* did not have occasion to address whether a domestic transaction is alone sufficient to apply § 10(b) to foreign defendants; unlike in *Parkcentral* and here, *Choi* was adjudicating claims involving U.S. defendants who were the counter-parties to the domestic transactions at issue. *See Choi*, 890 F.3d at 62-63, 68. Recognizing the limited focus of *Choi*, *Giunta* accordingly relied on *Parkcentral* for the rule that a domestic transaction alone is insufficient to apply the Exchange Act. *Giunta*, 893 F.3d at 82.

The other two cases Plaintiffs cite, Opp'n 20, similarly deal with the test for determining the *existence* of domestic transactions; neither case contradicts *Parkcentral* (or *Giunta*) or addresses

whether a domestic transaction is, by itself, sufficient to apply the Exchange Act. *See In re Petrobras Sec. Litig.*, 862 F.3d 250, 262 (2d Cir. 2017) (relying on *Absolute Activist* standard for finding a domestic transaction); *SEC v. Amerindo Inv. Advisors*, 639 F. App'x 752, 753 (2d Cir. 2016) (same); Pet. 25.

Plaintiffs ignore that district courts in the Second Circuit have relied on *Parkcentral* to dismiss claims as impermissibly extraterritorial. *See* Pet. 26 (citing *In re London Silver Fixing, Ltd., Antitrust Litig.*, No. 14-MD-2573 (VEC), 2018 U.S. Dist. LEXIS 124856, at *73-75 (S.D.N.Y. July 25, 2018) (relying on *Parkcentral* to dismiss CEA claims); *In re N. Sea Brent Crude Oil Futures Litig.*, 256 F. Supp. 3d 298, 307-10 (S.D.N.Y. 2017) (same)).

C. The Second And Ninth Circuits' Rules Cannot Be Reconciled

By arguing at length that the Second Circuit in *Parkcentral* is "plainly wrong" about the reach of the Exchange Act, Opp'n 21-23, Plaintiffs merely confirm that the conflict between the Second and Ninth Circuits is irreconcilable. Argument over which side of the conflict is correct is for the merits stage.

III. Certiorari Is Warranted To Prevent The Extraterritorial Application Of The Exchange Act

Plaintiffs do not dispute that permitting "wholly foreign claims" under the Exchange Act would interfere with foreign sovereigns' regulation of their own securities markets, invite reciprocal interference in U.S. markets by foreign governments, and

threaten to undermine the federal policy to facilitate U.S. investors' trading in unsponsored ADRs. Opp'n 24-25; *see* Pet. 33-39.

Plaintiffs minimize the risk of "wholly foreign claims" as "hypothetical," asserting that any such claims "would be barred at the threshold by a lack of personal jurisdiction." Opp'n 12, 25. But Plaintiffs also assert that all foreign issuers that translate their investor communications into English thereby "allow 'unsponsored' ADRs" in the United States — a transparent argument that all such foreign issuers "purposefully avail" themselves of the U.S. forum for purposes of personal jurisdiction. Opp'n 4, 25. (Plaintiffs myopically never acknowledge that many foreign issuers are from English-speaking countries or have shareholders in English-speaking countries other than the United States.)

Plaintiffs also assume that personal jurisdiction is co-extensive with the domestic reach of the Exchange Act, rendering the presumption against extraterritoriality superfluous. Opp'n 25. But the presumption against extraterritoriality is a "long-standing principle of American law," and implicates different concerns. *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991). Whereas due process ensures that personal jurisdiction is limited by "fair play and substantial justice" for the *defendant*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of *other nations*, which could result in international discord," *Aramco*, 499 U.S. at 248 (emphasis added).

As this Court has observed, "unintended clashes" with foreign laws are particularly likely in application of the Exchange Act to foreign issuers: "Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours . . . ." *Morrison*, 561 U.S. at 269. While a specific-personal-jurisdiction defense might insulate certain foreign issuers from securities actions in the United States, proper and consistent domestic application of § 10(b) cannot depend on defendants asserting a personal-jurisdiction defense. *See Charles Schwab Corp. v. Bank of Am. Corp.*, 883 F.3d 68, 89 (2d Cir. 2018) ("[A] party might have various reasons for declining to raise a personal jurisdiction defense . . . ."). The defendants in *Morrison* and *Aramco*, for example, did not assert a personal-jurisdiction defense to escape improper extraterritorial application of U.S. law.

A personal-jurisdiction defense may not even be available to foreign issuers that happen to be subject to *general* personal jurisdiction in the United States, such that the Exchange Act could apply to wholly foreign conduct and interfere with foreign regulators, contrary to Congress's intent. *See Morrison*, 561 U.S. at 269 ("[I]f Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'").

Personal jurisdiction, in short, is not a panacea for *Morrison*'s comity concerns. And the fact that, as always, a plaintiff "must still plead the remaining elements of the Section 10(b) claim," Opp'n 26, is

hopeless bootstrapping; suggesting that comity concerns can be mitigated by *applying* the Exchange Act is, of course, circular.

While the Plaintiffs dismiss the forum-shopping concerns raised by Toshiba and numerous *amici* as "unfounded hyperbole," Opp'n 12, 24-27, the class-action bar — undeterred by potential personal-jurisdiction defenses — already is actively soliciting new claims against foreign issuers whose shares are referenced in unsponsored ADRs. *See, e.g.*, Schall Law Firm, Press Release (Aug. 21, 2018) (inviting potential plaintiffs to join class action relating to unsponsored ADRs referencing Atlantia S.p.A. shares), https://schallfirm.com/cases/atlantia-s-p-a/; Rosen Law Firm, Press Release (Dec. 6, 2018) (inviting potential plaintiffs to join class action relating to unsponsored ADRs referencing Glencore plc shares), https://www.rosenlegal.com/cases-1373.html; Schall Law Firm, Press Release (Dec. 6, 2018) (inviting potential plaintiffs to join class action relating to unsponsored ADRs referencing Renault S.A. shares), https://schallfirm.com/cases/renault-sa/.

The Ninth Circuit's decision is already notorious for its unavoidable consequences:

> Under the Ninth Circuit's decision, foreign issuers potentially can be subject to civil liability under U.S. securities law even though they did nothing to foster the market in the unsponsored ADRs and they failed to take any affirmative steps to avail themselves of the U.S. securities market. The [Ninth Circuit's]

> decision extends the Exchange Act to reach allegedly fraudulent activities that occur wholly outside the United States and potentially results in foreign issuers involuntarily being made subject to the U.S. securities laws.

Samuel P. Groner et al., *Roundup of Key Federal Securities Litigation Developments*, Harvard Law School Forum on Corporate Governance and Financial Regulation (Dec. 19, 2018), https://corpgov.law.harvard.edu/2018/12/19/roundup-of-key-federal-securities-litigation-developments/. Numerous *amici* agree, including sovereigns such as the United Kingdom, and domestic and foreign trade associations, including the U.S. Chamber of Commerce and SIFMA. These *amici* join Toshiba in warning that the Ninth Circuit's decision expressly and irreconcilably conflicts with the Second Circuit, will permit undue interference with foreign securities

regulation, and will lead to an unwarranted increase in securities class-action lawsuits in the United States.

CONCLUSION

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

Respectfully submitted,

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