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

AMICUS CURIAE BRIEF OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF TOSHIBA CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of multinational companies before all branches and at all levels of government.[1] OFII is charged with representing the legal and policy interests of its members, who have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations throughout this country, as well as many others. Its members contribute substantially to the U.S. economy. The cumulative value of foreign direct investment in the United States at the end of 2016 was approximately $6.4 trillion. James K. Jackson (Congressional Research Service), *U.S. Direct Investment Abroad: Trends and Current Issues*, at 1 (June 29, 2017), *available at* https://fas.org/sgp/crs/misc/RS21118.pdf. Direct investment capital inflows in 2016 totaled approximately $479 billion. *Id.* at 3. Most of that amount, roughly $254 billion, was spent to acquire equity ownership interests in U.S. companies. *Id.* at 4. Petitioner Toshiba Corporation ("Toshiba"), a Japanese company, has invested heavily in the United States

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of OFII's intention to file this brief. No party's counsel wrote this brief (in whole or in part), and no person, other than OFII and Daimler North America Corporation, a member of OFFI, contributed monetarily to this brief's preparation or submission. OFII is informed that, by virtue of blanket consent letters filed by Petitioner and Respondents, all parties consent to the filing of this *amicus* brief.

through its ownership and acquisition of a number of U.S. entities and their manufacturing operations[2] (although OFII notes that those entities are not among its members).

Petitioner is a defendant in this case because plaintiffs chose to buy American Depository Receipts ("ADRs"), which gave plaintiffs certain interests in Toshiba stock that is registered on a foreign exchange. Despite this Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), limiting the extraterritorial application of the securities laws, the Ninth Circuit held that this was enough to subject Petitioner to potential liability under Section 10(b) of the Securities and Exchange Act. *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 949 (9th Cir. 2018). However, those ADRs were issued by unaffiliated U.S. companies, namely several U.S. banks, and traded over the counter. Toshiba did not trade its stock with plaintiffs or otherwise trade its stock on any U.S. exchanges. ADRs involving the stock of a number of OFII's foreign parent companies are similarly offered by U.S. banks. OFII is concerned that subjecting Toshiba to U.S. liability for ADRs it did not issue or otherwise trade on U.S. markets undermines the authority of foreign governments to regulate the securities of their own companies and creates uncertainty in U.S. law that discourages foreign companies from engaging with the United States by, among other things, investing here.

Without such investment, many of OFII's members would not exist. Moreover, OFII's members have an interest in the financial health of their parent companies and the global economy generally, which

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[2] *See, e.g.*, https://www.toshiba.com/tic/inside-toshiba/manufacturing-services

can impact the ability and willingness of foreign companies to invest. OFII and its members therefore have a substantial interest in the question presented in this case, *i.e.*, whether and to what extent securities class actions can proceed in U.S. courts when they are premised on the sale or trade of ADRs and similar instruments issued and traded in the U.S. solely by entities other than the foreign defendant.

OFII filed an *amicus* brief in *Morrison*, explaining why the attempted expansion of private U.S. securities lawsuits in that case improperly interfered with the foreign regulation of foreign companies and ultimately threatened investment in the United States. This Court ultimately agreed with the arguments and concerns that OFII expressed. It is OFII's hope and belief that the present brief will be of similar assistance to the Court.

SUMMARY OF ARGUMENT

OFII urges the Court to grant Toshiba's Petition and decide whether U.S. securities laws subject foreign entities to liability with respect to the sale of ADRs and similar instruments in the U.S. that are not sold or traded by the foreign entity. Petitioner offers sound reasons why such cases do not belong in our courts, and OFII agrees with and joins in those arguments. In this brief, OFII offers additional reasons to grant the Petition and adopt a rule barring such cases in U.S. courts or under U.S. law.

First, the extraterritorial application of U.S. law in these cases improperly disrespects foreign sovereignty because it infringes upon the *authority* of nations to regulate their own citizens and securities exchanges in the manner they see fit. Respect for foreign sovereignty is a key precept of international law and, as this

Court has recognized in *Morrison*, there is no reason to believe that Congress intended to disregard that precept in choosing to regulate U.S. securities.

