No. 19-1141

IN THE

Supreme Court of the United States

ATLANTIC TRADING USA, LLC, *et al.*,

Petitioners,

v.

BP P.L.C., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* TOSHIBA CORPORATION IN SUPPORT OF GRANTING THE PETITION

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INTEREST OF THE AMICUS CURIAE[1]

Toshiba Corporation ("Toshiba") is incorporated under the laws of Japan, is headquartered in Japan, and lists its common stock solely on stock exchanges in Japan. Toshiba is subject to oversight by Japan's Financial Services Agency ("FSA") and Japan's Securities Exchange and Surveillance Commission ("SESC"), and is required to comply with the formal requirements for listing on the Tokyo Stock Exchange.

For decades, Toshiba has abstained from accessing the U.S. capital markets. Toshiba does not offer or sell any securities in the United States, nor does it list any securities on any exchange in the United States. Toshiba has no reporting obligations to the U.S. Securities and Exchange Commission.

When Toshiba disclosed certain accounting irregularities in 2015, the FSA conducted an investigation and imposed on Toshiba the largest fine ever imposed by that agency. In addition, hundreds of investors, including United States investors, sued Toshiba in Japan, alleging violations of Japanese securities law. Despite the availability of remedies in Japan, Toshiba was also sued under § 10(b) of the United States Securities Exchange Act ("the Exchange Act"), 15 U.S.C. § 78j(b), in a putative class action in the Central District of California. The District Court dismissed the claims, holding that

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[1] Counsel for all parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part. No person or entity – other than the amicus or its counsel – made a monetary contribution to fund the preparation or submission of this brief.

although this Court did not reach the issue in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), "all the policy and reasoning in *Morrison*" point against application of the Exchange Act based on domestic transactions alone, absent an "affirmative act by Toshiba related to the purchase and sale of securities in the United States." *Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080, 1094-95 (C.D. Cal. 2016), *rev'd*, 896 F.3d 933 (9th Cir. 2018).

The Ninth Circuit reversed, and in October 2018, Toshiba sought certiorari, presenting for this Court's consideration with respect to the Exchange Act the first question presented by Petitioners in *Atlantic Trading* with respect to the Commodity Exchange Act. *Compare* Cert. Pet. at i ("Whether passing *Morrison*'s domestic transaction test is sufficient or merely necessary."), *with* Petition for a Writ of Certiorari at i, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, 139 S. Ct. 2766 (2018) (U.S. Sup. Ct. No. 18-486) ("[I]s a domestic transaction necessary and sufficient for application of the Exchange Act, or is a domestic transaction necessary but, by itself, not sufficient for application of the Act?"). This Court denied Toshiba's petition for certiorari, and Toshiba has now been forced to proceed to litigation in United States federal court – in addition to the actions against it in the courts of Japan – and is facing costly, burdensome, and invasive discovery in California. That discovery extends to Toshiba's communications with its regulators in its home country of Japan.

If the claims that the Ninth Circuit permitted to proceed against Toshiba had instead been brought in the Second Circuit, and considered under the rule in

Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE, 763 F.3d 198 (2d Cir. 2014), which has been endorsed and applied again by the Second Circuit in the decision at issue here, *Prime International Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019), the claims against Toshiba would have been dismissed. These disparate outcomes demonstrate that resolution of the conflict between the Second and Ninth Circuits on the primary question presented here would provide necessary guidance to United States courts in addressing extraterritorial concerns raised by myriad laws of domestic application.

SUMMARY OF ARGUMENT

This case involves a clear and irreconcilable conflict between the Second and Ninth Circuits – two of the most important, if not the two most important, Circuits for securities law[2] – on a critical question

[2] Over the last two decades, the Second and Ninth Circuits have handled more securities cases than all other circuits combined. *See* Stanford Law School, *Securities Class Action Clearinghouse, Filings Database, Heat Maps & Related Filings*, *available at* http://securities.stanford.edu/circuits.html (last visited Apr. 16, 2020); *see also Morrison*, 561 U.S. at 260 (describing D.C. Circuit's decision, despite its own doubts, to "defer[] to the Second Circuit because of its 'preeminence in the field of securities law'"); *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting) (describing Second Circuit as the "Mother Court" of securities law); *Public Pension Fund Group v. KV Pharm. Co.,* 679 F.3d 972, 987 (8th Cir. 2012) ("[T]he two circuit courts that traditionally see the most securities cases [are] the Second and Ninth Circuits." (quoting Nicholas Fortune Schanbaum, *Scheme Liability: Rule 10-b-5(a) and Secondary Actor Liability after* Central Bank, 26 Rev. Litig. 183, 197 (Winter 2007))).

concerning the extraterritorial application of United States law.

