No. 08-1191

IN THE

# Supreme Court of the United States

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK and GERALDINE SILVERLOCK,

*Petitioners*,

*v.*

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF FOR AMICI CURIAE ALECTA PENSIONSFÖRSÄKRING, ÖMSESIDIGT, AMPEGAGERLING INVESTMENT GMBH, APG ALGEMENE PENSIOEN GROEP N.V., ATP - ARBEJDSMARKEDETS**

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## INTEREST OF AMICI CURIAE[1]

This *amici* brief is filed on behalf of a group of institutional investors from outside of the United States, including a number of pension funds that invest for the long-term security of their millions of active and retired members. Collectively, *amici* have approximately 1.9 trillion U.S. dollars in assets under management, a significant amount of which they invest in securities sold in American and foreign markets. *Amici* include some of the largest institutional investors in the world and have a strong interest in maintaining the right to assert federal securities fraud claims in cases where a transnational fraudulent scheme includes a material American component.

As Congress has recognized in the text of the Securities Exchange Act of 1934 ("Exchange Act"), fraudulent conduct that occurs in this country may impact securities prices in worldwide markets. Accordingly, foreign investors have a strong interest in ensuring that American prohibitions on securities fraud sufficiently deter such fraudulent conduct, and provide a remedy to all investors who are injured as a result. This is particularly so because, depending on the extent and nature of the fraudulent conduct that occurs in

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel, made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of all *amici* briefs have been filed with the Clerk of the Court.

America, foreign investors may find it impractical to bring separate lawsuits in their home countries that encompass the full transnational scheme. Moreover, foreign investors often purchase the securities of businesses that have a substantial American presence, and both foreign and domestic investors alike rely on American law to ensure that corporations doing business in America are not tainted by fraud. A rule that would limit the applicability of America's securities regulation regime so as to exclude foreign investors who have been harmed by a fraudulent scheme executed within U.S. borders would shake foreign investors' confidence in American business, and make any corporation with a significant American presence appear to be a less attractive investment opportunity.

## SUMMARY OF ARGUMENT

The text of Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b), broadly prohibits the use of instrumentalities of interstate and foreign commerce to engage in fraudulent conduct in connection with the purchase or sale of securities. Thus, the plain language of the statute explicitly prohibits the conduct alleged in this case. Because nothing in either the text of the Exchange Act, or the canon of construction against extraterritorial application of federal law, requires a narrowing of Section 10(b)'s plain language, all investors damaged by the alleged fraud, including those who, like Petitioners, reside outside the United States or who purchased their securities on foreign exchanges, should be permitted to proceed with their claims.

The text of the Exchange Act explicitly contemplates some extraterritorial application. The term "interstate commerce" is defined to include foreign commerce. Section 2 of the Act, delineating the need for regulation, emphasizes that at least in the context of open and well-developed markets, foreign activity can have an important impact on the prices at which securities trade in the United States. Section 10(b), unlike other sections of the Act, is not limited only to securities registered on "national" exchanges, but instead applies to all securities. And Section 30(b) of the Act explicitly exempts from the Act's reach certain foreign transactions – thus implying that transactions not so exempted (like the transactions at issue in this case) fall within the Act's ambit. Given this statutory language, Petitioners have stated an Exchange Act claim.

First, Petitioners have alleged the existence of fraudulent conduct within the meaning of Section 10(b). Much of the alleged fraud in this case was committed by the defendant-issuer's American subsidiary and occurred wholly within the United States – indeed, the Complaint does not even allege that the foreign defendants were informed of the fraud until halfway through the Class Period. Thus, with respect to the American conduct, no question of extraterritoriality is even raised, and the statute should be applied as written.

This result does not change for the related fraudulent conduct that occurred outside of the United States (i.e., in Australia), which was wholly dependent on the fraud within the United States and which was also prohibited by the plain language of Section 10(b). Although there is a general presumption that federal

statutes do not apply to extraterritorial conduct unless there is "affirmative evidence" that Congress so intended, that canon of construction does not bar the application of federal law to a transnational scheme with a material domestic component. Instead, that canon bars application of federal law to conduct that occurs *entirely* on foreign soil. Because any foreign fraudulent conduct in this case was heavily intertwined with the domestic conduct, there arises no presumption that Congress did not intend Section 10(b) to prohibit the entire scheme. This conclusion is buttressed by the text of the Exchange Act itself which, as described above, explicitly applies to foreign conduct. Although the extraterritoriality canon may be appropriately applied to the Exchange Act for a wholly foreign scheme – a question that this Court need not reach in this case – the statute's explicit references to foreign activity should, at the very least, be interpreted to encompass schemes that include material domestic elements.

Second, Petitioners have alleged that the fraud occurred in connection with the purchase or sale of a security. Because the alleged fraudulent conduct impacted the issuer's securities trading in the United States on the New York Stock Exchange ("NYSE"), no issue is raised regarding the extraterritorial application of the phrase "purchase or sale" in Section 10(b). This result does not change merely because these particular plaintiffs purchased their shares abroad. Congress recognized in the Exchange Act that such foreign trades, at least in an efficient market, impact the prices at which American securities are bought and sold. For that reason, Congress sought to prohibit those "deceptive devices" (at least those with a domestic component, as

described above) that would influence trading of an issuer's securities on foreign exchanges, in order to ensure the integrity of the price of the very same issuer's securities trading in American markets.

For over three decades, courts have allowed foreigners to assert Section 10(b) claims relating to securities they purchased on foreign exchanges where significant fraudulent conduct occurred domestically. Yet Congress has never amended the Exchange Act to limit such claims. Congress's inaction is striking given the fact that, in recent years, Congress has substantially amended the private right of action under Section 10(b) on three separate occasions. Congress's silence in the face of substantial agreement among the circuits that foreign investors may bring Section 10(b) claims when they are harmed by transnational schemes with a material domestic component strongly suggests that Congress believes such claims advance the Act's purposes.

