No. ___

IN THE

Supreme Court of the United States

TOSHIBA CORPORATION,

Petitioner,

v.

AUTOMOTIVE INDUSTRIES PENSION TRUST FUND;
NEW ENGLAND TEAMSTERS &
TRUCKING INDUSTRY PENSION FUND,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER M. CURRAN
Counsel of Record
NICOLE ERB
ERIC GRANNON
JAIME M. CROWE
REUBEN J. SEQUEIRA
WHITE & CASE LLP
701 Thirteenth Street, N.W.
Washington, DC 20005
(202) 626-3600
ccurran@whitecase.com

Counsel for Petitioner

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QUESTION PRESENTED

In *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), this Court held that Section 10(b) of the Securities Exchange Act does not apply extraterritorially and reaches fraud only in connection with (i) transactions in securities listed on domestic exchanges and (ii) domestic transactions in other securities.

The question presented here is whether the Exchange Act applies, without exception, whenever a claim is based on a domestic transaction, as the Ninth Circuit held below, or whether in certain circumstances the Exchange Act does *not* apply, despite the claim being based on a domestic transaction, because other aspects of the claim make it impermissibly extraterritorial, as the Second Circuit has held. In other words, is a domestic transaction necessary and sufficient for application of the Exchange Act, or is a domestic transaction necessary but, by itself, not sufficient for application of the Act?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Toshiba Corporation, petitioner on review, was the defendant-appellee below. Toshiba Corporation has no parent corporation, and the only publicly held corporation that owns 10% or more of Toshiba Corporation's stock is Goldman Sachs & Co., (although some or all of that stock may be held for the beneficial ownership of others).

Automotive Industries Pension Trust Fund, respondent on review, was a plaintiff-appellant below.

New England Teamsters & Trucking Industry Pension Fund, respondent on review, was a plaintiff-appellant below.

Mark Stoyas was the original plaintiff in the district court, but was not an appellant in the court of appeals below, and is not a respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Toshiba Corporation respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a-37a) is reported at 896 F.3d 933.

The opinion of the U.S. District Court for the Central District of California (App. 40a-77a) is reported at 191 F. Supp. 3d 1080.

JURISDICTION

The Ninth Circuit entered judgment on July 17, 2018. This Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

U.S. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b). Manipulative and deceptive devices

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—

* * *

(b) To 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, or any securities-based swap agreement

any manipulative or deceptive device or contrivance 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.

Other relevant statutes and regulations are set forth in Appendix F (App. 262a-365a).

STATEMENT

This petition presents an express circuit split on a recurring issue of exceptional importance regarding the international regulation of securities transactions. In the decision below, the Ninth Circuit expressly departed from the Second Circuit and held that the U.S. Securities Exchange Act *always* applies to a securities fraud claim involving a domestic securities transaction, even if the claim is against a foreign issuer that did not participate in the transaction, has not entered the U.S. securities markets, has made its allegedly fraudulent statements abroad, and is subject to ongoing oversight by foreign securities regulators. The Ninth Circuit's holding subjects foreign issuers to Exchange Act claims whenever third parties bring the issuer's securities into the United States and transact in those securities, or any derivatives thereof, here. The resulting circuit split pits the two most important circuits in U.S. securities law against one another in a battle of irreconcilable rules that invites litigiousness and forum shopping in the United States and interference with securities regulation and enforcement abroad.

INTRODUCTION

In *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), this Court held that Section 10(b) does not apply extraterritorially and reaches fraud only "in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." 561 U.S. at 273. In so holding, this Court stated: "we reject the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad . . . ." *Id.* at 269. This Court explained: "The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'" *Id.* at 269 (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 256 (1991)).

Four years after *Morrison*, the U.S. Court of Appeals for the Second Circuit, in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014) (per curiam), relying on *Morrison*, held that a domestic securities transaction is necessary but not sufficient "to state a properly domestic claim" under Section 10(b) where "foreign elements" dominate. 763 F.3d at 215, 217. The Second Circuit stated: "a rule making the statute applicable whenever the plaintiff's suit is predicated on a domestic transaction, regardless of the foreignness of the facts constituting the defendant's alleged violation, would seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application." *Id.* at 215. The Second

Circuit added that this Court's reasoning in *Morrison* "does not . . . permit" applying the Exchange Act to "conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchanges." *Id.* at 215-16. On this basis, the Second Circuit affirmed the dismissal of a case based on domestic transactions, stating "we think it clear that the claims in this case are so predominantly foreign as to be impermissibly extraterritorial." *Id.* at 216.