In *Morrison v. National Australia Bank, Ltd.,* 561 U.S. 247, 269 (2010), this Court "reject[ed] the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad." Focusing on the potential that claims based on such conduct would interfere with other nations' regulation of securities markets, the *Morrison* Court held that § 10(b) of the Exchange Act has no extraterritorial application, and that, where it does not involve a "security registered on a national securities exchange," a domestic transaction is a necessary element of a claim under that statute. *Id.* at 266, 268. Because *Morrison* did not involve any domestic transaction, however, the Court had no occasion to address the related question; *i.e.*, whether a domestic transaction is necessarily sufficient to state a claim under that statute.

In addressing the question left open by *Morrison*, the Second and Ninth Circuits have reached antithetical results. Recognizing that an Exchange Act claim may involve a domestic transaction, but still raise the extraterritoriality concerns addressed in *Morrison* – for example, where the events underlying the claim took place overseas, or the claim is against a foreign issuer that did not participate in the transaction, has not entered the U.S. securities markets, and is subject to oversight by foreign securities regulators – the Second Circuit has held that a domestic transaction is *necessary* to a § 10(b) claim, but not always *sufficient* to permit application of the statute. The Ninth Circuit, however, reached

precisely the opposite conclusion, holding that the mere fact that the claim involves a domestic transaction is sufficient to permit application of the statute, regardless of any extraterritoriality concerns raised by the particular facts and circumstances at issue.

The conflict between the Second and Ninth Circuits concerns an issue of exceptional importance not only in the context of securities law, but concerning the extraterritorial application of United States law generally. This Court should resolve that conflict.[3]

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[3] The existence of a purported alternative basis for the Second Circuit's decision (addressed in the second question presented) is no reason to refrain from resolving the mature conflict between the Ninth Circuit and Second Circuit over the first question presented. In fact, the purported alternative basis appears to underscore the irreconcilability of the conflict, because the CEA statutory language that the Second Circuit held to be focused on domestic conduct may be materially indistinguishable from Section 10(b) of the Exchange Act, which *Stoyas* held is focused merely on domestic transactions. *See* Cert. Pet. at 32-33 (explaining that the term "registered entity," as used in the CEA, refers to U.S. exchanges, making the statutory language of CEA Section 6(c)(1) closely analogous to Section 10(b) of the Exchange Act).

Whether or not the Second Circuit accurately distinguished CEA Section 6(c)(1) from Section 10(b) of the Exchange Act, the Ninth Circuit and Second Circuit are squarely at odds over the "mode of analysis" prescribed by *Morrison* to determine a statute's focus. 561 U.S. at 266. In holding that the focus of CEA Section 6(c)(1) is "rooting out manipulation and ensuring market integrity," the Second Circuit properly "consider[ed] the 'conduct' that the statute 'seeks to regulate,' *as well as* 'the parties and interests it seeks to protect or vindicate.'" *Prime Int'l*, 937 F.3d at 104, 107 (quoting *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) (quoting *Morrison*, 561 U.S. at 267))

ARGUMENT

This Court Should Resolve The Irreconcilable Conflict Between The Second And Ninth Circuits On The Important Question Raised In This Case Concerning The Extraterritorial Application Of United States Law.

A. There Is An Irreconcilable Conflict Between The Second And Ninth Circuits.

"It is a 'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 561 U.S. at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*")). Absent "the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, "we must presume it is primarily concerned with domestic conditions." 561 U.S. at 255 (quoting *Aramco,* 499 U.S. at 248); *see also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007) ("[f]oreign conduct is [generally] the domain of foreign law"); *Kiobel v. Royal Dutch Petrol. Co.,* 569 U.S. 108, 115 (2013) (stating United States courts must "'presum[e] that United

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(emphasis added). The Ninth Circuit in *Stoyas*, ignoring the "conduct that the statute seeks to regulate," construed Section 10(b)'s focus exclusively in terms of the parties to be protected – securities purchasers in domestic transactions. *Stoyas*, 896 F.3d at 949 (holding that "because we are to examine the location of the transaction," the plaintiffs need not "allege any connection between Toshiba and the [securities] transactions"). There is no justification for Toshiba to be subject to suit in the Ninth Circuit when the Respondents here are not subject to suit in the Second Circuit.