Finally, the Act should not be construed in a manner that would undermine its goals. As numerous appellate courts have recognized, in enacting the Exchange Act, Congress could not have intended to allow the United States to become a haven for international fraudsters. Such an interpretation of the securities laws would weaken this country's reputation in the global community as a stringent regulator of fraud.

For these reasons, Petitioners' claims should be allowed to proceed.

## ARGUMENT

### I. THE PLAIN LANGUAGE OF SECTION 10(b) PERMITS PETITIONERS TO BRING THEIR CLAIMS

Section 10(b) of the Exchange Act provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered. . . , any manipulative or deceptive device or contrivance in contravention of [SEC rules promulgated under the Exchange Act]. . . .

15 U.S.C. § 78j(b). "Interstate commerce," in turn, is defined to mean commerce and communication "among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof. . . ." 15 U.S.C. § 78c(a)(17). Thus, by its terms, Section 10(b) forbids deceptive devices in connection with international commerce and communication. *See Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 664 (7th Cir. 1998).

Petitioners here allege a typical fraudulent scheme. Respondent National Australia Bank Ltd. ("NAB"), an Australian corporation, conducts business throughout the world, and issues securities that trade on NYSE as

well as on foreign exchanges. JA96a-97a.[2] In 1998, NAB purchased HomeSide Lending ("HomeSide"), a American company headquartered in Florida. At HomeSide's offices in Florida, HomeSide and its officers (the "HomeSide Respondents") falsified the value of HomeSide's assets. JA82a-84a. The HomeSide Respondents then transmitted the falsified information from Florida to NAB's headquarters in Australia, where the information was incorporated into NAB's financial statements. NAB both included HomeSide's results in its consolidated totals, and separately reported HomeSide's standalone results. JA61a, SA6. These financial statements were filed, among other places, with the SEC and NYSE in the United States, and with the Australian Securities and Investment Commission. JA97a. Because NAB securities traded efficiently around the world, the falsified financial statements contributed to the artificial inflation of NAB's securities on every exchange where they were listed, including the NYSE. JA96a-97a. Petitioners, residents of Australia who purchased NAB securities on an Australian securities exchange, experienced losses when the fraud at HomeSide was revealed, causing sharp drops in the value of their holdings. JA39a-40a.

Under any ordinary reading of Section 10(b), Petitioners have stated a claim.[3] Respondents are

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[2] "JA" and "SA" refer to the Joint Appendix and the Supplemental Appendix, respectively, which were filed on January 19, 2010.

[3] *See also* Brief for the United States as Amicus Curiae in Opposition to Certiorari 12-13, *Morrison v. Nat'l Austl. Bank*, 08-1191 (Oct. 2009) ("U.S. Br.") (conceding that Respondents violated Section 10(b)).

alleged to have employed "manipulative or deceptive device[s]" with scienter, and the false financial results were reported worldwide in connection with the "purchase or sale" of NAB securities. Nor is there any dispute that, if Congress so desired, it had the power to prohibit such conduct. *See Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949). Thus, the only basis for dismissing Petitioners' claims is if the statute is read *not* in accord with its plain meaning, but instead far more narrowly to apply only to a very limited subset of conduct. Neither the statute itself, nor the extraterritoriality canon of statutory construction, permits such a reading.

### A. The Exchange Act Explicitly Applies to Conduct with an Extraterritorial Component

In enacting the Exchange Act, Congress both explicitly and implicitly recognized the impact that foreign activity can have on American domestic interests, and extended the application of the Act accordingly.

First, the Act explicitly recognizes the importance of extraterritorial conduct to domestic interests. Section 2 of the Act, titled "Necessity for Regulation," explains that "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto," and, consequently, the Exchange Act was enacted to protect "interstate commerce." 15 U.S.C. § 78b. As noted above, "interstate commerce" is defined to include commerce "between any foreign country and

any State." 15 U.S.C. § 78c(a)(17). Congress stated that such securities trading is "carried on in large volume by the public generally and in large part originate[s] outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce. . . ." 15 U.S.C. § 78b(1). Because "State" is defined to mean "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States," 15 U.S.C. § 78c(a)(16), transactions that originate on exchanges located outside the "States" include those that originate on exchanges in foreign countries.

Nor are these references to foreign countries mere "boilerplate language." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251 (1991) ("*ARAMCO*"). Congress recognized that because well-developed markets absorb information on a global scale, transactions even in foreign countries can affect American interests. Section 2 provides that trading in such markets establishes prices "disseminated and quoted throughout the United States *and foreign countries* and constitute a basis for determining and establishing the prices at which securities are bought and sold . . ." 15 U.S.C. § 78b(2) (emphasis added). Congress found that regulation was necessary because "the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities . . ." *Id.* § 78b(3). Indeed, the legislative history confirms that Congress intended the Exchange Act to "provide for the regulation of securities exchanges and over-the-

counter markets operating in interstate and *foreign commerce* and through the mails, to prevent inequitable and unfair practices on such exchanges and markets. . . ." H.R. Rep. No. 78-1838, (Conf. Rep.), 1934 WL 1291 (May 31, 1934) (emphasis added). As this Court held in *Pasquantino v. United States*, 544 U.S. 349 (2005), "[T]he wire fraud statute punishes fraud executed in interstate or foreign commerce . . . , so this is surely not a statute in which Congress had only domestic concerns in mind." *Id.* at 371 (citations and internal quotation marks omitted). The same reasoning applies here.

Moreover, as explained above, Section 10(b) broadly prohibits any person from using any instrumentality of "interstate commerce" (defined to include foreign commerce) to employ a "deceptive device" in connection both with securities registered on national exchanges, and "any security not so registered." 15 U.S.C. § 78j(b). As Judge Friendly concluded after examining the legislative history of Section 10(b) in *Leasco Data Processing Equipment Corp.*, 468 F.2d 1326 (2d Cir. 1972), "Since Congress . . . meant § 10(b) to protect against fraud in the sale or purchase of securities *whether or not these were traded on organized United States markets*, we cannot perceive any reason why it should have wished to limit the protection to securities of American issuers." *Id.* at 1336 (emphasis added).