Second, a rule barring such cases is necessary to reduce uncertainties that continue to deter foreign investment and threaten adverse consequences for the global economy, even after this Court's decision in *Morrison*. Without a clear rule eliminating the uncertainty that still exists regarding the overseas reach of our securities laws, as demonstrated by the split between the Ninth Circuit's decision here and the Second Circuit's decision in *Parkcentral Glob. HUB Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014), foreign investors will continue to question the wisdom of investing or otherwise engaging in U.S. markets. This Court's precedents, including but not limited to *Morrison*, have consistently urged clear rules precisely to deal with the concerns this case raises.

I. EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAW TO ADRS DISRESPECTS FOREIGN SOVEREIGNTY BECAUSE IT INFRINGES UPON THE AUTHORITY OF NATIONS TO REGULATE THEIR OWN CORPORATE CITIZENS AND SECURITIES EXCHANGES

By definition, an American Depository Receipt ("ADR") involves shares of stock issued by a foreign company and traded solely on foreign exchanges, and therefore regulated by foreign governments. As a consequence, the extraterritorial application of U.S. laws in such cases will frequently conflict with the regulatory regimes established by other sovereign nations. The Ninth Circuit nevertheless adopted a rule that leads directly to this result. For this reason alone, the Ninth Circuit's rule merits careful scrutiny.

See F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 167 (2004) ("*Empagran*") ("to apply our remedies would unjustifiably permit [foreign] citizens to bypass their [countries'] own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic . . . laws embody").

The problem is not simply that the application of U.S. securities law to ADRs conflicts with foreign law, although that concern is serious enough. When U.S. courts apply U.S. securities law in such cases, they disregard the rightful authority of other nations to address conduct that by definition has a minimal connection with the United States. Indeed, the only reasonable expectation of any purchaser of ADRs of a non-U.S. company must be that that law of the foreign jurisdiction in which the company sits governs the investment. Indeed, nothing in the Amended Complaint suggests the plaintiffs were barred from bringing claims under Japanese law, and in fact they sought relief under Japanese law in this case for the drop in value of their ADRs. Appendix D at 229a. As this Court previously has recognized, whether or not there is an actual conflict in the law, a U.S. court must respect the authority of a foreign sovereign to address a dispute that arises predominantly within the foreign sovereign's territory.

A. This Court Has Appropriately Instructed the Lower Courts to Show Respect for the Authority of Foreign Sovereigns by Limiting the Extraterritorial Application of U.S. Law

In *F. Hoffman LaRoche, Ltd. v. Empagran S.V.*, 542 U.S. 155, this Court prohibited extraterritorial

application of U.S. antitrust laws. *Id.* at 159. One of the rationales for the Court's decision was its recognition that extraterritorial application of U.S. laws "creates a serious risk of interference with a foreign nation's ability to regulate its own commercial affairs." *Id.* at 165. Six years later, in *Morrison v. National Australia Bank, Ltd.*, the Court applied this same reasoning in support of its holding that Section 10(b) of the U.S. Securities Exchange Act of 1934 does not apply extraterritorially to reach "conduct in this country affecting exchanges or transactions abroad." *Id.* at 269. Mirroring its concern in *Empagran*, the Court pointed out that "[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.* (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991)). Although *Morrison* involved a foreign stock transaction, the Court's observation with respect to the impact on foreign laws applies equally to the U.S. sale of ADRs and similar instruments that give U.S. investors only an indirect interest in shares of foreign stock that is subject to foreign regulation.

In other words, *Empagran* and *Morrison* both recognized that, absent an expression of clear Congressional intent, U.S. law should not apply to claims based primarily upon conduct by foreign companies that have only an indirect effect upon U.S. interests. In doing so, the Court did *not* hold that a U.S. court may apply U.S. law extraterritorially as long as there is no actual conflict in the law or disagreement regarding public policy between the U.S. and the foreign nation involved. Rather, this Court held that the

driving consideration was the "risk of interference with a foreign nation's *ability* to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165 (emphasis added). Respect for a foreign nation's *ability* to govern is respect for that foreign sovereign's right to act as such.