States law governs domestically but does not rule the world'").

1. In *Morrison,* This Court Held That Where A Claim Does Not Involve A "Security Registered On A National Securities Exchange," A Domestic Transaction Is Necessary To Permit Domestic Application Of The Exchange Act.

In *Morrison,* this Court applied these principles to a claim for damages under § 10(b) of the Exchange Act. National Australia Bank ("NAB") stock was not traded on any United States exchange, and the plaintiffs had purchased their NAB stock on the Australian Stock Exchange. Plaintiffs asserted that § 10(b) applied nevertheless, because NAB defrauded them by overstating the value of a subsidiary based in Florida.

In *Morrison*, this Court applied what it would later describe as a "two-step framework for analyzing extraterritoriality issues." *See RJR Nabisco, Inc. v. European Cmty.,* 136 S. Ct. 2090, 2101 (2016). Finding no "affirmative intention of the Congress clearly expressed," the Court in *Morrison* first held that the Exchange Act is not applicable extraterritorially. *Morrison,* 561 U.S. at 265.

The Court then went on to examine whether the plaintiffs had alleged a proper domestic application of the statute. *Id.* at 266. Emphasizing that the presumption against extraterritoriality is neither a "timid sentinel" nor a "craven watchdog" that "retreat[s] to its kennel whenever *some* domestic

activity is involved in the case," *id.*, the Court "reject[ed] the notion that the Exchange Act reaches conduct in this country *affecting exchanges or transactions abroad* . . . ." *Id.* at 269 (emphasis added).

Noting that foreign regulation of securities exchanges and securities transactions often differs from United States regulation, the Court wrote that:

> The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application "it would have addressed the subject of conflicts with foreign laws and procedures."

Id. at 269 (quoting *Aramco*, 499 U.S. at 256). To avoid the "interference with foreign securities regulation that application of § 10(b) abroad would produce," the Court adopted a "transactional test," *id.,* holding that the Exchange Act's "focus" is "not upon the place where the deception originated, but upon purchases and sales of securities in the United States," *id.* at 265, and that the statute applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Id.* at 269. Because the securities at issue in *Morrison* were not listed on a domestic exchange, and the plaintiffs did not allege that they had acquired the securities in a domestic transaction, the Court found §10(b) inapplicable.

In *Morrison,* this Court thus made clear that a domestic transaction is a *necessary element* of a § 10(b) claim that does not involve securities listed on a United States exchange. But because *Morrison* did not involve any domestic transaction, the Court had

no occasion to address the related question – whether a domestic transaction is a *sufficient condition* for such a claim. In other words, *Morrison* left open the question whether the mere fact that a claim involves a domestic transaction renders the application of § 10(b) permissibly domestic, or whether the securities issuer's lack of involvement in the transaction or United States securities markets, the foreign nature of the underlying facts, and the possibility of interference with foreign securities law may render such an application impermissibly extraterritorial. The Second and Ninth Circuits have resolved this question in fundamentally conflicting ways.

2. The Second Circuit Interprets *Morrison* As Holding That A Domestic Transaction Is Necessary, But Not Always Sufficient, To Permit Domestic Application Of The Exchange Act.

In the decision below, the Second Circuit applied *Morrison* to determine whether the Commodity Exchange Act ("CEA") permits suit for manipulative conduct occurring outside the United States. *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019). "Given that courts 'have looked to the securities laws' when asked 'to interpret similar provisions of the CEA,'" the *Prime International* court followed *Parkcentral Global HUB Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014), in which the court had previously applied *Morrison* to the Exchange Act. *Prime Int'l*, 937 F.3d at 106.