Notably, Congress could have, but chose not to, apply territorial limitations to Section 10(b). For example, Section 9 of the Exchange Act limits prohibited transactions to those involving securities registered on a "national securities exchange," 15 U.S.C. § 78i(a)(1).

Similarly, Section 5, titled "Transaction on Unregistered Exchanges," is limited to "an exchange within or subject to the jurisdiction of the United States. . . ." 15 U.S.C. § 78e. That Congress affirmatively expanded Section 10(b) suggests Congress intended a broader application. *Cf. Patterson v. Shumate*, 504 U.S. 753, 758 (1992) ("The [Bankruptcy] Code reveals, significantly, that Congress, when it desired to do so, knew how to restrict the scope of applicable law to 'state law' and did so with some frequency. . . . Congress' decision to use [a broader phrasing] strongly suggests that it did not intend to restrict the provision. . . .").[4]

Additionally, the scope of conduct prohibited by Section 10(b) is defined by reference to the SEC's own interpretive rules and regulations. *See* 15 U.S.C. § 78j(b). Notably, "[a]lthough it has the power to grant exemptions from rules under Section 10(b), see Rules 10b-6(d), 10b-7(n) . . . the Commission has not promulgated a rule exempting foreign transactions from Rule 10b-5." *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968); *see also* Offshore Offers and Sales, Exchange Act Release No. 6863, 1990 WL 311658, at *5 (Apr. 24, 1990) (exempting certain offshore transactions

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[4] Section 10(b) also applies to "*any* security," with "very broad[ ]" definitions of what constitutes a "security." *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 n.6 (1971). If Congress intended that the Exchange Act generally, or the anti-fraud provision in Section 10(b) specifically, not be applied extraterritorially, it could have excepted securities issued by a foreign issuer or traded on foreign exchanges from these provisions. That Congress did not do so weighs in favor of the Act's extraterritorial application. *See Patterson*, 504 U.S. at 758.

from registration requirements, but explicitly stating that the regulation "does not limit the scope or extraterritorial application" of Section 10(b)). The SEC's interpretation of the scope of conduct regulated by statutes it administers is entitled to considerable weight. *See United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 718-19 (1975).

The text of Section 30 of the Exchange Act further demonstrates that Congress intended that the Act should apply to transactions with a foreign component. That section gives the SEC authority to regulate brokers and dealers who use interstate commerce to effect transactions in American securities on foreign exchanges. *See Schoenbaum*, 405 F.2d at 207. Section 30(b), however, contains a limited exemption from regulation for "any person insofar as he transacts a business in securities without the jurisdiction of the United States. . . ." unless the person is doing so in order to evade the other requirements of the Act. 15 U.S.C. § 78dd(b). Courts agree that this is a limited exception confined to persons who are in the business of trading securities, and does not apply to isolated transactions. *See Schoenbaum*, 405 F.2d at 208; *Robinson v. TCI/US West Commc'ns.*, 117 F.3d 900, 905 (5th Cir. 1997). "[S]ince Congress found it necessary to draft an exemptive provision for certain foreign transactions and gave the Commission power to make rules that would limit the exemption, the presumption must be that the Act was meant to apply to those foreign transactions not specifically exempted." *Schoenbaum*, 405 F.2d at 208.

The Exchange Act's venue provision also implicitly recognizes that actionable fraud may involve some

foreign conduct and foreign actors. Section 15 U.S.C. § 78aa permits a lawsuit to be brought in the district where the violation occurred, *or* "in the district wherein the defendant is found or is an inhabitant or transacts business." *Id.* This provision stands in sharp contrast to the far more limited venue provisions of Title VII and the Federal Tort Claims Act, which this Court found contributed to an inference that Congress had not intended an extraterritorial application for those statutes. *See ARAMCO*, 499 U.S. at 256 (Title VII's venue provisions "are ill-suited for extraterritorial application as they provide for venue only in a judicial district in the State where certain matters related to the employer occurred or were located"); *Smith v. United States*, 507 U.S. 197, 202 (1993) (FTCA's venue provision permits claims "only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred," which creates an anomalous result if applied to Antarctica).

Thus, the Exchange Act's text is replete with "affirmative evidence" of Congress's intention that it apply to extraterritorial conduct. *Sale v. Haitian Ctrs. Council,* 509 U.S. 155, 176 (1993).

### B. The Extraterritoriality Canon Does Not Bar Petitioners' Claims

Given that the plain language of Section 10(b) prohibits the conduct alleged in this case, and given that Congress has explicitly recognized the importance of even foreign purchases in efficient markets to American interests, the only basis for dismissing Petitioners' claims would be if this Court were to apply to Section 10(b) the

canon of construction that presumes that federal statutes are not meant to apply extraterritorially. *See Foley Bros.*, 336 U.S. at 285. However, that presumption applies when the conduct at issue occurred on foreign soil. Here, because the fraud had a significant – indeed, overwhelming – domestic component, and the statute makes it clear that some extraterritorial conduct falls within its ambit, there is no basis for a presumption that Congress did not intend to regulate the entire scheme.

#### 1. Section 10(b)'s Prohibition on Deceptive Conduct Extends to the Fraud Alleged

It is axiomatic that application of a statute to domestic conduct does not raise concerns about extraterritoriality. *See, e.g.*, *Pasquantino*, 544 U.S. at 371 ("Petitioners used U. S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States."); *Small v. United States*, 544 U.S. 385, 389 (2005) (in the context of gun possession law, an "extraterritorial" application is one that would "prohibit[ ] unlawful gun possession abroad as well as domestically"); *id.* at 400 (Scalia, J., dissenting) (describing the presumption against extraterritorial application as "restricting federal statutes from reaching conduct *beyond U.S. borders*," and having no role to play in a case involving "conduct *within U. S. borders*"); *cf. Rasul v. Bush*, 542 U.S. 466, 480 (2004) ("Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States.").