In fact, *Empagran* and *Morrison* are just two in a long line of this Court's jurisprudence recognizing that interference with the sovereign authority of other nations is itself an important reason not to apply U.S. law extraterritorially. For example, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the Court held, based on the presumption against extraterritorial application, that the U.S. Alien Tort Claims Act does not apply to primarily extraterritorial conduct, noting that the presumption "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* at 124. *See also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455-56 (2007) (in holding U.S. Patent Act does not apply to software installed abroad, Court explained that U.S. statutes must be construed taking into account "the legitimate sovereign interests of other nations"); *Munaf v. Geren*, 553 U.S. 674, 697 (2008) (rejecting petitioners' request for *habeas* relief where such relief "would interfere with the sovereign authority" of another country); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925) ("interference with the authority of another sovereign" is a matter the "other state concerned justly might resent").

This principle is equally compelling in the context of ADRs. Extending U.S. jurisdiction beyond America's borders—*e.g.*, to alleged injury caused by a foreign

company as a result of a transaction only indirectly involving foreign stock—is inconsistent with this Court's longstanding respect for the legitimate legal concerns of foreign sovereigns. As the Court explained in *Morrison*, with language that applies equally to the foreign stock transactions underlying the ADRs here:

> 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 as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.

Id. at 269. As conceded in the Amended Complaint, Toshiba has faced securities regulation and private claims in Japan with respect to the conduct at issue here, even from non-Japanese investors.[3]

As the district court in this matter explained, "nowhere in *Morrison* did the Court state that U.S. securities laws could be applied to a foreign company that only listed its securities on foreign exchanges but whose stocks are purchased by an American depository bank on a foreign exchange and then resold as a different kind of security (an ADR) in the United States. In fact, all the policy and reasoning in *Morrison* point in the other direction." *Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080, 1094 (C.D. Cal. 2016), *rev'd*, 896

[3] http://www.toshiba.co.jp/about/ir/en/news/20171114_2.pdf

F.3d 933 (9th Cir. 2018). That court was properly concerned with the "essentially limitless reach of § 10(b) claims" that would result from the ruling the Ninth Circuit ultimately rendered "because even if the foreign defendant attempted to keep its securities from being sold in the United States, the independent actions of depositary banks selling on OTC markets could create liability." *Id.* at 1094-95. The Ninth Circuit's bald response to this argument was that "it does not matter whether a foreign entity was not engaged in the transaction." *Stoyas v. Toshiba Corp.*, 896 F.3d at 949. In the Ninth Circuit's view, in other words, any foreign entity worldwide is subject to securities claims in the United States if a third party sells securities in the U.S. with value associated with its foreign stock. This simply cannot be the law.

The Ninth Circuit's application of U.S. securities laws to ADRs threatens the type of "legal imperialism" decried in *Empagran*. 542 U.S. at 164. As this Court explained in *Microsoft*, "United States law governs domestically but does not rule the world." 550 U.S. at 454.

B. Sovereign Nations—Including the United States Itself—Regularly and Rightfully Object to the Extraterritorial Application of Laws Based on the Perceived Affront to their Sovereignty

Concerns about affronting foreign sovereignty by the extraterritorial application of U.S. law are not merely abstract. Other nations—including many of America's closest allies—regularly have objected to extraterritorial applications of U.S. law of the type that the Ninth Circuit has authorized here. *See, e.g.*, Jill E. Fisch, *Imprudent Power: Reconsidering U.S.*

Regulation of Foreign Tender Offers, 87 Nw. U. L. Rev. 523, 523-24 (1993) ("The United States has offended the sovereignty of other countries" by "impos[ing] its regulations on [securities] transactions that may be viewed as essentially foreign"); *Morrison*, 561 U.S. at 269 (discussing objections of Australia, the UK, France, and a variety of international and foreign organizations to "the interference with foreign securities regulation that application of § 10(b) abroad would produce"); *see also Kiobel*, 569 U.S. at 124 (identifying objections to extraterritorial application of the Alien Tort Statute by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland and the United Kingdom); *Empagran*, 542 U.S. at 167-68) (similarly noting objections filed by foreign governments to application of U.S. antitrust laws to foreign transactions); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16-17, 21 (1963) (accounting for "vigorous protests from foreign governments," among other considerations, in ultimately holding that National Labor Relations Act should not apply to foreign-flag ships employing foreigners).