In *Parkcentral*, the Second Circuit held that the Exchange Act did not apply to claims that Porsche had

fraudulently manipulated the price of Volkswagen stock, damaging parties to certain "swap agreements" that were "pegged to the price" of VW stock. 763 F.3d at 201. The VW shares referenced in the swap agreements did not trade on United States exchanges, but exclusively on foreign exchanges, and Porsche was not a party to any of the swap agreements, nor had it participated in the market for swaps in any way. *Id.* at 207. Finally, Porsche's allegedly fraudulent conduct had been "the subject of investigation by German regulatory authorities and adjudication in German courts." *Id.* at 216. The *Parkcentral* court held that applying § 10(b) to these facts would be an impermissibly extraterritorial application of the statute, even if the plaintiffs obtained the securities in domestic transactions.

Following *Morrison,* the *Parkcentral* court held that the primary consideration in determining whether the proposed application of § 10(b) was impermissibly extraterritorial would be the "potential for incompatibility between U.S. and foreign law." *Id.* at 216-17. Given this Court's reliance in *Morrison* on the fact that Congress had not addressed the obvious probability of conflicts with foreign laws and procedures, the *Parkcentral* court reasoned that "if an [extraterritorial] application of the law would obviously be incompatible with foreign regulation, and Congress has *not* addressed that conflict, the application is one which Congress did not intend." *Id.* at 215 (original emphasis) (stating as a "corollary" of *Morrison*'s conclusion, "if an extraterritorial application of federal law would likely be incompatible with foreign law, and that application was intended

by Congress, Congress would have addressed the conflict").

The *Parkcentral* court also pointed to *Morrison*'s description of its transactional test in terms of "necessary elements rather than sufficient conditions," and emphasized that in *Morrison,* this Court "never said that an application of § 10(b) will be deemed domestic whenever such a transaction is present." *Id.* The Second Circuit therefore held that *Morrison* does not permit "treating the location of a transaction as the definitive factor in the extraterritoriality inquiry." *Id.* As the *Parkcentral* court put it, "a rule making the statute applicable whenever the plaintiff's suit is predicated on a domestic transaction, regardless of the foreignness of the facts constituting the defendant's alleged violation, would seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application." *Id.* Although the plaintiffs' swap transactions in *Parkcentral* had been "concluded domestically," *id.* at 207, the Second Circuit held that under *Morrison*, "the relevant actions in this case are so predominantly German as to compel the conclusion that the complaints fail to invoke § 10(b) in a manner consistent with the presumption against extraterritoriality." *Id.* at 216 (citing *Morrison*, 561 U.S. at 266).

In the matter now before the Court, the Second Circuit determined that the "focus" of the CEA is "transactional," and, therefore, that proper domestic application of the statute required plaintiffs to plead a domestic transaction. *Prime Int'l,* 937 F.3d at 104. Assuming that the plaintiffs had met this

requirement, the court followed *Parkcentral* and dismissed their claims, holding that even if the commodities transactions at issue in *Prime International* were domestic, the facts alleged in the case were "predominately foreign," and applying the CEA would be an improperly extraterritorial application of the statute. *Id.* at 106-07; *see also id.* at 107 (holding that the CEA's "focus is on rooting out manipulation and ensuring market integrity — not on the geographical coordinates of the transaction").

3. The Ninth Circuit Interprets *Morrison* As Holding That A Domestic Transaction Is Always Sufficient To Permit Domestic Application Of The Exchange Act.

The Ninth Circuit's rule on the question left open by *Morrison* is diametrically opposed to the Second Circuit's. In *Stoyas v. Toshiba Corp.,* 896 F.3d 933 (9th Cir. 2018), the Ninth Circuit held that § 10(b) applies to claims for losses allegedly resulting from Toshiba's 2015 announcement that it had overstated profits by $1.2 billion over a seven-year period.

Toshiba is incorporated under the laws of Japan, and is headquartered in Japan. Toshiba lists its common stock solely on stock exchanges in Japan – it does not offer or sell any securities in the United States, does not list any securities on any exchange in the United States, and does not otherwise participate in any U.S. securities market.

The *Stoyas* plaintiffs purport to represent a class of purchasers, in over-the-counter transactions in the United States, of American Depositary Receipts

("ADRs") that reference Toshiba stock listed in Japan. The ADRs at issue in *Stoyas* are unsponsored – *i.e.,* they represent "two-party contract[s] between the depositary and the ADR holders," involving no participation by, or even the acquiescence of, Toshiba. Toshiba has no reporting obligations with the SEC as a result of the ADRs.