Here, the Complaint alleges that false financial statements were drafted by the HomeSide Respondents, and sent to NAB to be publicly reported. Thus, the HomeSide Respondents employed a "manipulative or deceptive device or contrivance" within the meaning of Section 10(b), and application of Section 10(b) to this conduct is not "extraterritorial."

That these Respondents' direct communications with the market were minimal is of no moment. In *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008), this Court examined Exchange Act claims brought against certain vendors of cable set-top boxes who had allegedly conspired with Charter Communications to help Charter inflate its reported revenues. *Id.* at 153-55. Even though the vendors had not spoken directly to the market, this Court concluded they had engaged in a deceptive "course of conduct" that "included both oral and written statements" by making sham purchases from Charter and falsifying associated paperwork. *Id.* at 158.[5] This is precisely what Petitioners allege the HomeSide Respondents did.

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[5] This Court ultimately concluded in *Stoneridge* that despite the vendors' deceptive acts, the private plaintiffs had not established that they "relied" on the vendors' actions and thus could not establish the elements of a private claim. 552 U.S. at 160-62. However, because reliance is not an element of a government enforcement action, *SEC v. Pirate Investor LLC*, 580 F.3d 233, 239 n.10 (4th Cir. 2009), even absent that element, the vendors' deceptive conduct in *Stoneridge* constituted a complete violation of Section 10(b). Moreover, as discussed below, Petitioners here have alleged sufficient facts to satisfy the element of reliance with respect to HomeSide's conduct.

In concluding that NAB, and not HomeSide, was primarily responsible for the fraudulent conduct, the Second Circuit did not discuss this Court's analysis in *Stoneridge*. *See Morrison v. Nat'l Austl. Bank, Ltd.*, 547 F.3d 167, 176 (2d Cir. 2008). Instead, the Second Circuit conducted a comparative analysis, concluding that because, by its reckoning, NAB was more responsible for the fraud than HomeSide, the entire scheme was immune under Section 10(b). *See id.* Not only is this conclusion at odds with the facts alleged, but the Second Circuit's analysis made no attempt to engage the text of the statute. Nothing in Section 10(b) requires or permits a comparative analysis of each defendant's contribution to an alleged fraudulent scheme: the statute broadly prohibits "any manipulative or deceptive device."[6] Indeed, Congress explicitly provided in the PSLRA that such comparative analyses are only relevant to the *damages* phase of litigation, and even then, only when the conduct was reckless rather than the intentional fraud alleged against the HomeSide Respondents. *See* 15 U.S.C. §78u-4(f).

In fact, unlike the third-party vendors in *Stoneridge*, the HomeSide Respondents are alleged to have

[6] As the Eleventh Circuit subsequently observed, the Second Circuit's new "comparative" analysis also appears to have been at odds with its prior precedent. *See In re CP Ships Ltd. Sec. Litig*, 578 F.3d 1306, 1317 n.11 (11th Cir. 2009) ("[T]he recent *Morrison* case in the Second Circuit may represent a somewhat more stringent application of the conduct test than was indicated in previous Second Circuit cases"); *see also* U.S. Br. 20 ("the decision below appears to impose a standard more demanding than the approaches previously adopted by the Second Circuit and other courts of appeals").

masterminded the entire scheme. Indeed, the Complaint does not even allege that NAB was informed of the fraud until halfway through the Class Period, JA89a. Though Petitioners' allegations (which must be accepted as true for pleading purposes) state that NAB was at least reckless in failing to discover the fraud earlier, there remains the possibility that a trier of fact might conclude that for a large portion of the Class Period, the *only* fraudulent conduct in this case was committed by the American subsidiary and its officers. *Compare Chill v. General Electric Co.*, 101 F.3d 263, 270 (2d Cir. 1996) (dismissing claims against GE because there was no evidence that it knew of the fraud at its subsidiary, Kidder Peabody) *with In re Kidder Peabody Securities Litigation*, 10 F. Supp. 2d 398, 408 (S.D.N.Y. 1998) (sustaining claims against the subsidiary for supplying the false statements to its parent). Thus, application of Section 10(b)'s prohibition on "manipulative or deceptive" conduct to the HomeSide Respondents presents no issue of extraterritoriality.[7]

Nor does the presumption against extraterritorial application bar Petitioners' claims with respect to that portion of the scheme that concerned NAB's activities in Australia. That is because the presumption bars application of a federal statute when the relevant

[7] The HomeSide Respondents cannot be deemed mere "aiders and abetters" of the fraud. This is because the charge of "aiding and abetting" includes as one element the existence of a separate primary violator for the defendant to have aided. *See SEC v. Fehn*, 97 F.3d 1276, 1288 (9th Cir. 1996). If a factfinder were to conclude that NAB did not act with scienter for the first half of the period, there would be no other defendant for the HomeSide Respondents to have "aided."

conduct occurs *entirely* outside the United States – not when the conduct contains a material domestic component.

For example, in *ARAMCO*, this Court was called upon to consider whether Title VII of the Civil Rights Act applies to employment conditions occurring entirely in Saudi Arabia. 499 U.S. at 247. Because the language of the statute did not provide "any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty," *id.* at 248 (quoting *Foley Bros.*, 336 U.S. at 285), and reading it so broadly created inconsistencies in the statutory scheme, *id.* at 255-56, this Court held that Title VII does not apply to *entirely* overseas conduct.

