

No. 08-1191

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IN THE  
**Supreme Court of the United States**

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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.*

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

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**BRIEF OF *AMICI CURIAE* LAW PROFESSORS  
IN SUPPORT OF RESPONDENTS**

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are professors at American law schools<sup>2</sup> who have studied and written about corporate law and securities law, including securities litigation under the private right of action courts have implied in Section 10(b) of the 1934 Securities Exchange Act (the "1934 Act"), 15 U.S.C. § 78j(b) (1988), as well as the express private rights of action otherwise enumerated in the federal securities laws. *Amici* seek to provide this Court with information that will assist it in interpreting the circumstances under which foreign investors who purchased the securities of a foreign issuer in a foreign market should be permitted to bring a civil action for money damages under the implied Section 10(b) private right of action in a United States court.

*Amici* do not necessarily all agree with all of the particular statements herein, but *Amici* do agree that this Court should affirm the judgment below and that this Court should do so for reasons substantially similar to the reasons set forth in this brief.

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<sup>1</sup> 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 *Amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

<sup>2</sup> A full list of *Amici*, who joined this brief as individuals and not representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

## SUMMARY OF ARGUMENT

*Amici* agree with the result of the Second Circuit's holding that the plaintiffs in this case cannot sue National Australia Bank ("NAB") under Section 10(b). *Amici* do not, however, believe the Second Circuit's reasoning was consistent with the legislative intent of Congress when it passed Section 10(b). Instead of the "balancing" tests used by the Second Circuit, *Amici* argue for a crisp "bright line" rule predicated on Congress' intent in adopting the 1934 Act to regulate United States securities markets but not to regulate foreign securities markets. Such a bright line rule would exclude transactions in foreign securities markets from coverage under Section 10(b) and would be consistent with Congressional intent clearly demonstrated in the legislative history. For example, Huston Thompson, a drafter of the Securities Act of 1933 (the "1933 Act"), testified before Congress that the language of the statute meant that "we were not going to attempt to go beyond our own national limits" and that the Act covers foreign securities only if they are "[s]old in this country."<sup>3</sup> Similarly, Representative Wolverton stated that "[t]he great danger is from foreign securities over here. I am trying to provide against that danger."<sup>4</sup> There is no reason to believe that Congress intended a broader jurisdictional reach for the 1934 Act's regulation of trading markets than it did for the 1933 Act's provisions protecting buyers in the United States from unregistered securities and securities sold under false pretenses. The legislative history of the

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<sup>3</sup> *Federal Securities Act, Hearings on H.R. 4314 Before House Comm. on Interstate and Foreign Commerce, 73d Cong., 1st Sess. (1933)*, quoted in Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677, 700-01 (1990).

<sup>4</sup> *Federal Securities Act, Hearings on H.R. 4314, supra*, quoted in Sachs, *supra*, at 695.

1934 Act contains no statements that suggest any intention to extend the jurisdictional reach of the Act beyond the national limits.

The bright line rule urged by *Amici* comports with this Congressional intent. If adopted by this Court, this bright line rule would provide predictability for transacting parties in the global securities market and avoid burdening United States courts with foreign disputes that are better resolved by the courts of countries involved.

Congress is free to change its intent on this issue if it likes. Indeed, Congress is debating a bill that would do just that. Section 7216 of H.R. 4173 provides for extraterritorial jurisdiction with respect to antifraud provisions in the federal securities laws if there is "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors." H.R. 4173, 111th Cong., 2d Sess., § 7216 (2010). Congress also might take the more cautious step of only allowing the Securities and Exchange Commission ("SEC"), but not private plaintiffs, to pursue persons whose conduct in the United States contributes to securities fraud in foreign markets. Another approach would be for Congress to authorize the SEC to decide which foreign countries' securities markets should be protected from conduct within the United States that violates Section 10(b) and then extend extraterritorial application of Section 10(b) to those countries. Alternatively, Congress could do nothing. Unless and until Congress takes further action, this Court should uphold the intent of Congress in 1934 that transactions in foreign securities markets are not within the scope of Section 10(b).

## ARGUMENT

### I. THE INTENDED BENEFICIARIES OF SECTION 10(B) DO NOT INCLUDE PERSONS WHO PURCHASE OR SELL SECURITIES OUTSIDE OF THE UNITED STATES

#### A. Only Intended Beneficiaries of a Statute Are Permitted to Sue Under It

The federal securities laws, including the 1933 Act and the 1934 Act, contain several express private rights of action. In these provisions, Congress explicitly provides that specified investors may sue specified persons who commit specified acts in violation of the statute.

The provision at issue in this case, Section 10(b) of the 1934 Act, does not contain an express private right of action. Although it may be doubted that Congress ever intended for there to be a private right of action under Section 10(b), the federal courts nonetheless have implied one in order to further the objectives of the statute. This Court has several times previously defined the scope of this implied private right of action. This Court is now being asked to decide whether the implied private right of action under Section 10(b) is so broad as to include foreign plaintiffs who sue over securities of a foreign issuer that were purchased on a foreign securities exchange.

This Court has altered its approach to implied private rights of action over the years. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court declined to find an implied private right of action in Title VI to the Civil Rights Act of 1964. The Court observed:

Respondents would have us revert in this case to the understanding of private causes of

action that held sway 40 years ago when Title VI was enacted. That understanding is captured by the Court's statement in *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" expressed by a statute. We abandoned that understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975), which itself interpreted a statute enacted under the *ancien regime* and have not returned to it since. Not even when interpreting the same Securities Exchange Act of 1934 that was at issue in *Borak* have we applied *Borak's* method for discerning and defining causes of action. See *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* [511 U.S. 164] (1994).