The Ninth Circuit in this case expressly rejected the Second Circuit's holding in *Parkcentral*, and held the very opposite: application of Section 10(b) turns *solely* on the presence of a domestic securities transaction, regardless of the predominance of foreign conduct, the effect on foreign exchanges, and the interference with securities regulation in foreign nations. App. 31a-32a. In holding that a foreign issuer that never entered the U.S. securities markets could be sued here under the Exchange Act, the Ninth Circuit stated that "it does not matter" under *Morrison* that the foreign issuer did not engage in the domestic transaction. App. 31a-32a. The Ninth Circuit expressly acknowledged its departure from the Second Circuit's decision in *Parkcentral*, stating that *Parkcentral* is "contrary to Section 10(b) and *Morrison* itself" and, furthermore, "turns *Morrison* and Section 10(b) on their heads." App. 31a, 33a.

In expressly departing from the Second Circuit, the Ninth Circuit in effect has opened a new forum for U.S. class-action litigation against any foreign issuer in the world. Regardless of whatever efforts it undertakes to avoid being subject to U.S. securities

laws and litigation, a foreign issuer is now exposed in the Ninth Circuit to class-action lawsuits under the Exchange Act based on third-party transactions in the United States. Merely by transacting in a foreign issuer's securities (or a derivative thereof) in the United States, third parties can manufacture rights under the Exchange Act not available to parties that transact in the same securities abroad. The Ninth Circuit's decision invites opportunistic plaintiffs to exploit the conflict between the Second and Ninth Circuits by filing only in the Ninth Circuit new Exchange Act claims against foreign issuers. The limitless reach of Section 10(b) in the Ninth Circuit threatens to significantly increase securities litigation in the United States, an adverse result that this Court has found repelling. *See Morrison*, 561 U.S. at 270.

Beyond creating a domestic forum for essentially foreign securities claims, the Ninth Circuit's decision invites interference with foreign securities regulation. *Morrison* held that the Exchange Act respects the prerogative of foreign sovereigns to regulate their own markets and issuers, and that Section 10(b) must be read to "avoid" an application that produces "interference with foreign securities regulation." 561 U.S. at 269. The Ninth Circuit's decision, however, permits application of the Exchange Act to foreign companies that list their securities exclusively on foreign exchanges, have not otherwise entered the U.S. securities markets, had no involvement with the underlying domestic securities transactions, and whose allegedly fraudulent conduct occurred abroad and has been investigated by foreign authorities. The

Ninth Circuit's decision here cannot be squared with *Morrison*.

Furthermore, the Ninth Circuit's decision threatens to undermine the federal policy of fostering the U.S. market in unsponsored American Depositary Receipts ("ADRs") for the benefit of U.S. investors. The U.S. Securities and Exchange Commission, recognizing that foreign issuers are subject to primary regulation abroad, has enabled depositary institutions to create unsponsored ADRs without the permission or participation of the foreign company whose stock is referenced in the ADRs. Faced with the Ninth Circuit's decision, foreign issuers may attempt to prevent trading in unsponsored ADRs referencing their stock, to the detriment of the SEC policy and U.S. investors.

The question presented in this petition asks this Court to decide whether a domestic transaction is necessary *and* sufficient to apply Section 10(b), regardless of other circumstances, as the Ninth Circuit held below, or whether a domestic transaction is necessary but *not* sufficient to apply Section 10(b), as the Second Circuit has held. As shown below, more securities class-action cases have been filed in the Second and Ninth Circuits over the last twenty years than in all of the other circuits combined. Given the preeminent role of the Second and Ninth Circuits in U.S. securities litigation, there is no reason to wait to resolve their express conflict on the question presented while an aggressive plaintiffs' bar subjects foreign issuers to U.S. class-action litigation. Indeed, this Court previously has granted certiorari in securities cases to resolve a split between only

these two circuits. Further percolation is, in any event, unlikely. Experienced plaintiffs' counsel now have every incentive to forum shop and bring cases against foreign issuers like Toshiba exclusively in the Ninth Circuit. Even if another circuit eventually addresses the question presented, by then it is likely that the Ninth Circuit's decision will have significantly undermined this Court's decision in *Morrison*.