Similarly, in *Sale v Haitian Centers*, this Court considered the application of certain provisions of the Immigration and Naturalization Act to conduct that occurred solely outside U.S. territorial waters. *See* 509 U.S. at 171. Once again, the Court found that after considering the statutory scheme as a whole, application outside U.S. territory created anomalies that Congress could not reasonably have intended, *see id.* at 172-74, and that the presumption against extraterritorial application of American law lent further support to a narrower reading, *see id.* at 173; s*ee also Foley Bros*., 336 U.S. at 285 (concerning labor conditions in Iran and Iraq); *Smith*, 507 U.S. at 199 (tort claim arising "exclusively on acts or omissions occurring in Antarctica"); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 586 (1992) (Stevens, J., concurring in the judgment) (concerning the applicability of a provision of the Endangered Species Act to actions taken outside the

U.S.). But, when a single course of conduct depends heavily on conduct *within* the United States, there is simply no basis to assume that Congress did not intend to regulate the entire scheme. *See Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 (1952) (applying American law to a transnational scheme); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-276 (1927) (same). This is particularly so where, as here, the fraudulent conduct overseas was entirely derivative of, and dependent on, the domestic conduct.

This Court's decisions in *F. Hoffman-La Roche Ltd. v. Empagran*, S.A., 542 U.S. 155 (2004) and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007) are not to the contrary. In those cases, the statutes at issue specifically delineated when a scheme that included both foreign and domestic conduct would be characterized as foreign and outside the reach of American law. Thus, in *Hoffman*, this Court considered the scope of the Foreign Trade Antitrust Improvements Act, which excludes from the reach of the Sherman Act certain domestic "conduct involving trade or commerce . . . with foreign nations," with very precise definitions as to what constitutes such conduct. 542 U.S. at 161 (quoting 15 U.S.C. § 6a). Similarly, in *Microsoft*, this Court considered the Patent Act, which by its terms extends only to conduct within the territorial United States, and then contains a very limited extension to precisely-defined activity, involving both foreign and domestic elements, undertaken with the intent to evade the Patent Act's domestic requirements. *See* 550 U.S. at 443-45. In both cases, this Court was called upon to interpret these carve-outs and determine when, under those statutes, transnational conduct would fall within the scope of the law. *See Microsoft*, 550 U.S. at 442; *Hoffman*, 542 U.S. at 162.

Section 10(b), by contrast, contains no provision characterizing transnational schemes as foreign. Therefore, where the domestic component is material to the completion of the fraud – here, so material that a factfinder may conclude that there was *no* fraudulent foreign conduct for the first half of the Class Period – there is no basis to apply a presumption against extraterritoriality, and the plain language of Section 10(b) should control. *See SEC v. Kasser*, 548 F.2d 109, 116 (3d Cir. 1977) (liability under Section 10(b) exists if the domestic conduct was material to the fraud); Brief of Amicus Securities & Exchange Commission, *Morrison v. Nat'l Austl. Bank*, 07-0583 (2d Cir.), at 22 (recommending that Section 10(b) be applied to frauds where "the conduct in the United States is material to the fraud's success and forms a substantial component of the fraudulent scheme").

A rule that would designate as "extraterritorial" any scheme that included an element of foreign conduct would be impossible to administer and would greatly damage America's interests. Even in 1934, Congress recognized that for an actively-traded security in a well-developed market, prices quoted in foreign countries would affect prices in the United States, 15 U.S.C. § 78b(2); 76 years later, improvements in technology and the integration of international markets have only strengthened this association. Certainly, if every country refused to apply its fraud laws to transnational conduct, fraudsters would have unprecedented freedom to effectuate their schemes without fear of penalty. Nor does it make sense for a fraud to be subdivided into pieces and tried in different locations or under different laws; the entire scheme must be considered as a whole.

*See* Hannah L. Buxbaum, *Multinat'l Class Actions Under Fed. Sec. Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 58-59 (2007) (recognizing the interest that all nations have in trying claims arising out of a single transnational scheme in a single forum). Here, given the very real possibility that the foreign parent was not even aware of the American misconduct from 1999 through 2000, it hardly makes sense to characterize the fraud as "extraterritorial" and refuse to apply the plain terms of Section 10(b).

The *Restatement (Third) of Foreign Relations Law of the United States* (1987), which this Court relied upon in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), also supports the application of American law to a fraud that contains a material domestic component. Section 416 applies specifically to securities actions, and provides that federal securities laws apply to "conduct occurring predominantly in the United States that is related to a transaction in securities, even if the transaction takes place outside the United States." Even more broadly, § 403 makes it clear that regulation is reasonable when there is a "link" to the regulating state, based on, among other things, conduct within the territory. *Id.* § 403(2)(a). Regulation is also reasonable when there is universal agreement among states that the activity should be regulated, when regulation is important to the international "economic system," and when there is little likelihood of international conflict. *Id.* § 403(2) (c, e, h). A single, transnational fraudulent scheme where substantial portions occur within the U.S. has an important "link" to the U.S. as a regulating territory; moreover, nations universally agree on the desirability of regulation and, unlike the antitrust laws,

application of Section 10(b) to activity outside American borders has not resulted in conflict with other nations. *See Restatement* § 416, Note 3 ("In contrast to regulation under the antitrust laws, which not infrequently involved prohibition of conduct which another state favored or required, . . . United States securities regulation . . . has not resulted in state-to-state conflict."); *cf. id.* at cmt a (reasonableness of applying securities laws "depends not only on the territorial links of a given activity with the United States, but also on the character of the activity to be regulated. . . . Thus, an interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements.").

Finally, any presumption against the application of Section 10(b) to NAB's conduct is rebutted by the fact that the statute explicitly applies extraterritorially, "so this is surely not a statute in which Congress had only domestic concerns in mind." *Pasquantino*, 544 U.S. at 372. At minimum, these statutory provisions are "affirmative evidence" that Section 10(b)'s prohibitions on fraudulent conduct extend at least to foreign actions taken in furtherance of a transnational fraudulent scheme with a material domestic component. *Sale*, 509 U.S. at 176.