*Alexander*, 532 U.S. at 287 (parallel citations omitted).

Statutes with express private rights of action generally specify who may sue under them. See, e.g., 1933 Act, Sections 11 and 12, 15 U.S.C. §§ 77k(a), 77l. Statutes under which private rights of action have been implied (obviously) do not because courts, not Congress, created these private rights of action. Statutes under which implied private rights of action have been created have intended beneficiaries or persons whom Congress sought to protect. This Court has routinely held that only the intended beneficiaries of a statute should be permitted to sue under an implied private right of action. See, e.g., *Cort*, 422 U.S. at 78; *Piper v. Chris Craft Indus., Inc.*, 430 U.S. 1 (1977) (denying standing to sue under 1934 Act Section 14(e) because plaintiff was not a member of the class for whose benefit the statute was enacted).

When statutes are "silent" as to whether they apply outside the United States, this Court has generally presumed that those statutes apply only

within the United States because "Congress is primarily concerned with domestic conditions." *Foley Bros. v. Filardo*, 336 US. 281, 285 (1949). As explained more fully below, *Amici* do not believe this presumption has been rebutted in the instant case. The legislative history demonstrates that Section 10(b) of the 1934 Act was enacted to protect investors in United States securities markets, not investors in foreign markets. If anybody should be permitted to bring private lawsuits under Section 10(b) – a statutory provision that nowhere mentions a private right of action – the right to sue should be limited to persons who buy or sell in securities markets in the United States.

**B. Case Law Applying Section 10(b) to Securities Transactions Abroad Is Based on Erroneous Assumptions That Congress Was Unaware of Foreign Markets and That Congress Would Have Regulated Foreign Securities Transactions If It Had Considered the Issue**

Many lower court decisions holding that Section 10(b) applies to securities transactions abroad base their holding on two assumptions: first, Congress was silent on this issue because it did not consider foreign securities markets in 1934; and second, Congress would have wanted the federal securities laws to protect foreign as well as domestic trading markets, and would have expressly said so if it had considered the issue. The historical background of the federal securities laws and their legislative history refute both assumptions.

## 1. Congress Was Aware of Foreign Markets

The assumption that Congress was ignorant of foreign securities markets, is illustrated by Judge Friendly's opinion in *Bersch v. Drexel Firestone, Inc.*: "[t]he Congress that passed these extraordinary pieces of legislation in the midst of the depression could hardly have been expected to foresee the development of offshore funds thirty years later." 519 F.2d 974, 993 (2d Cir. 1975). The assumption of Congressional ignorance that underlies this view, however, can only be correct if Congress had ignored facts about global securities markets that were obvious in 1934.

England, not the United States, dominated securities markets up until World War I. "[T]he London market appropriately received a large share of attention. It was even used as a norm for measuring interest rate levels and trends in other countries." Sidney Homer, *A History of Interest Rates* 328 (1960). By the 1920s, however, the United States had shifted from being the world's largest debtor nation to the world's largest creditor nation. American investors bought and sold large quantities of foreign securities, many of which were risky. Hyperinflation in Germany in 1923 proved devastating for bond holders and anyone else holding assets denominated in Deutschmarks. In November 1923, the interest rate for call money on the Berlin Stock Exchange rose to as high as 30 percent per day. *Id.* at 465. The financial crisis precipitated in the United States in 1929 was mirrored by a financial crisis in Europe precipitated by the insolvency of Creditanstalt in Austria in 1931. *Id.* at 404. As discussed below, American investors lost large sums of money in European securities markets and suffered devastating losses in Latin American securities markets as well. Congress did not need to foresee (as Judge Friendly asserted in *Bersch*) "the development of offshore funds thirty years later." The legislative record establishes that Congress

discussed at length the money American investors had lost offshore and that Congress took specific steps to address those losses.

Professor Margaret Sachs correctly points out that there is abundant legislative history demonstrating that "the Congress that enacted the 1933 and 1934 Acts was well aware of international securities markets." Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 Colum. J. Transnat'l L. 677, 691 (1990). See also Louis Loss, *Securities Regulation* 236-44 (1951); I Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* 300-01 (2006) (describing Congressional hearings on losses Americans suffered in foreign securities); Joel Seligman, *The Transformation of Wall Street* 7-8, 10, 11, 18-19, 27-28, 68-69, 70 (rev. ed. 1995) (discussing intense political controversy in Congress and the Executive Branch during the early 1930s over foreign securities sold in the United States).

In 1930, the Commerce Department noted "the enormous absorption of foreign capital issues by the American public" and that "increasing attention to such issues has been required by bankers, businessmen, investors and students of international finance." Commerce Dep't, *Handbook on American Underwriting of Foreign Securities* 1 (1930), quoted in Sachs, *supra*, at 693. From 1923 to 1930, investors in the United States had purchased approximately \$6.3 billion in foreign bonds. I Loss, Seligman & Paredes, *supra*, at 299, citing S. Rep. No. 1455, 73d Cong., 2d Sess., 89 (1934). Leading investment banks persuaded investors to exchange Liberty Bonds for higher yielding foreign bonds. I Loss, Seligman & Paredes, *supra*, at 299. In March 1932, Senator Hiram Johnson reported that bonds of 16 European countries were trading at 57 percent of their par value. *Id.* at 299-300, citing 75 Cong. Rec. 6055 (1932). Losses in Latin America were even worse. As of December 31, 1931, the aggregate

market value of bonds from 14 Latin American countries was 26 percent of their face value. Peruvian bonds had a market value of 7 percent of face value. *Id.* at 300, citing 75 Cong. Rec. 6057 (1932).

