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 EUROPEANISSUERS, ÉCONOMIESUISSE, ICC SWITZERLAND, AND THE ASSOCIATION FRANÇAISE DES ENTREPRISES PRIVÉES AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

EuropeanIssuers is a pan-European organization that represents the interests of publicly traded companies in Europe. Its nearly 8,000 members include national associations and companies from fifteen nations of the European Union ("E.U."), whose businesses touch all economic sectors and cover markets worth approximately €7.6 trillion (approximately $8.5 trillion). Its association members are AEM (Portugal); ABSC-BVBV (Belgium); AFEP (France); Aktienforum (Austria); ANSA (France); Assonime (Italy); Deutsches Aktieninstitut (Germany); Emisores Españoles (Spain); MiddleNext (France); the QCA (UK); SEG (Poland); SwissHoldings (Switzerland); SYDEK (Cyprus); Eneiset (Greece); and VEUO (Netherlands).

EuropeanIssuers aims to ensure that E.U. policy creates an environment in which companies can raise capital through the public markets and deliver growth. To that end, it regularly monitors and comments on regulations in the field of capital markets, corporate governance and corporate law to

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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*, their members, or their 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 have been filed with the Clerk of the Court.

ensure that its members' views are heard by policymakers. Its role in that regard extends outside the E.U. because of the effects that non-E.U. law may have on EuropeanIssuers' members.

Économiesuisse is the largest umbrella organization representing the Swiss economy. Économiesuisse is comprised of more than 100,000 businesses of all sizes, employing a total of 2 million people in Switzerland. Économiesuisse's mission is to create an optimal economic environment for Swiss business, to continuously improve Switzerland's global competitiveness in manufacturing, services and research, and to promote sustained growth as a prerequisite for a high level of employment in Switzerland.

The International Chamber of Commerce Switzerland ("ICC Switzerland") is a National Committee of the International Chamber of Commerce. Founded in 1922, it represents Swiss companies, chambers of commerce, and business associations.

The Association Française des Entreprises Privées ("AFEP") is an umbrella organization that represents over one hundred of the largest private business organizations in France. Its member companies contribute more than 13% of the French GDP and employ over 2 million employees. AFEP, on behalf of its members, advocates for public authorities around the world to develop fair and predictable rules to govern corporations.

The U.S. capital markets occupy a unique place for *amici curiae*'s members, due both to the breadth of those U.S. markets and to the global implications of U.S. laws and the litigation that sometimes takes place under those laws. While some European-listed companies seek to access U.S. capital markets, many do not. Yet because European markets are free and open, and provide robust investor protections, U.S. investors regularly purchase and sell securities of publicly traded European companies, including those that never access the U.S. capital markets. In some cases, those investors effect their transactions in the United States through mechanisms such as American Depository Receipt ("ADR") trading. Because of the strong links between European and U.S. capital markets, *amici curiae* and their members take a keen interest in developments in the United States, including with respect to regulatory and litigation risk. For these reasons, and as leading representatives of publicly traded European national associations and companies, *amici curiae* have a distinct interest in this case.

SUMMARY OF THE ARGUMENT

In *Stoyas*, the Ninth Circuit held that a foreign company can be found liable to a plaintiff under the U.S. securities laws so long as that plaintiff engages in a single transaction relating to the foreign company's securities in the United States. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933, 942 (9th Cir. 2018). According to the court below, this is true even where, as here, (a) the securities traded were created by a U.S. bank under a program it established without any participation by the foreign company, (b) the securities traded represent interests in foreign securities that the foreign company issued abroad, (c) there is no allegation that the foreign company participated in the purchase or sale of the traded securities, and (d) the alleged fraud relates to statements made in the foreign company's home country financial disclosure and is being investigated by the home country regulator. *See id.* at 940-41.