Unless this Court grants this petition and reviews the Ninth Circuit's decision, the express conflict between the two most important circuits in securities cases will sow confusion among litigants, lower courts, foreign governments, foreign issuers, financial markets, and investors.

BACKGROUND

Toshiba Corporation ("Toshiba") is incorporated under the laws of Japan, is headquartered in Japan, and lists its common stock solely on stock exchanges in Japan. Toshiba files periodic public reports with Japan's Financial Services Agency ("FSA") and Japan's Securities Exchange and Surveillance Commission ("SESC"), and is required to comply with the formal requirements for listing on the Tokyo Stock Exchange. App. 91a-92a, 135a, 204a.

Toshiba does not offer or sell any securities in the United States, does not list any securities on any exchange in the United States, does not otherwise participate in any U.S. securities market, and does not have any reporting obligations to the U.S. Securities and Exchange Commission.

Plaintiffs purport to be purchasers, in over-the-counter ("OTC") transactions in the United States, of certain ADRs that reference Toshiba stock listed in Japan. Plaintiffs have not alleged (and cannot allege) that Toshiba had any role whatsoever in creating, offering, or selling the ADRs or that Toshiba had any involvement with Plaintiffs' domestic securities transactions in the ADRs.

A. American Depositary Receipts

ADRs are negotiable certificates that evidence American Depositary Shares ("ADSs"). Additional Form F-6 Eligibility Requirement Related to the Listed Status of Deposited Securities Underlying American Depositary Receipts, Securities Act Release No. 8287, Exchange Act Release No. 48,482, 68 Fed. Reg. 54,644, 54,644 & n.4 (Sept. 17, 2003) [hereinafter "Additional Form F-6 Eligibility Requirement"] (App. 272a & n.4). ADSs are securities created by a depositary institution (usually a bank or trust company), and represent an ownership interest in foreign securities held by the depositary. *Id.* (App. 272a & n.4). Market participants use the terms ADR and ADS interchangeably. *Id.* n.4 (App. 272a n.4). Each ADR issued by a depositary references "a fixed number or fraction of underlying securities on deposit with a depositary." *Id.* (App. 274a).

ADRs may be sponsored or unsponsored. The SEC describes a *sponsored* ADR as "effectively a *three-party* contract: it is established jointly by a deposit agreement between the foreign company whose securities will be represented by the ADRs and

the depositary, with ADR holders as third-party beneficiaries." *Id.* at 54,645 (App. 275a) (emphasis added).

By contrast, an *unsponsored* ADR is "essentially a *two-party* contract between the depositary and the ADR holders," and is "established by the depositary acting on its own." *Id.* at 54,644-45 (App. 274a-275a) (emphasis added). Formation of an unsponsored ADR "does not involve the formal participation, or even require the acquiescence of, the foreign company whose securities will be represented by the ADRs." *Id.* at 54,645 (App. 274a); *see also* App. 12a-13a (same). And, while the depositary must file a Form F-6 with the SEC to create an unsponsored ADR, the foreign issuer whose securities are referenced in the unsponsored ADR has no filing obligations with the SEC. Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Exchange Act Release No. 58,465, 73 Fed. Reg. 52,752, 52,762 (Sept. 10, 2008) [hereinafter "Exemption from Registration under Section 12(g)"] (App. 330a-331a).

B. District Court Proceedings

On June 4, 2015, Plaintiff Mark Stoyas filed in the U.S. District Court for the Central District of California a complaint against Toshiba seeking to represent a class of plaintiffs that purchased, in OTC transactions in the United States, *unsponsored* ADRs referencing Toshiba stock listed in Japan. Am. Compl. ¶ 270 (App. 220a-221a). (Plaintiff-Respondent Automotive Industries Pension Trust Fund was appointed lead plaintiff on September 4,

2015. Plaintiff-Respondent New England Teamsters & Trucking Industry Pension Fund was added as a named plaintiff in an Amended Complaint, filed December 17, 2015.)