The Senate in December 1931 held hearings on the sale of foreign securities in the United States. Those hearings focused on high commissions that investment banks earned selling foreign bonds and competition among investment banks to market those issues. Many of these bond issues had serious disclosure problems. *Sale of Foreign Bonds or Securities in the United States Pursuant to S. Res. 19, Hearings Before Senate Comm. on Finance*, 72d Cong., 1st Sess. 226, 615-22, 743, 1273-74, 1356 (1931-32), and Speech of Senator Hiram Johnson at 75 Cong. Rec. 6052-62 (1932) (concerning the hearings), cited in I Loss, Seligman & Paredes, *supra*, at 300-01.

The 1932-34 Stock Exchange Practices hearings also addressed the failure by United States underwriting banks to disclose risks in Latin American bonds. National City Company's own representatives in Peru had warned the bank that no further loans could be safely made to Peru, but National City did not communicate any of these concerns to investors. See S. Rep. No. 1455, 73d Cong., 2d Sess., 126-31 (1934), cited in I Loss, Seligman & Paredes, *supra*, at 301. Testimony revealed that foreign bonds had been issued "with little expectation of redemption, and were sold by the American financiers to make outrageously high profits." S. Rep. No. 20, 73d Cong., 1st Sess., 2 (1933), cited and quoted in Loss, *supra*, at 241-42; see also H.R. Rep. No. 974, 73d Cong., 1st Sess. (1933), cited in Loss, *supra*, at 242.

Federal securities laws were necessary, a Senate report concluded, because "billions of dollars have been invested in practically worthless securities, foreign and domestic, including those of foreign

governments, by the American public through incomplete, careless or false representations." S. Rep. No. 47, 73d Cong., 1st Sess. (1933), quoted in Sachs, *supra*, at 694. Senator Fletcher's Report on Stock Exchange Practices also stated that regulation of investment bankers was justified in part because they had "indulged in practices of doubtful propriety in the promotion of foreign loans and in the sale of foreign securities to the public." Senate Comm. on Banking and Currency, Stock Exchange Practices, S. Rep. No. 1455, 73d Cong., 2d Sess. (1934), quoted in Sachs, *supra*, at 694-65. Likewise, during hearings on the 1933 Act, Representative Wolverton stated that "[t]he great danger is from foreign securities over here. I am trying to provide against that danger." *Federal Securities Act, Hearings on H.R. 4314 Before the House Comm. on Interstate and Foreign Commerce, 73d Cong., 1st Sess. (1933)*, quoted in Sachs, *supra*, at 695.

Congress had every reason to protect United States investors from fraud by foreign issuers. Generally applicable language in the 1933 and 1934 Acts clearly extends to foreign as well as domestic securities bought and sold in the United States; there is no exemption for foreign securities sold here. *See, e.g.*, 15 U.S.C. § 77b(a)(7); 15 U.S.C. § 78c(a)(17); Sachs, *supra*, at 699-701. Section 8(a) of the Securities Act originally had a shorter 7 day waiting period "in the case of securities of any foreign public authority, which has continued the full service of its obligations in the United States, the proceeds of which are to be devoted to the refunding of obligations payable in the United States." Loss, *supra*, at 238 n.315. This provision was removed in the 1940 amendment that authorized the SEC to shorten the 20 day waiting period. *See id.* Congress thus expressly addressed securities of foreign issuers sold into the United States and/or traded in the United States, and decided that they would be subject to our securities laws.

Congress also specifically addressed the plight of United States investors holding foreign debt securities. The Johnson Act, adopted in 1934, imposed criminal liability on any person who within the United States sold the bonds, securities or other obligations of a foreign government issued after 1934 while that government was in default in the repayment of its obligations to the United States. 48 Stat. 574 (1934), 31 U.S.C. § 8042, reenacted in the criminal code at 18 U.S.C. § 955 (1948), cited in Loss, *supra*, at 241 & n.324. A Congress oblivious to the impact of offshore markets on Americans could not have enacted such a law.

The Foreign Bondholders Act of 1933 allowed the President to bring into being a special corporation to negotiate and file suit on behalf of holders of defaulted foreign securities "issued sold or owned in the United States." 15 U.S.C. § 77ee(8). The President did not issue the proclamation envisioned by the Foreign Bondholders Act, and the corporation specified therein never came into being. Instead, at the suggestion of several members of President Roosevelt's cabinet, private parties in 1933 organized the Foreign Bondholders Protective Council. This nonprofit corporation was modeled on the 1868 Council of the Corporation of Foreign Bondholders in England. A White House press release stated: "The Government realizes a duty, within the proper limits of international law and international amity, to defend American interests abroad. . . . It would not be wise for the Government to undertake directly the settlement of private debt situations." Foreign Bondholders Protective Council Inc., Ann Rep. 6 (1945), cited and quoted in Loss, *supra*, at 240 & n.321.

Congress thus was concerned about Americans' losses in foreign bonds, but Congress also knew that intervention in foreign securities markets on behalf of American investors would have important foreign policy implications. President Roosevelt allowed

investors and issuers to resolve these problems on their own, with the proviso that going forward all foreign securities and all domestic securities sold or traded in the United States would be subject to the United States' securities laws.