The threat to foreign sovereign interests is especially acute in cases like this, where a securities class action amalgamating thousands of claims—in a manner not permitted in the vast majority of foreign countries—is filed against a foreign corporation that is a significant "engine" for a foreign economy. As Professor John C. Coffee, Jr. observed: "the United States' foreign neighbors must fear that a global class action in a U.S. court may threaten the solvency of even their largest companies and could have an adverse impact on the interests of local constituencies, including labor, creditors, and local communities."

Global Class Actions, NATIONAL L.J., June 11, 2007, at 12.

Nor should foreign governments be expected or required to monitor litigation involving ADRs and step in to object to each involved court. It is undiplomatic, even offensive, to require a foreign sovereign to file such an objection in each of the ADR securities class actions that are being filed in the United States each year—particularly when, as described above, many nations regularly have objected to *any* extraterritorial application of U.S. law.

In addition, it is unrealistic to assume that foreign sovereigns will simply continue to object in court when they feel their legitimate sovereign interests are being ignored. Some will instead choose to engage in self-help measures that will harm U.S. interests in other contexts. For example, as this Court recently pointed out in *Kiobel*, the extraterritorial application of U.S. law suggests other countries "could hale our citizens into their courts." 569 U.S. at 124. *See also* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. Cal. L. Rev. 903, 914 (1998) (extra-territorial applications of U.S. securities laws could cause other countries to retaliate and "seek[] to regulate activities of U.S. parties that impact their countries"); *McCulloch*, 372 U.S. at 21 (recognizing that infringements of foreign sovereignty caused by overbroad applications of U.S. law may "invite retaliatory action from other nations").

As this Court learned in *Empagran*, some nations have already reacted to the efforts of some U.S. courts to apply U.S. law extraterritorially by enacting "blocking statutes" and rejecting enforcement of U.S. judgments. *See, e.g.*, Brief *Amici Curiae* Governments

of the Federal Republic of Germany and Belgium in *Empagran*, *available at* 2004 WL 226388, at *27-*28 (Feb. 3, 2004); Foreign Proceedings (Excess of Jurisdiction) Act 1984, No. 3 (Australia's "blocking statute," passed in response to prior extraterritorial applications of U.S. law). And as the Court noted in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), in reversing the Ninth Circuit's broad general personal jurisdiction ruling, "[t]he Solicitor General informs us … that 'foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.'" *Id.* at 142 (quoting U.S. Brief at 2). Whether or not appropriate, such responses by foreign governments are natural to a reasonably perceived insult to their sovereignty.

When other countries have applied their own law extraterritorially, the United States has replied in kind. Indeed, the American position has long been that even trial by an international tribunal, such as the International Criminal Court, would "imping[e] on the sovereignty of the United States" to the extent that it would give others an ability to second-guess U.S. policy decisions. Congressional Research Service, *U.S. Policy Regarding the Int'l Criminal Ct.*, at 3-4 (Sept. 2002). To date, other nations have frequently shown respect for American objections to their assertion of extraterritorial jurisdiction, which has avoided international incidents. The United States can only harm its international standing on such issues, however, if it insists upon asserting authority over the foreign stock transactions of foreign companies. As explained in the following section, only a rule that is consistent with the position the United States itself takes

when the tables are turned can avoid the legitimate condemnation of foreign sovereigns.

II. AT A MINIMUM, A RULE CLARIFYING APPLICATION OF U.S. SECURITIES LAWS TO ADRS AND SIMILAR INSTRUMENTS IS NECESSARY TO PROVIDE CLARITY IN THE LAW AND REDUCE UNCERTAINTIES THAT HAVE ADVERSE CONSEQUENCES FOR U.S. INVESTMENT AND THE GLOBAL ECONOMY

As this Court recently reaffirmed: "Simple jurisdictional rules … promote greater predictability. Predictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Predictability regarding the overseas reach of U.S. law is especially important when foreign companies are deciding whether to invest or otherwise engage in the United States and its markets.

In addition, this Court has observed that U.S. securities class actions, "if not adequately contained, 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). The potential for abuse is high because U.S. securities class actions almost always involve multi-billion-dollar prayers for relief and the promise of "protracted discovery, with little chance of reasonable resolution by pretrial process." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105 (1991); *Merrill Lynch, Pierce, Fenner, & Smith Inc. v. Dabit*, 547 U.S. 71, 80 (2006) ("Even weak cases

brought under [§ 10(b)] may have substantial settlement value.").