Plaintiffs alleged that from 2008 to 2014 Toshiba made fraudulent financial statements in securities disclosures, public documents, and statements in Japan, causing Toshiba's stock price to fall in Japan and, in turn, causing the price of Plaintiffs' ADRs to fall in the United States. Am. Compl. ¶¶ 247-269 (App. 206a-220a). In their Amended Complaint, Plaintiffs acknowledged that, pursuant to Japan's Financial Instruments & Exchange Act ("JFIEA"), Japan's FSA and SESC investigated Toshiba's allegedly fraudulent financial statements. Am. Compl. ¶ 37 (App. 95a). Plaintiffs also acknowledged that the Japan Exchange Group and Tokyo Stock Exchange also investigated Toshiba's accounting and compliance with stock exchange disclosure rules. Am. Compl. ¶¶ 96, 213 (App. 131a, 194a). Plaintiffs further acknowledged that Toshiba shareholders, pursuant to Japan's Companies Act, demanded that Toshiba sue former executives for breach of duty, and that Toshiba in fact brought an action against three former CEOs, a former CFO, and a former Audit Committee Chairman. Am. Compl., Ex. 8 (App. 246a-254a); Am. Compl. ¶ 69 (App. 115a-116a). As Plaintiffs admit, multiple shareholder lawsuits are pending against Toshiba in Japan. Decl. of Andrew M. Pardieck 16-17 (App. 260a-261a).

Despite acknowledging all these facts establishing the matter to be essentially a Japanese controversy, Plaintiffs filed this action against Toshiba in the U.S.

District Court for the Central District of California. Plaintiffs claimed damages under Section 10(b) and Section 20(a) of the U.S. Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78j(b) and 78t(a), as well as under Article 21-2 of the JFIEA. Am. Compl. ¶¶ 277-304 (App. 224a-231a). The district court had jurisdiction over Plaintiffs' Exchange Act claims pursuant to 15 U.S.C. § 78aa(a).

On February 1, 2016, Toshiba moved to dismiss Plaintiffs' Amended Complaint. Regarding Plaintiffs' Exchange Act claims, Toshiba, relying on *Parkcentral*, argued that Plaintiffs' claims were inconsistent with this Court's ruling in *Morrison* that the Exchange Act does not apply extraterritorially. App. 57a-59a, 62a-63a.

On May 20, 2016, the district court dismissed Plaintiffs' Exchange Act claims and Japanese law claim. As to Plaintiffs' Exchange Act claims, the district court held that the ADR transactions "are securities transactions that occurred domestically," but that "Plaintiffs have not argued or pled that Defendant was involved in those transactions in any way." App. 64a. After describing Toshiba's reliance on *Parkcentral*, the district court reasoned:

> [W]hile *Morrison* did not squarely address the question, nowhere in *Morrison* did the Court state that U.S. securities laws could be applied to a foreign company that only listed its securities on foreign exchanges but whose stocks are purchased by an American depositary bank on a foreign

> exchange and then resold as a different kind of security (an ADR) in the United States. In fact, all the policy and reasoning in *Morrison* point in the other direction.

App. 64a; *see also Parkcentral*, 763 F.3d at 215-16 ("The Court never said that an application of § 10(b) *will* be deemed domestic *whenever* such a transaction is present. . . . If the domestic execution of the plaintiffs' agreements could alone suffice to invoke § 10(b) liability . . . then it would subject to U.S. securities laws conduct that occurred in a foreign country, concerning securities in a foreign company, traded entirely on foreign exchanges.").

Like the Second Circuit in *Parkcentral*, the district court warned of the extraterritorial overreach that Plaintiffs' reading of *Morrison* would entail:

> Plaintiffs' proffered understanding would create essentially limitless reach of § 10(b) claims because even if the foreign defendant attempted to keep its securities from being sold in the United States, the independent actions of depositary banks selling on OTC markets could create liability. This is inconsistent with the spirit and law of *Morrison*.