The District Court granted Toshiba's motion to dismiss, even though the court acknowledged that "[f]acially," the plaintiffs' claim involved domestic transactions, in that the ADRs were sold and purchased in the United States. 191 F. Supp. 3d at 1094. The court noted that *Morrison* did not squarely address the question whether U.S. securities laws apply to a foreign company that lists its securities only on foreign exchanges, but whose stock is purchased on a foreign exchange and held by an American depositary, which then creates "a different kind of security" (ADRs) referencing the foreign stock. *Id.* But the District Court held that "all the policy and reasoning in *Morrison* point in the other direction." *Id.*

The District Court held that to read *Morrison* as holding that the Exchange Act *always* applies to a securities fraud claim involving a domestic securities transaction – even if the claim is against a foreign issuer that did not participate in the transaction, has not entered the U.S. securities markets, made its allegedly fraudulent statements abroad, and is subject to ongoing oversight by foreign securities regulators – would lead to the "essentially limitless reach of § 10(b) claims": the independent actions of actors in the United States could create liability for a foreign issuer

even if that issuer had done all it could to keep its securities from being sold in the United States. *Id.* at 1094-95. Such a result, the District Court held, would be "inconsistent with the spirit and law of *Morrison*." *Id.* at 1095.

The Ninth Circuit, however, reversed. *Stoyas*, 896 F.3d at 952. In the Ninth Circuit's view, application of Section 10(b) turns *solely* on the presence of a domestic securities transaction, regardless of the predominance of foreign conduct, the effect on foreign exchanges, and the interference with securities regulation in foreign nations. *Id.* at 949-50.

4. The Conflict Between The Second And Ninth Circuits Over *Morrison* Is Square And Irreconcilable, And Has Created Forum-Shopping Risk.

The Ninth Circuit's ruling in *Stoyas* – that the location of the transaction is, itself, determinative, and that under *Morrison* "it does not matter" that the foreign issuer did not engage in the domestic transaction, and, in fact, has no connection to United States securities markets, *id.* at 949 – is the precise opposite of the Second Circuit's in *Parkcentral*, and now in *Prime International.*

And the Ninth Circuit not only adopted a rule contrary to the Second Circuit's; it expressly and specifically criticized the latter's approach as "contrary to Section 10(b) and *Morrison* itself," and as "turn[ing] *Morrison* and Section 10(b) on their heads." 896 F.3d at 949-50 (9th Cir. 2018). The *Stoyas* court held that the Second Circuit's rule is based on "speculation about Congressional intent, an inquiry

Morrison rebukes," and described the Second Circuit's holding as adopting "an open-ended, under-defined multi-factor test, akin to the vague and unpredictable tests that *Morrison* criticized and endeavored to replace with a 'clear,' administrable rule." *Id.* at 950.

It is difficult to imagine a clearer statement of a conflict between the Circuits, or of the intractable nature of that conflict. Nevertheless, the Ninth Circuit questioned whether its ruling created any real conflict, noting that "no Second Circuit case, nor any other Circuit, ha[d] applied *Parkcentral*'s rule." *Stoyas*, 896 F.3d at 950 n.22. And in opposing certiorari in *Stoyas*, the United States argued that there was "no square conflict," because the Second Circuit might "revisit" its holding in *Parkcentral*, in light of intervening decisions by this Court. Brief for the United States as Amicus Curiae 19-20, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, No. 18-846 (May 20, 2019) ("SG *Toshiba* Amicus Br.").

The Second Circuit's decision in this case, however, puts to rest any doubt that there is a square conflict between the Circuits. And it is not a conflict that may be resolved by an outlier circuit reconsidering its position – the Second and Ninth Circuits hear more securities cases than all of the other circuits combined,[4] and each has made clear its disagreement with the other. The *Stoyas* court expressly and methodically rejected the Second Circuit's reasoning, and the Second Circuit has made clear its intent to extend its interpretation of *Morrison*, as evidenced by the ruling below. *See Prime Int'l*, 937 F.3d at 106 ("Given that courts 'have looked to the securities laws'

[4] *See* n.2, *supra*.

when asked 'to interpret similar provisions of the CEA,' we do not hesitate in applying *Parkcentral*'s gloss on domestic transactions under Section 10(b) to domestic transactions under Section 22 of the CEA.").