## 2. Congress Did Not Intend to Regulate Foreign Securities Transactions

Some courts have assumed that Congress would have wanted the 1934 Act to reach securities fraud outside as well as inside the United States. For instance, Judge Friendly and the Second Circuit framed the "effect" test and the "conduct" test to address international application of Section 10(b). The effect test looks to the effect of a defendant's statements on United States investors<sup>5</sup> – for example, if a foreign issuer's securities are traded on a United States exchange, Section 10(b) presumably allows those investors to sue even if misleading statements are made abroad. When, however, the converse is true – conduct occurs inside the United States that injures investors outside the United States – Judge Friendly used the "conduct test" to find subject matter jurisdiction in those cases as well. In *ITT v. Vencap Ltd.*, Judge Friendly observed that the United States should not be "used as a base for manufacturing fraudulent securities devices for export, even when they are peddled only to foreigners," because "[t]his country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States." 519 F.2d 1001, 1017 (2d Cir. 1975).

To be sure, a Congress with a strong internationalist agenda *might* decide to apply federal securities laws in the manner described by Judge

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<sup>5</sup> See, e.g., *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), *modified en banc*, 405 F.2d 215 (2d Cir. 1968).

Friendly. Saving the world from the many threats to economic and political stability in the 1930s, including securities fraud, might have been a noble objective for Congress to undertake.

Congress did not do so. Instead, throughout the 1930s, Congress focused on the United States' problems rather than other countries' problems and in many areas stood by silently while other countries did or did not work out their problems. Congress was well aware of economic and political troubles in Europe, Latin America and Asia in the 1930s. Congress took a hard line in refusing to accommodate other countries that might find it difficult to comply with United States securities laws; unlike the English Companies Act, the 1933 and 1934 Acts made no exception for securities sold here by foreign governments. *See* Sachs, *supra*, at 698 & n.110.

Congress also was aware of the practical limits of its regulatory reach, particularly when the United States was a follower rather than a leader in the regulation of securities. The Securities Act followed "several centuries of legislation in England." Loss, *supra*, at 3 (citing a statute of Edward I on licensing of brokers in the City of London and a 1697 statute of Parliament to restrain "the number and ill practice of stock jobbers"). The English Companies Act of 1900 was strengthened by the Companies Acts of 1907 and 1928 before Congress passed the federal securities laws, which were modeled in large part on that Act. *Id.* at 6, 82. Germany enacted a corporate law in 1931. France had a national corporate law that was amended several times after 1929. *Id.* at 74. The United States – which had failed to regulate its own markets in the years leading up to the Great Depression – was in no position to tell other countries how to regulate their markets.

The legislative history of the 1933 Act and the 1934 Act, the text of the Acts themselves, as well as other contemporaneous acts of Congress, show

abundant evidence that Congress "chose to extend the benefits of the 1933 and 1934 Acts only to those investors whose trades occur in the United States." Sachs, *supra*, at 721.

First, as discussed above, the legislative history demonstrates that Congress explicitly stated its intent to protect domestic traders in foreign securities. See Point I.B.1 *supra*. The legislative history included a detailed chart of purchases by American investors of foreign securities in the United States but no such detail about trading in foreign markets of United States securities or foreign securities. See Sachs, *supra*, at 696-97. Petitioners correctly note that "the Exchange Act included a Congressional finding that 'prices established and offered in [securities] transactions are generally disseminated and quoted throughout the United States and foreign countries.'" Pet. Br at 39, citing 15 U.S.C. § 78b(2). This finding shows that Congress understood the importance of foreign markets. Petitioners do not, however, point to any evidence in the legislative history that Congress sought to use the generally applicable provisions of the securities laws to regulate securities prices or any other aspect of securities trading taking place in foreign countries.

Second, the definition of "interstate commerce" in the 1934 Act was intended, as it was intended in the 1933 Act, to reach only commerce between states or between a foreign country and one of the states. Both Acts apply to securities involved in "interstate commerce," which is defined as trade, transportation, communication, or commerce in securities "among the several States" or "between any foreign country and any State." See 15 U.S.C. § 77b(a)(7); 15 U.S.C. § 78c(a)(17).

The legislative history indicates that "between any foreign country and any State" was intended to cover transactions in foreign securities inside the United States, not transactions outside the United States.

In an exchange between Huston Thompson, a drafter of the 1933 Act, and Representative Wolverton, Mr. Thompson insisted that the language of the statute meant that "we were not going to attempt to go beyond our own national limits" and that the Act covers foreign securities only if they are "[s]old in this country":

Rep. WOLVERTON: This act is drawn to regulate commerce in securities, both interstate and foreign, is it not?

Mr. THOMPSON: Interstate commerce. We struck out the words "foreign commerce."

Rep. WOLVERTON: Does it not have that effect where we are dealing with foreign securities?

Mr. THOMPSON: Sold in this country, yes. It is different from the Federal Trade Commission Act in this: For example, the Federal Trade Commission's jurisdiction extends down to Mexico. It goes beyond this country. If two of our nationals go down to Mexico and start a business, the jurisdiction of the Federal Trade Commission attaches. We have limited this bill to the United States and its territories.

\* \* \* \*

I limited it to sales within the United States and its Territories. In other words, we were not attempting to go beyond our national limits . . . .