#### 2. The Alleged Fraud Occurred In Connection with the Purchase or Sale of Securities Under Section 10(b)

NAB's securities were listed on the NYSE and traded within the United States. NAB was also required under SEC regulations to file its financial statements

in this country. Finally, because NAB securities traded in a globally efficient market, NAB's American securities were priced in accordance with pricing for common shares elsewhere, including on Australian securities exchanges. Thus, the false statements alleged here were issued in connection with *domestic* purchases and sales of securities, and the issue of extraterritorial application of Section 10(b) does not arise.

That the particular plaintiffs in this case made their purchases outside the U.S. does not change this result where, as here, the market for the securities is globally efficient. Congress recognized in Section 2 that securities prices are set by information and trading that transcends national boundaries. 15 U.S.C. § 78b(2). Thus, Congress made it clear that there is an inherent American interest in ensuring that even foreign purchasers are not defrauded, because the prices they pay for their securities will ultimately impact the prices at which securities are sold in America. Once again, Section 2 is affirmative evidence of Congress's intention that Section 10(b)'s prohibition on fraudulent conduct "in connection with the purchase or sale of any security" extends at least to fraudulent conduct (with, as described above, a material domestic component) taken in connection with foreign purchases and sales "upon securities exchanges and over-the-counter markets," 15 U.S.C. § 78b.

To be sure, in *Hoffman*, this Court held that, under the FTAIA, where the anticompetitive conduct is both foreign and domestic, and where the foreign plaintiffs complain of injuries that are "independent" of the domestic effects, the foreign plaintiffs have no cause of

action. *See Hoffman*, 542 U.S. at 164. However, that holding was based on the specific terms of the FTAIA, in which Congress explicitly exempted from the scope of the Sherman Act certain domestic anticompetitive conduct. *See id.* at 166. That exempted conduct was statutorily defined to include anticompetitive conduct involving foreign commerce that had no adverse domestic effect. *See id*. Under such circumstances, this Court held that the foreign plaintiffs could not use the existence of some domestic effects that had no relationship to their own injuries as a basis for a private claim, because without the requisite connection to domestic effects, those particular plaintiffs' injuries were "not the consequence of any domestic anticompetitive conduct that Congress sought to forbid." *Id.* at 165-66.

Section 10(b), however, unlike the FTAIA, does *not* contain a statutory immunity for fraudulent conduct without domestic effects. Moreover, this Court's distinction between domestic effects and foreign ones in *Hoffman* was well in keeping with antitrust law generally, where the particular market and its precise definition – including its geographic scope – plays an important role in determining the impact of anticompetitive conduct. *See, e.g.*, *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993). In the antitrust realm, because there is little reason to believe a single market for a particular good – particularly a consumer good such as the vitamins at issue in *Hoffman* – will span several countries, it is reasonable to sever domestic effects from foreign ones.

In the context of securities that trade in globally efficient markets, however, there can be no foreign

effects that are "independent" of domestic ones, as Congress recognized. 15 U.S.C. § 78b(2). Therefore, it makes little sense to apply a rule that artificially seeks to sever purchases abroad from purchases within the territorial United States.

### 3. Respondents' Fraud Caused Petitioners' Injuries

Finally, Petitioners have alleged facts that satisfy the elements of reliance and loss causation under Section 10(b).

In a fraud on the market case, the element of reliance is satisfied when an investor buys or sells a security at a price that has been distorted by fraud. *See Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Therefore, in a globally efficient market, "reliance" does not exist in any single country, but is instead a result of information that is generally available worldwide, including information on trading patterns. *See* 15 U.S.C. § 78b(2); Buxbaum, *supra*, at 46. Thus, the fact that NAB filed separate, but materially identical, financial statements in Australia and the United States is of no moment, because Petitioners relied on all available information, not merely information filed in a particular territory. Moreover, the globally efficient market was interdependent across countries – NAB could not have filed two sets of irreconcilable numbers, and if it had done so, the fraud would have immediately been revealed. Australian investors "relied" upon the American filings in the sense that the American filings confirmed the financial information contained in the Australian ones.

Nor can it be said that the chain of causation between the fraud and the Petitioners' ultimate losses was too remote for liability, as the Second Circuit believed. *See Morrison*, 547 F.3d at 176-77. That court first held that only the domestic conduct could be considered in determining whether Petitioners' losses resulted from the fraud, and then concluded that the domestic component was too distant from the financial statements issued by NAB to fall within the ambit of Section 10(b). *See id.* Both of these conclusions were in error.[8]

First, as explained above, the entire fraudulent scheme to falsify NAB's financial statements was prohibited by the plain language of Section 10(b), and because of the scheme's substantial domestic component, no presumption arises that the statute should not be applied exactly as written. For the reasons stated above, once it is determined that the domestic conduct was integral to the scheme, it is meaningless to parse the fraud into its constituent parts and such an effort only invites piecemeal litigation or, worse, immunity for fraudsters who design their frauds to escape the jurisdiction of any one nation. Therefore, the only relevant question is whether Petitioners' injuries were caused by NAB's false financial statements, a point upon which there is no dispute.

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[8] Though the Second Circuit discussed the relationship between the fraud and Petitioners' injuries in terms of "losses," it did not mean the element of loss causation – which was satisfied when the fraud was revealed to the market and caused the drop in NAB's securities prices – but the elements of reliance and transaction causation. *See Morrison*, 547 F.3d at 176-77; *Basic*, 485 U.S. at 243 (the element of reliance "provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury").

Second, even if this Court were inclined to subdivide the scheme into domestic and foreign components, in this case, Petitioners have alleged facts that, if proven, would demonstrate that their injuries were directly traceable to the domestic portion of the conduct – namely, HomeSide's generation of false financial statements and transmittal of those false statements to NAB.