Thus, it is unlikely the Second and Ninth Circuits will resolve their conflict, and given the outsized role those courts play in U.S. securities litigation, there is no reason to await further percolation, which is, in any event, improbable, since plaintiffs' counsel now have every incentive to forum shop and bring cases against foreign issuers like Toshiba exclusively in the Ninth Circuit. Even if another circuit eventually addresses the question presented, by then it is likely that the Ninth Circuit's decision will have significantly undermined this Court's decision in *Morrison*.

Courts in the Second Circuit are now falling into line with *Prime International* and applying *Parkcentral* where the claims are predominantly foreign. *See In re Platinum & Palladium Antitrust Litig.*, No. 1:14-cv-9391-GHW, 2020 U.S. Dist. LEXIS 55506, at *75-76, 79-84 (S.D.N.Y. Mar. 29, 2020) (reconsidering and granting motion to dismiss CEA claims under *Parkcentral*, stating: "The Court's holding in *Platinum I* that *Parkcentral* does not apply to Plaintiffs' CEA claims in this case is untenable after *Prime International Trading*"); *Cavello Bay Reinsurance Ltd. v. Stein*, No. 18-cv-11362, 2020 U.S. Dist. LEXIS 54184, at *26 & n.8 (dismissing Exchange Act claims, citing *Prime International*, and rejecting a "narrow" application of *Parkcentral*).

New cases, meanwhile, continue to be filed in the Ninth Circuit against foreign defendants involving securities not issued in the United States or listed on

a U.S. exchange, based on allegations of predominantly foreign conduct. *See, e.g.*, *DalPoggetto v. Wirecard AG*, No. 2:19-cv-00986 (C.D. Cal. Feb. 14, 2020) (involving a German company, alleged misrepresentations in German securities filings regarding a Singapore subsidiary, and over-the-counter trades in unsponsored ADRs and F-shares); *Hashem v. NMC Health Plc*, No. 2:20-cv-02303 (C.D. Cal. Mar. 10, 2020) (involving a U.K. company, alleged misrepresentations in annual reports and press releases regarding foreign acquisitions and construction projects in the UAE, and over-the-counter trades in unsponsored ADRs); *Gabbard v. PharmaCielo Ltd.*, No. 2:20-cv-02182 (C.D. Cal. Mar. 6, 2020) (involving a Canadian company, alleged misrepresentations in annual reports and press releases regarding cannabis oil operations in Colombia and related party transactions, and over-the-counter trades in F-shares); *Lavdas v. Metro Bank PLC*, No. 2:19-cv-04739 (C.D. Cal. Jan. 10, 2020) (involving a U.K. bank, alleged misrepresentations in press releases, investor calls and annual reports regarding the strength of the bank's capital base, and over-the-counter trades in F-shares). Whether United States courts must follow the *Parkcentral* rule or the *Stoyas* rule could be decisive in all such cases.

B. The Square Conflict Between The Second And Ninth Circuits Concerns An Issue Of Exceptional Importance With Serious Foreign Policy Implications.

The issue now before the Court is one of significant national and even international importance. This Court has recognized the importance of the question

presented, calling for the views of the Executive Branch on Toshiba's petition for certiorari in *Stoyas*. The Solicitor General acknowledged that the international comity concerns raised by Toshiba and amici regarding the question presented were "weighty" and must be taken "seriously." *See* SG *Toshiba* Amicus Br. 21; *see also* Supplemental Brief for Petitioner 8, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund,* No. 18-486 (U.S. Sup. Ct. June 3, 2019).

The unusually broad support at the petition stage for granting Toshiba's petition further demonstrates the importance of the issue. Thirteen parties joined eight amicus briefs to urge the Court to review the question presented by Toshiba: 1. Ministry of Economy, Trade and Industry of Japan ("METI"); 2. Government of the United Kingdom of Great Britain and Northern Ireland; 3. U.S. Chamber of Commerce; 4. Securities Industry and Financial Markets Association ("SIFMA"), Competitive Enterprise Institute ("CEI"); 5. Keidanren ("Japan Business Federation"); 6. EuropeanIssuers, Économiesuisse, International Chamber of Commerce Switzerland, Association Française des Entreprises Privées; 7. Organization For International Investment ("OFII"); 8. Institute of International Bankers, and Swiss Bankers Association.