*Federal Securities Act, Hearings on H.R. 4314 Before House Comm. on Interstate and Foreign Commerce, 73d Cong., 1st Sess. (1933), quoted in Sachs, supra, at 700-01.*

There is no basis to conclude that Congress intended a broader jurisdictional reach for the 1934 Act's regulation of trading markets than it did for

the 1933 Act's provisions protecting buyers in the United States from unregistered securities and securities sold under false pretenses. The legislative history of the 1934 Act contains no statements that indicate any intention to extend the jurisdictional reach of the Act beyond the national limits. *Amici Alecta Pensions et al.* quote a conference committee report stating 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." Brief for *Amici Curiae Alecta Pensionsforsakring et al.* at 10, quoting H.R. Rep. No. 78-1838 (Conf. Rep.), 1934 WL 1291 (May 31, 1934). All this means is that securities exchanges and over-the-counter markets in the United States were "operating in interstate and foreign commerce" and Congress intended to regulate them. There is not even a hint in this language or elsewhere in the legislative history that Congress intended to "provide for the regulation" of the London Stock Exchange, Australian stock exchanges, or other foreign markets.

Third, the registration provisions of the 1933 Act illustrate the limited jurisdictional reach of the federal securities laws. The 1933 Act requires that foreign securities sold to investors in the United States be registered. See 15 U.S.C. § 77f-j (registration and disclosure provisions applicable to foreign as well as domestic issuers). The 1934 Act prescribes virtually identical treatment of foreign and domestic issuers subject to its reporting requirements. See, e.g., 15 U.S.C. § 78l-m. If, however, United States issuers sell their securities only to foreign investors, the 1933 Act does not require registration and has for decades been interpreted by the SEC not to require registration. See SEC Regulation S, 17 C.F.R. § 230.901 (exempting from registration an offer or sale "that occurs outside the United States"); Offshore Offers

and Sales, Securities Act Release No. 6863, 55 Fed. Reg. 18306 (promulgating Regulation S).

Congress could have explicitly extended protection to foreign traders from conduct here in the United States by requiring United States issuers to register their securities before selling them abroad. Presumably, if Congress had been concerned about using the securities laws to protect investors in foreign markets, it would have done so. Congress did not do so in 1933 or 1934, and has for years allowed the SEC to exempt securities sold exclusively abroad from registration. It would be odd that the same Congress that declined to require registration of securities sold abroad by Americans would want Section 10(b) to be used by private plaintiffs to sue over other securities purchased or sold abroad.

Fourth, there were extensive colloquies in Congress over personal jurisdiction across international boundaries. These colloquies focused on the procedural problem of asserting personal jurisdiction over foreign defendants who perpetrated fraud in United States markets. *See* Sachs, *supra*, at 705-06. Congress was concerned that under the then current pre-*International Shoe* personal jurisdiction law, established by *Pennoyer v. Neff*, 95 U.S. 714 (1877), foreign traders had to enter the United States in order for courts to have personal jurisdiction over them. While Congress discussed in detail the trouble that domestic traders would have obtaining personal jurisdiction over foreign defendants, none of these colloquies concerned assertion of personal jurisdiction over persons who perpetrated fraud on foreign markets. Sachs, *supra*, at 705-06. Had this been a concern relevant to the 1933 and 1934 Acts, Congress could and would have addressed it.

Fifth, the Foreign Bondholders Act, discussed above, extends its protection to holders of defaulted foreign securities "issued, sold or owned in the

United States." 15 U.S.C. § 77ee(8). This language does not protect foreign traders in those bonds or even Americans who purchase foreign securities abroad while living abroad and then do not return to the United States. Congress could have applied the Foreign Bondholders Act to securities bought and sold abroad and owned abroad, but did not do so.

Sixth, Congress declined to extend protection in the 1934 Act to persons who buy and sell securities outside the United States even though this Court in 1925 explicitly held that extraterritorial effect would not be given to statutes that did not explicitly provide for extraterritorial application. *See N.Y. Cent. R.R Co. v. Chisholm*, 268 U.S. 29, 31 (1925) (declining to infer extraterritorial effect to the Federal Employers' Liability Act). Congress would not have simply overlooked such a significant question when this Court had so recently articulated a strong presumption against extraterritorial application of federal statutes.

Despite this overwhelming evidence that Congress intended that Section 10(b) not apply to trades taking place outside of the United States, some courts refuse to apply such a bright line rule. These courts have ignored Congressional intent and have instead balanced the foreign and domestic elements in each case to determine if plaintiffs may sue in United States courts. *See, e.g., Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983); *SEC v. Kasser*, 548 F.2d 109 (3d Cir. 1977); *Bresch*, 519 F.2d at 986-87; *In re Alstom S.A. Sec. Litig.* 406 F. Supp. 2d 346 (S.D.N.Y. 2005); *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 158 (S.D.N.Y. 2003).

The approach in this caselaw is wrong because Congress' intended beneficiaries in Section 10(b) do not include persons who purchase or sell securities outside the United States. This Court should apply the bright line rule that Congress intended.

**C. Congress Addressed Its Limited Concerns About Foreign Securities Markets in Section 30 of the 1934 Act**

Congress addressed the international application of the 1934 Act in Section 30 of the Act, which provides:

(a) It shall be unlawful for any broker or dealer, directly or indirectly, to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security *the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States*, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors or to prevent the evasion of this title.

(b) The provisions of this title or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this title.