This Court's precedent does not permit the expansive result in *Stoyas*, which amounts to an impermissible, extraterritorial application of the United States securities laws. The Ninth Circuit misreads *Morrison v. National Australia Bank* to permit suit under Section 10(b) in the present case, notwithstanding the manifestly foreign nature of the allegations and the risk of international conflict presented by the suit. *Morrison* is, in fact, animated by the need to *avoid* the extraterritorial application of the U.S. securities laws to matters that are properly regulated abroad. 561 U.S. 247 (2010). *Morrison* set a necessary condition for a domestic securities claim—a domestic transaction—but did not hold that this necessary condition is also a sufficient one. Indeed, *Morrison* underscored that limited domestic contacts may be insufficient to render a claim domestic as required for application of the U.S. securities laws. *Id.* at 266 (noting that it is the "rare case . . . that lacks *all* contact with the territory of the United States").

The Second Circuit expressly recognized this in its decision in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198, 216-17 (2d Cir. 2014) (per curiam), where it held that a securities fraud claim premised on alleged foreign fraud in connection with foreign-traded securities was impermissibly extraterritorial, notwithstanding the presence of a domestic securities transaction. The *Stoyas* decision has therefore set up a split between the Ninth and the Second Circuits in a matter of great importance for and impact on foreign issuers.

In addition to being contrary to *Morrison*, *Stoyas* is also fundamentally unfair to foreign issuers that do not access the U.S. capital markets but nonetheless find that ADRs referencing their securities are traded in the United States. Many of the foreign companies that will be affected by the Ninth Circuit's rule have made the deliberate choice to forgo the benefits of the U.S. securities market in order to avoid the risk of litigation in the United States under U.S. procedural and substantive law that may differ substantially from the law of the foreign companies' principal trading jurisdictions. *Stoyas* opens the door for securities holders to subject foreign companies to that very risk based solely on trading that is entirely beyond the foreign issuers' control.

Indeed, in today's global, largely electronic trading market, an issuer cannot control where in the world investors may trade its shares or securities referencing those shares. Beyond their initial offering, shares can be sold and resold—by other parties—numerous times, in any number of jurisdictions. In the United States, this is compounded by recent changes to securities regulations that permit depository institutions to unilaterally package foreign shares as ADRs for sale in the United States. For "unsponsored" ADRs like those here, there is no requirement that foreign issuers consent to the depository institution's issuance of ADRs and, in practice, many foreign issuers do not consent, just as foreign issuers have no ability to consent to the trading of securities-based swaps such as those at issue in *Parkcentral*. Under *Stoyas*, this trading may nevertheless expose foreign companies to considerable risk of litigation in U.S. courts.

This Court should grant certiorari.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION BELOW MISUNDERSTANDS *MORRISON V. NATIONAL AUSTRALIA BANK* AND CREATES A SPLIT WITH THE SECOND CIRCUIT'S PRECEDENT

In *Morrison*, this Court held that the presumption against extraterritoriality was not rebutted with respect to Section 10(b) of the Securities

Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act"), and that the statute accordingly does not have extraterritorial effect. *Morrison*, 561 U.S. at 265. The Court then went on to analyze whether the claims asserted there were nonetheless permissible domestic applications of the statute and concluded that they were not. *Id.* at 269-70. In reaching this conclusion, the Court noted that a permissible application of the Exchange Act requires a domestic transaction, *i.e.*, that the relevant "purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* Because the transactions in *Morrison* were not domestic, the Court had no opportunity to opine further on the scope of a permissible domestic claim.

In *Stoyas*, the Ninth Circuit went beyond *Morrison*'s requirement of a domestic transaction and held that such a transaction is not only necessary but also sufficient to render a Section 10(b) claim domestic. *Stoyas*, 896 F.3d at 949. On that logic, the Ninth Circuit held that Toshiba Corp. ("Toshiba"), a foreign company, was potentially subject to liability under Section 10(b) solely because third parties allegedly effected transactions within the United States in ADRs referencing Toshiba shares. *See id.* at 940-41. *Stoyas* reached that result even though Toshiba was not alleged to have sold any securities itself within the United States or to have had any involvement with the ADR programs in the United States, and even though the purported fraud giving rise to the claim occurred in Japan, where Toshiba lists its shares and makes annual and periodic disclosures. Although framed as supportive of *Morrison*, the Ninth Circuit's decision undermines *Morrison*'s purpose and represents a substantial extraterritorial expansion of the U.S. securities laws.