The United Kingdom left no doubt that the threat of interference with foreign regulations and markets is real:

> This appeal involves a particularly alarming example of interference with a foreign nation's legal system, because the Ninth Circuit's decision would immediately allow private U.S.

> plaintiffs to undermine a foreign government's usual regulation of its domestic securities markets, even when a foreign-registered company's own activities have no factual nexus to the United States.

Brief Of The Government Of The United Kingdom Of Great Britain And Northern Ireland As Amicus Curiae In Support Of The Petitioner In Its Petition For A Writ Of Certiorari 2, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund,* No. 18-486 (U.S. Sup. Ct. Dec. 4, 2018) ("U.K. *Toshiba* Amicus Br."). Japan raised a similar warning: "[T]he effect of [the Ninth Circuit's] decision on the Japanese companies, stakeholders and economy is extremely large." Brief Of The Ministry Of Economy, Trade And Industry Of Japan As Amicus Curiae In Support Of Petitioner 2, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund,* No. 18-486 (U.S. Sup. Ct. Nov. 2, 2018).

The Solicitor General and SEC argued in *Toshiba* that "adverse consequences for foreign securities regulation and international comity" are "unlikely" to occur under the Ninth Circuit's rule because of potential alternative defenses to claims under the Exchange Act. SG *Toshiba* Amicus Br. 21. Despite these assurances, however, Toshiba now faces extensive discovery targeted at materials produced to, and communications with, Japan's securities regulators and criminal investigators. In fact, the *Stoyas* Plaintiffs in their "first" document request (which they characterized as "limited") sought close to a *billion* such documents located in Japan.

Referring to the amicus briefs of foreign governments and foreign organizations in *Morrison*,

this Court stated in that case: "They all complain of the interference with foreign securities regulation that application of § 10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence. The transactional test we have adopted . . . meets that requirement." 561 U.S. at 269-70. Regrettably, the Ninth Circuit's interpretation of *Morrison* has subjected Toshiba and Japanese regulators to the interference *Morrison* sought to avoid.

Such interference raises serious concerns not only for foreign defendants like Toshiba. The mechanistic rule propounded by the Ninth Circuit (and Petitioners) significantly increases the risk that U.S. market participants will be dragged into litigation around the world to face the reciprocal application of foreign laws. *See* Supplemental Brief for Petitioner 12, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund,* No. 18-486 (U.S. Sup. Ct. June 3, 2019); Brief Of The Securities Industry And Financial Markets Association And The Competitive Enterprise Institute As Amici Curiae Supporting Petitioner 18-19, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund,* No. 18-486 (U.S. Sup. Ct. Dec. 6, 2018); U.K. *Toshiba* Amicus Br. 10 (stating that foreign regulators now may be "apt to resist [U.S.] enforcement efforts and perhaps to retaliate with counter-measures of their own").

In any event, *Morrison* did not hold that extraterritorial application is permissible so long as foreign interference is "unlikely." SG *Toshiba* Amicus Br. 21. That approach perverts the meaning of a "presumption" against extraterritorial application. *See Morrison*, 561 U.S. at 255 ("[t]he canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law").

The question presented thus goes to the heart of how *Morrison* should be applied – not only with respect to the Exchange Act or CEA, but every other statute where the presumption against extraterritoriality is at issue. *See* Brief For The Chamber Of Commerce Of The United States Of America As Amicus Curiae In Support Of Petitioner 19-20, *Toshiba Corp. v. Auto. Indus. Pension Tr. Fund,* No. 18-486 (U.S. Sup. Ct. Dec. 6, 2018) (citing various statutes to which the presumption has been applied, including the Patent Act; Stored Communications Act; RICO; Alien Tort Statute; wire-fraud statute; Civil Rights Act of 1964; Bankruptcy Code; Foreign Corrupt Practices Act; Comprehensive Drug Abuse Prevention and Control Act of 1970; Trafficking Victims Protection Reauthorization Act; and Internal Revenue Code).

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and resolve the conflict between the Second and Ninth Circuits on this important question concerning the extraterritorial application of United States law.

Respectfully submitted,

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