15 U.S.C. § 78dd(a)-(b) (emphasis added).

Section 30(a) applies to transactions outside the United States in the securities of issuers from inside the United States in circumstances where those transactions would otherwise evade the Act, and the SEC promulgates rules to prevent such evasion. The presumption clearly set forth in Section 30(b) is that

the Act does not ordinarily apply to transactions abroad. Section 30(a) recognizes, however, that some transactions abroad in United States issuers might be deliberately structured to evade the Act unless the SEC prohibits them. This statutory structure is entirely sensible because almost all United States issuers are traded in the United States if they are traded abroad. Section 30(a) thus aims at market manipulation and other conduct abroad that can have a direct impact on investors in the United States. Without Section 30(a), for example, there would be little point in regulating manipulation of a security's price on the New York Stock Exchange if the same security is listed in London and it can be manipulated there. In this situation, conduct abroad harms United States investors, and Congress gives the SEC the power to prevent it.

Section 30(a), however, does not authorize the SEC to regulate transactions outside the United States in securities of issuers that are also outside the United States. If Section 30(a) had been intended to authorize the SEC to promulgate rules regulating transactions in securities of issuers outside the United States, it would have said "of any issuer" instead of "the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States." If Section 30(b) had been intended to give the SEC license to regulate transactions in the securities of foreign issuers in foreign securities markets, this language limiting Section 30(a) to securities of domestic issuers would be meaningless.

## II. CONGRESS' INTENT IN 1934 TO ESTABLISH A BRIGHT LINE RULE EXCLUDING FOREIGN TRANSACTIONS IS EVEN MORE IMPORTANT TODAY

### A. There Are Compelling Policy Reasons to Exclude Foreign Transactions from Coverage Under Section 10(b)

The approach Congress settled on in 1934 – that Section 10(b) should extend only to purchases and sales of securities taking place within the United States – is still the correct approach today.

First, applying Section 10(b) only to securities transactions within the United States provides a clear rule for subject matter jurisdiction. Issuers, investors, and courts will then know with precision whether United States securities laws apply.

By contrast, the "conduct" and "effect" tests applied by the Second Circuit are uncertain and unpredictable. The distinction between "preparatory" conduct and "substantial" conduct illustrates the confusion engendered by the conduct test in practice. The Second Circuit may have been correct that NAB's alleged conduct in the United States was at most "preparatory" to the alleged securities fraud and that a "substantial" component of the alleged fraud itself took place in Australia. However, what constitutes "preparatory" conduct and "substantial" conduct under the facts of any particular case is necessarily determined by a court on an *ad hoc* basis, and therefore litigants face great "difficulty in predicting the application of the conduct test." See Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class Action Lawsuits*, 2009 Wis. L. Rev. 465, 492. Furthermore, the distinction between "preparatory" and "substantial" conduct collapses if there is a showing that the "preparatory" conduct

was also a "substantial" step in the alleged fraud. In short, the test used by the Second Circuit does not come close to the clarity that issuers and investors should expect from our legal system. *See id.* As Professors Choi and Silberman conclude, "the amount and importantly the qualitative type of conduct that must occur in the United States to trigger the conduct test is uncertain." *Id.*

Professor Buxbaum also has explained that "the conduct test may reach conduct that affects neither U.S. market conditions nor the financial interests of U.S. investors." Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 24 (2007). "This expansive interpretation of the conduct test has led to considerable fragmentation and complexity in subject matter jurisdiction jurisprudence." *Id.*

Equally uncertain and unpredictable is the inquiry into the reasonableness of an exercise of jurisdiction that courts often undertake in those cases where they have decided that jurisdiction is permitted because the "conduct" or "effect" test was met. Courts sometimes base such a "reasonableness" inquiry on a range of "all relevant factors" mentioned in the *Restatement (Third) of the Foreign Relations Law of the United States* § 403(2) (1987). A court, for example, might consider whether foreign jurisdictions will recognize U.S. judgments so a prevailing defendant will not be subject to a multiplicity of suits and/or whether the plaintiff has access to alternative remedies abroad. *See Choi & Silberman, supra*, at 477 (discussing cases applying these criteria). Each of these factors involves judicial speculation regarding the implementation of the assertion of jurisdiction. Finally, the doctrine of *forum non conveniens* leads courts to take some cases and not others. *See id.* at 478 (discussing how courts might use *forum non-conveniens* in transnational securities fraud cases).

Thus, once the uncertain and unpredictable "conduct" and "effect" tests have been applied to determine if the court may exercise subject matter jurisdiction, there is another layer of uncertain and unpredictable analysis as the court determines whether it should exercise jurisdiction. Such an approach to jurisdiction in securities suits is not only indeterminate, but it is also unnecessary. United States courts have the better alternative of simply abiding by the Congressional intent, which is to presume no subject matter jurisdiction over Section 10(b) cases when foreign investors buy or sell securities outside the United States.

Second, the bright line rule chosen by Congress also allows legislatures and courts of other countries to decide how to protect investors within their borders. As this Court observed in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004), allowing federal subject matter jurisdiction over foreign injuries that were independent of domestic injuries would be "an act of legal imperialism." The United States should not impose its laws on foreign countries. Federal courts should particularly not do so when Congress has not authorized it.

Third, the instant case involves class action litigation, an area where United States law is both unique and controversial. See e.g. Martin H. Redish, *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* (2009) (identifying problems with the class action litigation system, including lack of strategic decision-making or even knowledge of the litigation by class members, and questioning whether the United States class action system may rescind individuals' rights to seek redress for their injuries). The United States is unusual in allowing contingent fees, requiring each party to bear the costs of litigation regardless of who wins, requiring class members to opt out, and other aspects of class actions. Most other countries have

made other choices. In securities class actions, the United States allows plaintiffs to proceed on the basis of the "fraud on the market theory" rather than requiring plaintiffs to prove actual reliance on misleading information. *See Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). This approach has been rejected in most other countries. *See Buxbaum, supra*, 46 Colum. J. Transnat'l L. at 61.