As Petitioners demonstrate, the false statements at NAB were proximately caused by the fraudulent conduct at HomeSide. Br. for Petr. 30-31. There is every reason to believe that the 1934 Congress (and the 1995 Congress that enacted the PSLRA) would have at least expected traditional common law causation concepts to be employed when interpreting the statute; if anything, the securities laws were enacted because common-law concepts were too restrictive. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 388-389 (1983). For that reason alone, Petitioners have stated a claim.

Additionally, just two terms ago, this Court examined reliance and causation in a situation where – as here – the entity that ultimately issued the false statements to the public was alleged to have schemed with a different entity that contributed to the fraud. *See Stoneridge*, 552 U.S. at 158-59. This Court explained that in order to determine whether a particular defendant's deceptive conduct had a sufficient "proximate relation" to the plaintiff's injuries to satisfy the element of reliance, a court must first determine whether the "deceptive acts" were "communicated to the public." *Id.* at 158-59. If this has not occurred, the court examines the "chain" between the acts and the ultimate false statement,

*id.* at 159, considering such factors as whether the defendant had a role in preparing the false financial statements, whether the defendant's actions made it "necessary or inevitable" that a false statement would issue, and whether the defendant's conduct occurred in the "investment sphere" or in the "the marketplace for goods and services." *Id.* at 166.

There is no reason why a new and more restrictive test for causation – one that goes beyond both proximate cause and *Stoneridge* – should apply.[9] This is particularly so because in developing the *Stoneridge* test, this Court already considered the policies of the securities laws and the scope of conduct regulated by Section 10(b). *Id.* at 160-63. Nothing in the statutory language suggests that Congress would have intended a *third* causation test depending on where the losses were experienced or the securities purchased, nor is there any basis in this Court's precedents for creating a new and distinct concept of causation for foreign harms experienced as a result of illegal domestic conduct. Certainly, HomeSide should not enjoy a functional exemption from the securities laws as compared to its domestic mortgage service competitors. *Cf. Hellenic Lines Ltd. v. Rhoditis*,

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[9] *Stoneridge* has been employed as the test for causation when determining whether any particular actor has "caused" statements to issue – be it an outside vendor, a law firm, an investment bank, an officer of the company, or a subsidiary. *See, e.g.*, *In re DVI Inc. Sec. Litig.*, 249 F.R.D. 196, 203 (E.D. Pa. 2008); *Pugh v. Tribune Co.*, 521 F.3d 686 (7th Cir. 2008); *In re Nature's Sunshine Prods. Sec. Litig.*, No. 2:06cv267 (TS), 2008 WL 4442150 (D. Utah Sept. 23, 2008); *In re Parmalat Sec. Litig.*, 570 F. Supp. 2d 521 (S.D.N.Y. 2008).

398 U.S. 306, 310 (1970) (applying Jones Act to business owned and operated in U.S. despite alien ownership, in part to avoid giving an American-based business a special immunity from liability that its domestic competitors lacked); *Morrison*, 547 F.3d at 175 ("those who operate from American soil should not be given greater protection from American securities laws because they carry a foreign passport or victimize foreign shareholders").

Under *Stoneridge*, Petitioners' injuries were caused by the domestic conduct. Section 10(b) prohibits the use of deceptive devices "directly or indirectly"; it does not require that the specific actor personally make the false statements. And here, unlike in *Stoneridge*, HomeSide's fraudulent conduct was explicitly "communicated to the public," 552 U.S. at 159: not only were HomeSide's results incorporated into NAB's totals, but HomeSide's own financial results were separately reported and attributed to HomeSide. (SA6, 21, 26, 60). And because the results specific to HomeSide were announced to the market as they had been supplied to NAB by the HomeSide Respondents, the HomeSide Respondents played an important role in preparing NAB's financial statements. Finally, because HomeSide prepared its financials and communicated them to NAB for the purpose and with the intention that they be included in NAB's securities filings, the HomeSide Respondents' conduct occurred in the "investment sphere," and not "the marketplace for goods and services." For these reasons, the HomeSide Respondents caused NAB's false statements to issue, and Petitioners relied on their actions.

Moreover, in *Stoneridge*, this Court held that reliance and causation would be satisfied if the defendant's actions made it "necessary or inevitable" that the false statement would issue. *Id.* at 161. Here, HomeSide was a subsidiary of NAB; its results, as reported, necessarily would be included in NAB's financial statements, at least barring some kind of extraordinary affirmative action by NAB. HomeSide, not NAB, made the decision as to how it would value its mortgage assets. JA82a. This is a far cry from the situation in *Stoneridge*, where the issuing company, rather than the defendant vendors, made the determination as to how to account for the relevant transactions. *See Stoneridge*, 552 U.S. at 161. Additionally, NAB was not even told of the fraud at HomeSide for the first half of the Class Period, JA89a; at least during that time, although Petitioners' allegations of recklessness must be accepted at the pleading stage, there remains the possibility that a factfinder would conclude that NAB did not even know of the fraud, once again rendering it "necessary or inevitable" that HomeSide's fraud would cause NAB to issue false statements. Thus, the HomeSide Respondents' conduct – and thus, the domestic conduct – was relied upon by Petitioners.

Any other application of the *Stoneridge* test would hand corporations a license to commit fraud. It is quite common for frauds to occur at subsidiaries which then transmit false financial information to the parent. *See, e.g.*, *Kidder*, 10 F. Supp. 2d at 408; *In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333 (S.D.N.Y. 2005); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433 (S.D.N.Y. 2005); *In re Van Der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388 (S.D.N.Y. 2005); *Menkes v. Stolt-*

*Nielsen S.A.*, No. 3:03cv409 (DJS), 2006 WL 1699603 (D. Conn. June 19, 2006); *Teachers' Ret. Sys. of La. v. ACLN, Ltd.*, No. 01 Civ. 11814 (LAP), 2004 WL 2997957 (S.D.N.Y. Dec. 27, 2004). In many cases, there may not be strong evidence that the parent corporation was even aware of the fraud. *See Chill*, 101 F.3d at 270. It would wreak havoc if such subsidiaries were not deemed to have "caused" the fraud, and thus no claim would lie against either parent or subsidiary. Parent corporations would routinely adopt policies of "see no evil, hear no evil" in order to shunt responsibility for the fraud onto the subsidiary, leaving injured investors with no remedy at all. Congress cannot have intended that Section 10(b) – or the private right of action that it ratified with the PSLRA, *see Stoneridge*, 552 U.S. at 165 – would be so easily circumvented. *Cf. Itoba Ltd. v. Lep Group PLC*, 54 F.3d 118, 124 (2d Cir. 1995) (rejecting an interpretation of Section 10(b) that would allow easy circumvention "simply by preparing SEC filings outside the United States").