The Second Circuit correctly interpreted *Morrison* to avoid this inappropriately extraterritorial expansion in *Parkcentral Global Hub Ltd.* 763 F.3d at 216-17. In that case, a suit for securities fraud was brought by international hedge funds that allegedly executed securities-based swap agreements within the United States, with values pegged to the price of a foreign issuer's securities listed on a European exchange. *Id.* at 201. As with the ADRs referencing Toshiba's shares at issue here, the issuer of the underlying shares in *Parkcentral* did not participate in the creation or trading of the securities-based swaps. In addition, and as here, the alleged securities fraud occurred primarily outside the United States, and the foreign issuer's home jurisdiction was conducting an investigation into the alleged fraud. *Id.* at 207, 216.

The Second Circuit reasoned that construing a domestic transaction as *sufficient* to create a domestic claim would "seriously undermine" this Court's conclusion in *Morrison* that Congress did not intend for Section 10(b) to be applied extraterritorially. *Id.* at 215. Such a construction, the Second Circuit explained, would create conflict between the Exchange Act and foreign law by requiring application of the Act to "wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely unaware of it." *Id.* The case before it, the Second Circuit concluded, concerned claims that were "predominantly foreign," and thus "impermissibly extraterritorial" under *Morrison*, even though they involved a domestic transaction. *Id.* at 216.

This Court should address this split between the two preeminent federal circuit courts for securities litigation. Failure to do so will permit opportunistic plaintiffs to engage in forum shopping by executing trades and bringing securities litigation against foreign issuers in the Ninth Circuit (or anywhere outside the Second Circuit), in the hope of benefiting from the Ninth Circuit's expansion of *Morrison*. This Court has previously tried to address rules likely to result in forum-shopping or the "inequitable administration of the laws." *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09 (2001) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)); *see also Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (stating that the decision to grant certiorari was influenced by concerns about forum shopping). For the same reasons, the Court should resolve the split between the Second and Ninth Circuits.

II. IT IS PARTICULARLY UNFAIR TO SUBJECT A FOREIGN ISSUER TO U.S. LAW IN CONNECTION WITH UNSPONSORED ADRS

It is particularly significant that this dispute involves an unsponsored ADR program. *See Stoyas*, 896 F.3d at 940-41. Industry participants have raised concerns for over a decade about the sort of unfairness that could arise from the application of the U.S. securities laws to foreign issuers based on such programs, which are often created without the consent of foreign issuers, and in many cases without their knowledge. *See* EuropeanIssuers, Comment Letter on Proposed Amendments to Exemption from Registration under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers (Apr. 25, 2008), http://www.europeanissuers.eu/positions/files/view/5806126cb5d67-en (hereinafter, "EuropeanIssuers 2008 Comment Letter"). As feared, under *Stoyas*, foreign issuers whose securities are involved in unsponsored ADRs are now exposed to litigation risk in the United States through no action of their own.

As described in a 2012 study by the staff of the U.S. Securities and Exchange Commission ("SEC"), "[a]n ADR is a negotiable security that represents an ownership interest in a specified number of foreign securities that have been placed with a depositary financial institution *by the holders of such securities*. An ADR is in essence *a substitute trading mechanism for foreign securities* – the holder can transfer title to the underlying foreign securities by delivery of the ADR." SEC, Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 As Required by Section 929Y of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Staff of the Securities and Exchange Commission app. A, at A1 (April 2012), https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf (hereinafter "SEC Staff Cross-Border Study") (emphasis added) (footnote omitted).

ADRs are created through facilities established by U.S. banks and trust companies that charge fees to investors for services such as the deposit and withdrawal of the underlying foreign securities. *Id.* at A2. The depositary bank (or its custodian) monitors and collects dividends and converts them to U.S. dollars for distribution. The clearance and settlement process for ADRs generally is the same as for other domestic securities that are traded in the U.S. markets. Thus, with ADRs, "investors can own an interest in securities of foreign issuers while holding securities that trade, clear and settle within automated U.S. systems and within U.S. timeframes." *Id.*

Unsponsored ADRs such as those referencing Toshiba's shares are created by U.S. depositary institutions without the participation or consent of the issuer of the underlying shares. The depositary institution seeks to earn fees by convincing U.S.

investors to deposit the underlying shares in the ADR facility, but the share issuer plays no part in this process. While depositaries sometimes write to issuers asking for their non-objection to the creation of unsponsored programs, they typically create the programs whether or not the issuers respond. When these programs are created, U.S. investors can deposit shares of the foreign issuers with the banks, receiving ADRs that they can then trade in the United States.