Class actions involving all or mostly foreign plaintiffs also give rise to unique difficulties with class certification under Federal Rule of Civil Procedure 23 and identification of a lead plaintiff as required by the Private Securities Litigation Reform Act of 1995. *See Choi and Silberman, supra*, at 479 (discussing these difficulties). The SEC itself has suggested that securities class actions present unique considerations and that "a more jurisdictionally restrictive standard may be warranted in the class action context." Brief of the Securities Exchange Commission as *amicus curiae* in *Morrison v. Australia National Bank* in response to the court's request at 4, n.1, 547 F.3d 167 (2d Cir. 2008).

Class action litigation is therefore an area where it is particularly important that the United States allow other countries to make their own law. Other countries have made different decisions about the tradeoffs in substantive law and procedural law between the interests of plaintiffs or defendants in class action litigation. Other countries reject class action litigation entirely because they believe that it is too expensive, encourages frivolous litigation, does not deter securities fraud, allows plaintiffs to sue without showing they actually relied on defendant's misleading statements, or for other reasons. *Amici* do not endorse any particular view of the United States class action system, but *Amici* recognize that not every country in the world wants a class action litigation system like ours or wants its securities markets subject to one. *Amici* believe that other

nations should make this choice for themselves and not have the United States make it for them.

**B. Application of Section 10(b) to Foreign Securities Sold in the United States Would Adequately Deter Transnational Securities Fraud and Accomplish the Objectives of the Act**

It is also unnecessary to grant foreign purchasers of foreign securities on foreign exchanges a private right of action under Section 10(b) in order to provide recovery for transnational fraudulent conduct that contains a component of conduct that occurs in this country. If there were actionable securities fraud on the part of a foreign issuer in such a case, a suit by the purchasers who bought the same security or American Depository Receipts in the United States would provide for recovery in a matter consistent with Congressional intent. Adding foreign investors who purchased foreign securities abroad to the plaintiff class would simply expand the class of claimants beyond the group of persons whom Congress intended to protect under the 1934 Act.

Indeed, including securities bought outside the United States in a plaintiff class could skew incentives of plaintiffs' lawyers in a direction that weakens deterrence of fraud harming investors inside the United States. The most successful plaintiffs' lawyers generally pursue cases with the largest aggregate damages, and it could be more attractive to file suit against a large foreign issuer with a relatively small United States trading presence than against an issuer with more securities traded in the United States but lower aggregate damages. When aggregate damages claimed in a suit are not proportional to losses by United States investors, litigation resources will not likely be devoted to fraud most likely to harm United States investors. See Choi & Silverman, *supra*, at 494-95 &

n.124. American lawyers will instead devote an increased percentage of their resources to being private attorneys general for world markets.

Moreover, many foreign jurisdictions (including, notably, Australia) also deter securities fraud by enacting laws to protect buyers and sellers of securities in transactions within their borders. Persons can choose the protection of the United States securities laws by buying or selling foreign securities in the United States. Likewise, foreign issuers whose securities are bought and sold in the United States have subjected themselves to United States securities laws. The result is a fair, predictable application of the law.<sup>6</sup>

### **C. The Material and Significant Conduct Test Urged by the SEC and the Solicitor General Is Unclear and Unpredictable**

In urging this Court to deny the petition for certiorari in this case, the SEC and the Solicitor General suggested a two-fold approach that purports to lend some clarity to this area of the law. Under that approach, when a foreign plaintiff in a private Section 10(b) suit "alleges that he was injured outside the United States by transnational securities fraud," he "should be required to prove that his loss resulted not simply from the fraudulent scheme as a whole, but directly from the component of the scheme that occurred in the United States." *See*

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<sup>6</sup> Courts have allowed investors and issuers to choose the legal regime that applies to transactions in circumstances where the transaction has ties to the United States that are significantly stronger than the transactions in NAB securities at issue here. *See Richards v. Lloyd's of London*, 135 F.3d 1289, 1294-95 (9th Cir. 1998) (rejecting plaintiffs' contention that suit against Lloyd's should be litigated in U.S. under the federal securities laws despite "choice clause" in contract binding the parties to proceed in England under English law).

Brief for the United States as *Amicus Curiae* (submitted October 2009) at 14. In addition, as a threshold matter, in order for there to be a violation of Section 10(b), the conduct in the United States that allegedly forms part of the fraudulent transnational scheme should be "significant conduct" that is "material to the fraud's success." *Id.* at 13.

Petitioners' brief suggests that the materiality inquiry would ensure that the domestic conduct was an "integral link" in the chain of events in the transnational fraud leading to the foreign investors' losses. Pet. Br. at 32. This inquiry, however, appears entirely open ended and presumes that, at the earliest stage of the litigation, the court has access to information that may require extensive fact-finding. It may be appropriate to use such a test after a full trial on the merits, but it is impractical to require that a court make such a determination at the outset of the litigation. In *Mills v. Electric Auto Lite*, 396 U.S. 375, 384-85 (1970), for example, this Court held that for proxy fraud to be actionable under Section 14(a) of the 1934 Act, it must be an "essential link" in the plaintiffs' transaction. Such, however, is a heavily fact-based determination best made at trial. Making such a determination at the jurisdictional phase of a case is a task that this Court should not foist upon the lower federal courts.

The "significant conduct" requirement is even worse, calling for a sufficient quantum of conduct to occur in the United States to warrant application of the 1934 Act. How much is a sufficient quantum of conduct? This is a regurgitation of the "conduct" test used in the Second Circuit, which commentators have rightly criticized as unpredictable. See Choi & Silberman, *supra*, at 492.