## II. CONGRESS HAS MANIFESTED ITS INTENTION THAT THE SECURITIES LAWS PROTECT FOREIGN INVESTORS INJURED BY DOMESTIC FRAUD

If there is any remaining doubt that Congress intended the private right of action under Section 10(b) to extend to the conduct alleged here, it is resolved by observing that Congress has in recent years made extensive changes to the laws governing private securities actions, and yet has not moved to disturb the uniform opinion of the circuits that Section 10(b) does, under the proper circumstances, permit a private right

of action for foreign purchasers injured by domestic conduct.

Beginning with *Schoenbaum v. Firstbrook* in 1968, the Second Circuit Court of Appeals has issued a series of decisions developing an analysis for determining the transnational reach of the federal securities laws.[10] The analysis – articulated in terms of "conduct" and "effects," *see Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983) – has influenced other circuit courts of appeals analyzing the extraterritorial reach of the federal securities laws. Based on principles developed by the Second Circuit, courts have agreed that "Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners. . . ." *In re CP Ships Ltd. Sec. Litig*, 578 F.3d 1306, 1313 (11th Cir. 2009) (citing *Bersch*, 519 F.2d at 987). Though the circuits have differed in their precise articulation as to the contours of the conduct and effects test, no circuit has disagreed with the basic framework. *See Kauthar SDN BHD*, 149 F.3d at 665-67 (comparing circuit approaches); *Robinson*, 117 F.3d at 905-07 (same). Indeed, in 1987 the *Restatement (Third) of Foreign Relations* incorporated this line of caselaw into a special provision addressing securities claims. *See Restatement* § 416.

Against this backdrop, Congress has reexamined and amended the provisions of the Exchange Act that

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[10] Courts have placed heavy reliance on Judge Friendly's analysis on the transnational application of the federal securities laws in *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975), and *Leasco*. *See Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 413-14 (8th Cir. 1979) (gathering cases).

bear on Section 10(b)'s private right of action several times. In 1995, Congress passed the PSRLA; three years later, it enacted the Securities Litigation Uniform Standards Act of 1998; and most recently, in 2002, Congress passed the Sarbanes-Oxley Act. All of these statutes focused specifically on the private right of action under Section 10(b), addressing such matters as pleading standards, loss causation, statutes of limitation, and the ability to prosecute federal securities class action claims in state courts. *See* 15 U.S.C. § 78u-4; 15 U.S.C. § 78bb(f); 28 U.S.C. § 1658(b). Despite the extensive body of caselaw regarding the extraterritorial application of Section 10(b), Congress did not restrict such extraterritorial application. This is persuasive evidence that Congress approved of not only the implied right of action under Section 10(b), *see Stoneridge*, 552 U.S. at 165, but also its extraterritorial extension to include foreign investors who have purchased securities affected by U.S. fraud in foreign markets. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We . . . presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

## III. THE UNITED STATES HAS AN INTEREST IN PREVENTING FRAUDS FROM BEING LAUNCHED FROM ITS SHORES

Finally, clear policy considerations embodied within the text of the Exchange Act support continued extraterritorial extension of the implied right of action. *See Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 294 (1993) (the court must "infer how the 1934 Congress would have addressed the issue[s] had the 10b-5 action been included as an express provision in the 1934 Act.").

First, preventing the use of the United States as a factory for fraudulent activity directly impacts the interests of American, as well as foreign, markets and investors. As noted by Judge Friendly, "This country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975). As the Third Circuit observed in *Kasser*, if the antifraud laws do not apply, it "may embolden those who wish to defraud foreign securities purchasers or sellers to use the United States as a base of operations." 548 F.2d at 116; *see also id.* ("We are reluctant to conclude that Congress intended to allow the United States to become a 'Barbary Coast,' as it were, harboring international securities 'pirates.'"). One commenter put it in these terms:

> For issuers that maintain a dual listing, it is possible, given the internationalization of the capital markets, to engage in manipulation in one country in order to reap benefits in another. . . . If U.S. law extends only to claims arising out of U.S. transactions, such fraud would be insufficiently deterred if the impact of the fraud in other markets outstripped whatever damages were paid to U.S. investors.

*Buxbaum*, *supra*, at 57-58.

Moreover, this country has an interest in maintaining a reputation as a trustworthy place to do business and a reliable location for foreign investment. If foreign investors believe that they cannot trust the

securities issued by corporations with a substantial American presence – because the American portion of the business may not be subject to stringent antifraud regulation – those investors will hesitate to risk their capital on such securities. Such a result would disadvantage American businesses relative to their competitors. Indeed, to exempt such conduct "might induce reciprocal responses on the part of other nations" causing some countries to decline acting "against individuals and corporations seeking to transport securities frauds to the United States. . . ." *Kasser*, 548 F.2d at 116.

Thus, it is clear that Congress's purposes in enacting the Exchange Act will be defeated if foreign investors are excluded from the ambit of the implied right of action even though a U.S.-based fraud has affected securities prices on both domestic and foreign exchanges and injured foreign investors.

## CONCLUSION

For the reasons stated above, Petitioners have stated a claim under Section 10(b), and the Second Circuit's decision should be reversed.

Respectfully submitted,

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