Under current SEC rules, if the issuer of the underlying shares publishes its financial reports in English on its website, it can do nothing to stop the depositary institutions from creating unsponsored ADR programs. This is due to the interaction between a number of SEC rules applicable to ADRs. The depositary institution that creates the ADR program must register the ADRs with the SEC under Form F-6 (the underlying shares are *not* registered with the SEC). A condition to the use of Form F-6 is that the issuer of the underlying shares must be registered with the SEC or exempt from registration under SEC Rule 12g3-2(b). *See* SEC, Registration Statement Under the Securities Act of 1933 for Depository Shares Evidenced by American Depositary Receipts (Form F-6), SEC No. 2001 (Oct. 2008), https://www.sec.gov/about/forms/formf-6.pdf. Foreign issuers that are listed abroad and not registered with the SEC are automatically exempt under Rule 12g3-2(b) if they publish their home country reports in English on their websites. 17 C.F.R. § 240.12g3-2(b)(1).

Because almost every listed company in the world publishes its home country reports in English on its website, U.S. depositary banks can create unsponsored ADR programs in respect of substantially all listed companies everywhere in the world, without obtaining the consent of the companies.

This situation is the collateral consequence of a 2008 amendment to Rule 12g3-2(b). *See* Exemption from Registration Under Section 12(g) at 45, n.113, Exchange Act Release No. 34-58465, 94 S.E.C. Docket 68 (Sept. 5, 2008) (hereinafter, "2008 Adopting Release"). Prior to the 2008 rule change, a foreign issuer had to submit an application and paper copies of English translations or summaries of its home country reports to the SEC in order to claim the Rule 12g3-2(b) exemption. *See* 17 C.F.R. § 240.12g3-2(b) (2008). Thus, an ADR program could only be created in respect of shares of an issuer that took the affirmative step of applying for the Rule 12g3-2(b) exemption. As amended, the Rule 12g3-2(b) exemption is automatically applicable to any foreign issuer that is listed on a foreign exchange and publishes English versions of its home country reports on its website. 17 C.F.R. § 240.12g3-2(b)(1).

The amendment to Rule 12g3-2(b) was not adopted in order to facilitate the creation of unsponsored ADRs, but instead was intended to modernize the 40-year old rule by automatically exempting foreign issuers that meet the revised requirements, and by eliminating the burdens of paper filings. *See* 2008 Adopting Release. The principal consequence of the rule change was to exempt thousands of foreign issuers that for years had been in technical violation of the Exchange Act's registration requirements. This was because, absent the Rule 12g3-2(b) exemption, all foreign issuers with 300 or more U.S. resident shareholders must register under the Exchange Act. *See* 17 C.F.R. § 240.12g3-2(a). Before 2008, many foreign companies exceeded the threshold of 300 U.S. resident shareholders due to the globalization of securities markets, but very few applied for the Rule 12g3-2(b) exemption (most were unaware of the need to apply). While the SEC generally did not enforce the requirement that these companies register, the rule amendment ended this situation by providing these companies (and many others) with an automatic exemption.

In addition to serving its main purpose of modernizing the exemption regime, the rule change also opened the door for U.S. banks to establish unsponsored ADR programs. Because the exemption was now automatic, the depositary institutions could for the first time create ADR programs without the consent (or even the knowledge) of the companies that issued the underlying shares.

During the comment process on the rule change, EuropeanIssuers noted this anomaly to the SEC, proposing that at a minimum depositary banks be required to notify issuers before establishing unsponsored ADR programs. *See* EuropeanIssuers

2008 Comment Letter at 5. The SEC decided not to add any such requirement, based in part on a representation by one of the major depositary banks that such banks would not establish unsponsored programs without issuer consent. *See* 2008 Adopting Release.