Investing and raising capital should not be a guessing game; issuers and investors should know in advance whether one country's laws apply or another country's laws or both. The "effect" and "conduct" tests of the Second Circuit do not provide the needed

certainty. The material and significant conduct test does not make this "balancing" approach any better.

**D. Allowing Traders in Foreign Markets to Sue Under Section 10(b) Will Burden United States Courts and Make the United States a Venue for Global Securities Litigation**

Allowing investors who purchase their securities abroad to sue under Section 10(b) will import into the United States securities litigation that should be heard in other countries. United States courts will become the arbiters of disputes between foreign investors and foreign companies over securities purchased in foreign markets. Even the remotest connection of an alleged fraud with "conduct" in the United States will invite commencement of suit here, and an unpredictable "balancing test" for determining subject matter jurisdiction will make it uncertain how long a suit will remain in our courts.

Lawyers in the United States may benefit from such "securities litigation tourism" just as lawyers in the United Kingdom have benefited from "libel tourism" there in which aggrieved parties around the world take advantage of expansive United Kingdom libel laws. It is unlikely, however, that turning a single country into a global litigation mill for a particular subject matter – whether securities law or libel law – enhances that country's role in the world economy.<sup>7</sup> The fact that this function is

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<sup>7</sup> International commentators have expressed concern with the "long arm" of United States capital markets law. *See, e.g.*, Sascha Lotze, *US-amerikanisches Kapitalmarktsrecht und Internet*, 2002, at 78; Peter Versteegen, in: *Kölner Kommentar zum WpÜG*, 2003, § 24 WpÜG, at 34; Rainer Süßmann, in: *Geibel/Süßmann Kommentar zum WpÜG*, § 24 WpÜG, at 8. Foreign issuers are sued in the United States by plaintiffs looking for more favorable substantive or procedural law than

foisted upon the world by unilateral action of a country's courts is also unlikely to foster good will among nations. *See generally* Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 Va. J. Int'l L. 251, 304-05 (2006) (concluding that "expanding the use of civil litigation in U.S. courts to serve global regulatory goals is highly problematic from an international relations point of view"). The likely result is a weakening of international cooperation in many areas, including deterrence of securities fraud. For United States courts to affect United States foreign relations so significantly without any authorization from Congress is even more difficult to justify.

Litigation tourism is also a game that other countries can play at our expense. Global communication networks such as the Internet make it possible to establish a connection, however tentative, between just about any type of conduct and a particular country. If a "balancing standard" for subject matter jurisdiction is the appropriate measure for deciding whether a country's courts should get involved in a dispute, we should not be surprised to see such "balancing" done by other nations' courts in cases brought against United States citizens. If this Court endorses such an approach, the United States will have no legitimate ground to complain.

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that available in their home countries. *See, e.g.*, Christof Aha and Jens Föderer, *Die Roche – Entscheidung des U.S. Court of Appeals*, 6 RIW 450, 451 (2003) (citing U.S. suits involving DaimlerChrysler, Deutsche Bank, Deutsche Telekom and Bayer). Forum shopping by foreign plaintiffs may result from a tendency in the United States towards higher judgments and settlements, as well as the possibility for derivative suits and class actions. *Id.* Forum shopping and the extraterritorial application of United States law also create legal uncertainty for foreign issuers. *Id.* at 458.

### E. Congress Can Change Its Mind

Congress is free to change the limited jurisdictional scope that it settled upon in 1934 if it wants to do so, and is now debating a bill that would do just that. Section 7216 of H.R. 4173 provides for extraterritorial jurisdiction with respect to antifraud provisions in the federal securities laws if there is "conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors." H.R. 4173, 111th Cong., 2d Sess., § 7216 (2010). If this bill is enacted, "the United States could become a magnet for global class actions." John C. Coffee, Jr., *High Court and Congress on a Collision Course*, Nat'l L.J., Jan. 18, 2010. This is, however, a choice for Congress and not this Court.

Alternatively, Congress could articulate a version of the "conduct test" that defined when there is a United States interest in having United States law applied to foreign securities transactions and then direct courts to apply that test. *See* Buxbaum, *supra*, 46 Colum. J. Transnat'l L. at 59 (such an approach "would account for the realities of the global marketplace and take seriously the need to address cross-border securities fraud. It would not, however, be easy to implement."). Once again, this is a choice for Congress and not this Court.

Congress also might take the more cautious step of only allowing the SEC, but not private plaintiffs, to pursue persons whose conduct in the United States contributes to securities fraud in foreign markets (this is exactly what Congress did in 1995 to allow the SEC to sue aiders and abettors of securities fraud after this Court's holding in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that aiders and abettors could not be sued by private plaintiffs under Section 10(b)).

Another approach would have Congress authorize the SEC to decide which foreign countries' securities markets should be protected from conduct within the United States that violates Section 10(b) and then extend extraterritorial application of Section 10(b) to those countries. See Choi & Silberman, *supra*, at 468 (proposing such an approach).

Alternatively, Congress could do nothing. Doing nothing would allow other countries to decide how best to protect their securities markets while we protect ours.

Unless and until Congress takes further action, this Court should uphold the intent of Congress in 1934 that transactions in foreign securities markets are not within the scope of Section 10(b).

### CONCLUSION

*Amici* respectfully submit that the Court should affirm the result reached by the Second Circuit and establish a bright line rule limiting the application of Rule 10(b) to securities bought or sold in the United States.

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