Based in part on an *amicus* brief filed by OFII and others, the Court has recognized that the expansion of liability under U.S. securities law "rais[es] the costs of doing business" in America, such that "[o]verseas firms with no other exposure to [U.S.] securities laws could be deterred from doing business here." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (citing OFII *amicus* brief).

OFII recognizes that the Ninth Circuit adopted a "bright-line rule" insofar as it held that all foreign issuers are subject to U.S. securities litigation if ADRs are sold based on their stock. *Stoyas*, 896 F.3d at 949. While this might create some measure of certainty in the Ninth Circuit, the rule it adopted is directly contrary to the thoughtful application of *Morrison* taken by the Second Circuit in *Parkcentral Glob. HUB Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014), as Petitioner here has aptly explained and the Ninth Circuit has admitted. *Stoyas*, 896 F.3d at 950 ("*Parkcentral* … is contrary to Section 10(b) and *Morrison*"). Like the present case, *Parkcentral* arose from domestic transactions ("swap agreements") that indirectly involved stock in a foreign company traded overseas. 763 F.3d at 201. In that case, the Second Circuit held that while a U.S. transaction was necessary to the application of the U.S. Securities Exchange Act, it was not sufficient, for application of that law to the domestic transaction could still – and in that case did – violate the presumption against extraterritorial application. *Id.* at 215.

In the end, whether the Second Circuit's or Ninth Circuit's holding is correct, they are unquestionably at odds, and the result is an uncertainty in U.S. law that leaves foreign companies unable to predict how U.S. courts will treat securities lawsuits filed with respect to ADRs. As Petitioners explain in detail, because the Second and Ninth Circuits are already the primary fora for U.S. securities lawsuits, the result of the current split in authority is that U.S. law as a whole remains uncertain and in conflict from the perspective of foreign entities. That alone is a reason for this Court to resolve this circuit split.

And while the Second Circuit's approach makes clear that circuit will not apply U.S. securities laws to what are predominantly foreign stock transactions, the Ninth Circuit's holding in this case to the contrary will deter foreign involvement in U.S. markets. Discouraging such investment not only has adverse consequences for U.S. companies who are subsidiaries of foreign corporations, but it also substantially harms both the U.S. and global economies generally. Exacerbating the problem, the threat posed by class actions against foreign issuers continues to be an issue. In 2017 (the last full year for which data was available), 61 such class actions were filed in U.S. federal courts, a 39% increase from the 44 such actions filed in 2016. Pricewatershouse Coopers LLP, *Seeing Through the Smoke: Securities Litigation Study*, at 5 (Apr. 2018), *available at* https://www.pwc.com/us/en/forensic-services/assets/securities-litigation-study-seeing-through-the-smoke.pdf.

Uncertainty regarding the extraterritorial reach of U.S. securities class actions, particularly when coupled with the substantial costs and exposure posed by even meritless class actions, creates financial risk

and causes foreign companies to be fearful of engaging with the United States. *See, e.g.*, John C. Coffee, Jr., *Global Class Actions*, National L.J., June 11, 2007, at 3 n.3 (the "fear of U.S. private antifraud litigation" is tied to the "growing disenchantment of foreign issuers with the U.S. market"). The International Chamber of Commerce has recognized that the extraterritorial application of laws "creates considerable commercial and legal uncertainty. This uncertainty discourages international businesses from engaging in trade and investment and distorts trade and investment decisions by international business." *Policy Statement on Extraterroriality and Business*, at 2 (July 13, 2006).

To establish the predictability needed by foreign companies if they are to continue to invest in or otherwise engage with the United States and its markets, OFII respectfully requests that this Court grant Toshiba's Petition and establish a clear rule rejecting U.S. securities class actions involving ADRs and similar instruments that merely give investors an indirect interest in foreign companies' foreign stock transactions.

CONCLUSION

Allowing class actions involving ADRs to proceed in U.S. courts infringes upon the authority of sovereign nations to regulate their stock exchanges and companies. And particularly given that the Second Circuit has taken an approach radically at odds with the approach taken by the Ninth Circuit in this case, the issue cries out for resolution by this Court so as to provide clarity in U.S. securities law nationwide. Abstention creates uncertainty and risk that poses adverse consequences for the U.S. and global economy.

For all these reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted.

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