The representation proved to be short-lived. Within days of the effectiveness of the rule change, hundreds of new unsponsored ADR programs were created without the consent of the issuers of the underlying shares, many relating to shares of EuropeanIssuers members. The number of unsponsored ADR programs rapidly increased from just under 170 unsponsored ADR programs in 2008 to about 1,320 in 2012. *See* Deutsche Bank, Unsponsored ADRs: 2017 Market Review 3 (Dec. 2017), https://tss.gtb.db.com/FileView/Data.aspx?URL=dbdr/cms/DB DR Unsp ADR Review 2017 Final.pdf.

A natural consequence of the expansion of unsponsored ADR programs is litigation such as *Stoyas*, which seizes on the transactional test of the *Morrison* decision to bring claims under the U.S. securities laws that are in fact predominantly foreign. If *Stoyas* stands as the law in the Ninth Circuit, the thousands of unsponsored ADR programs—established with no involvement of the relevant foreign issuers—will expose issuers around the world to the risk of securities litigation in the United States, in the Ninth Circuit and possibly in other Circuits if they follow *Stoyas*. It is fundamentally unfair—and directly in conflict with *Morrison*—to subject foreign issuers around the world to Exchange Act claims in the United States simply because unrelated investors engage in domestic transactions in securities created without the participation of the foreign issuers, referencing shares that the foreign issuers issued publicly in non-U.S. markets.

III. THE DECISION BELOW PLACES THE UNITED STATES IN DIRECT CONFLICT WITH FOREIGN JURISDICTIONS

Each country makes its own policy choices on how to regulate its own securities markets. If the *Stoyas* decision is followed and the unilateral actions of investors can bring foreign issuers within the ambit of Exchange Act liability, foreign issuers—even those that deliberately avoid participating in in the U.S. securities market, foregoing the benefits of doing so in order not to be subject to the U.S. regulatory structure—face the serious risk of being subject to liability under two different and conflicting regulatory regimes. This would be true even where the application of the U.S. securities laws would conflict with foreign countries' policing of their own securities markets. Moreover, the risk that *Stoyas* will allow private plaintiffs, seeking to remedy predominantly foreign wrongs, to run roughshod over the comity interests that this Court sought to promote in *Morrison* is hardly speculative given the significant incentives that plaintiffs have to take advantage of more favorable U.S. substantive law and procedure.

See Morrison, 561 U.S. at 270 (noting that "some fear that [the United States] has become the Shangri–La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets").

The Ninth Circuit in *Stoyas* recognized the "forceful[]" argument that applying the Exchange Act to unsponsored ADRs would undermine *Morrison*'s "animating comity concerns." *Stoyas*, 896 F.3d at 950. It nonetheless erroneously determined that the Court's instructions in *Morrison* required it to rule as it did, despite the fact that this "in some cases will result in the Exchange Act's application to claims of manipulation of share value from afar." *Id*

These substantial comity issues have generated an extraordinary outpouring of commentary from foreign governments and organizations expressing unanimous concern about the inappropriate extraterritorial application of the U.S. securities laws. In its *Morrison* decision, this Court cited *amicus curiae* briefs from three foreign governments and eight foreign business organizations imploring the Court to respect the choices that other countries have made about the best way to protect investors in their securities markets. *Morrison,* 561 U.S. at 269.

More recently, in response to the SEC staff's request for comments in preparation of what ultimately became the SEC Staff Cross-Border Study, numerous foreign governments and organizations emphasized again how essential it is for the United

States to respect the securities law choices of other countries. A sample of the comments shows the depth of commitment to these views:

- *European Commission*. "The European Union and the United States have made legitimate policy choices which both ensure financial market integrity and transparency, but rest on different legal or business traditions and thus often differ in important substantive and procedural respects. . . . Extraterritorial application of the antifraud provisions of the United States' securities laws . . . to cases involving a private right of action regarding alleged misconduct in connection with securities, where the *nexus* is stronger with a foreign jurisdiction, is liable to violate the E.U.'s and its Member States' sovereignty, and to impede the proper development of E.U.'s securities regulation. As such we strongly urge the SEC to advise against such an extension." European Commission, Comment Letter on Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 1-2 (Feb. 22, 2011), https://www.sec.gov/comments/4-617/4617-49.pdf.

- *United Kingdom*. "The balance that is carefully struck in one jurisdiction may be upset by the extraterritorial availability of remedies in another jurisdiction. In this way, a jurisdiction's ability to set regulatory policies for its listed corporations may be defeated and the principle of comity called into question. . . . If extraterritorial claims under the antifraud provisions of the Exchange Act were permitted, the United Kingdom's policy would be undermined because of the different legal standards applied to such claims and the different litigation system in the United States." Government of the United Kingdom, Comment Letter on Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities and Exchange Act of 1934 3 (Feb. 11, 2011), https://www.sec.gov/comments/4-617/4617-4.pdf.

- *France*. "The Republic of France and other foreign nations have a paramount interest in regulating securities transactions that take place on their own soil and in protecting investors who trade within their borders. The broad application of U.S. antifraud law to foreign securities transactions would threaten international relations and principles of international comity by substantially interfering with the sovereign interests, policies, and laws of other nations. In particular, allowing private plaintiffs to sue for securities fraud that takes place outside the United States would interfere with the ability of foreign nations to regulate their own securities markets and manage their economies." Government of France, Comment Letter on Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities and Exchange Act of 1934 3-4 (Feb. 17, 2011), https://www.sec.gov/comments/4-617/4617-29.pdf.

- *Germany*. "Germany now fears that the considerations undertaken in the USA in relation to Section 929Y of the Dodd Frank Act on investors having private rights of action could potentially seriously hamper Germany's proven and internationally well-balanced regulatory system. An unreasonable extraterritorial application of U.S. private rights of action could potentially interfere with Germany's sovereignty, thus hugely affecting German governmental interests in a way that would be unacceptable. No such interference should occur between two countries like Germany and the USA which cooperate so closely in economic and political terms and that are pursuing the same goals in combating securities fraud." Federal Republic of Germany, Comment Letter on Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 2 (Feb. 18, 2011), https://www.sec.gov/comments/4-617/4617-12.pdf.

- *Switzerland*. "[T]here is no need to overlap the Swiss system with the extraterritorial application of civil remedies under U.S. law. At the same time, such an extraterritorial assertion of U.S. jurisdiction would interfere with the rules of comity and the sovereignty of foreign nations. Just as important, providing investors in Swiss markets with a private right of action for securities fraud in U.S. courts may result in conflicting judicial decisions, as U.S. and Swiss law may differ. It is not in the interest of Nations—including the United States—to have different regulations apply to the same dispute and thus invite plaintiffs to forum shop. In Switzerland's view, deviations from the *Morrison* rule would give rise to these problems." Swiss Confederation, Comment Letter on Study of the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934 3 (Feb. 22, 2011), https://www.sec.gov/comments/4-617/4617-53.pdf.

While these letters were specifically addressed to a requirement in the Dodd-Frank Act that the SEC study the possible restoration of the conducts and effects tests in private actions under Section 10(b) of the Exchange Act, their statements ring equally true in the present case. Toshiba's shares are listed only in Japan, its allegedly fraudulent statements were contained in its home country reports and financial statements, prepared in accordance with Japanese legal and regulatory requirements, and its conduct is subject to an investigation by Japanese authorities. In addition, Toshiba issued the securities underlying the ADRs that are the subject of the *Stoyas* complaint outside the United States. It has been sued solely because unrelated investors allegedly engaged in domestic transactions in ADRs created by a U.S. bank without Toshiba's consent.

It would be inappropriate for the United States to impose its policies and regulations on issuers such as Toshiba—that have taken affirmative steps to remain outside of U.S. capital markets—merely because third-parties have unilaterally engaged in transactions in the United States. If *Stoyas* stands as the law, it will undermine the ability of other countries to effectively establish their own distinct securities law regimes, and create a near limitless reach of U.S. securities law.

CONCLUSION

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

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