App. 64a-65a; *see Parkcentral*, 763 F.3d at 214 ("The mere fact that the plaintiffs based their suit on a domestic transaction would make § 10(b) applicable to allegedly fraudulent conduct anywhere in the world."). The district court held that, under

Morrison, a defendant subject to the Exchange Act must have taken "[s]ome affirmative act in relation to the purchase or sale of securities." App. 65a. The district court concluded: "Plaintiffs have not pled that Toshiba listed its securities in [the] United States or sponsored, solicited, or engaged in any other affirmative act in connection with securities sales in the United States; thus, § 10(b) does not apply to Toshiba." App. 66a. Plaintiffs' Section 20(a) claim, which depends on a primary violation of Section 10(b), therefore also failed. App. 66a.

Plaintiffs appealed to the Ninth Circuit.

C. Court of Appeals Proceedings

The Ninth Circuit reversed. In doing so, the Ninth Circuit accepted that Toshiba was not a party to or involved with any of Plaintiffs' unsponsored ADR purchases, and that Toshiba did not dispute that Plaintiffs' purchases were domestic securities transactions. App. 13a, 31a-32a, 36a. The Ninth Circuit also acknowledged that the "Toshiba ADRs" were not Toshiba-issued securities. App. 16a ("ADRs and the deposited securities are separate securities.") (quoting Additional Form F-6 Eligibility Requirement 54,646 (App. 279a)); App. 35a-36a ("the [First Amended Complaint] erroneously ignores the distinction between ADRs and common stock."). Borrowing from the SEC, the court of appeals explained that because "Toshiba ADRs are unsponsored," each Plaintiff purchasing the ADRs "enter[ed] into 'essentially a two-party contract' with the depositary institution." App. 13a (citing Additional Form F-6 Eligibility Requirement 54,645

(App. 275a)). The court added that "the depositary institutions each filed a Form F-6 without Toshiba's 'formal participation' and possibly without its acquiescence." App. 12a-13a (quoting Additional Form F-6 Eligibility Requirement 54,644-46 (App. 274a-281a)).

The Ninth Circuit adopted the Second Circuit's test to find a "domestic transaction." App. 28a-30a (citing *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012)). The Ninth Circuit, however, expressly rejected *Parkcentral*'s holding "that the existence of a domestic transaction is necessary but not sufficient under *Morrison*." App. 31a; *see Parkcentral*, 763 F.3d at 215. The Ninth Circuit insisted that *Morrison* requires a strictly geographic transactional test to determine whether the Exchange Act applies. App. 31a-32a ("[B]ecause we are to examine the location of the transaction, it does not matter that a foreign entity was not engaged in the transaction. For the Exchange Act to *apply*, there must be a domestic transaction." (emphasis in original)).

The Ninth Circuit determined that, under *Morrison*, Section 10(b) would necessarily apply to claims against Toshiba based on domestic transactions involving over-the-counter purchases in the United States of unsponsored ADRs referencing Toshiba stock listed in Japan. App. 31a-32a. The court found irrelevant that Toshiba had not created the ADRs or otherwise entered the U.S. securities markets, that Toshiba had no involvement with the underlying domestic securities transactions in unsponsored ADRs, that Toshiba's allegedly

fraudulent conduct occurred abroad in Japan, and that Toshiba's conduct was under investigation by Japanese authorities. App. 31a-32a.

Having concluded that the Exchange Act applied to Toshiba, the Ninth Circuit determined that it would not be futile to allow Plaintiffs to again amend their complaint to allege a violation of Section 10(b) by Toshiba. App. 37a. The Ninth Circuit remanded the case to the district court. App. 37a.

On August 3, 2018, expressly arguing that the Ninth Circuit's decision created an important conflict with the Second Circuit's *Parkcentral* decision, Toshiba moved to stay issuance of the mandate pending this Court's consideration of Toshiba's petition for a writ of certiorari. On August 8, 2018, the court granted Toshiba's motion and stayed the mandate. App. 39a.

This petition followed.

REASONS FOR GRANTING THE PETITION

This case presents an express and irreconcilable circuit split, between the two most important circuits in U.S. securities law, on the crucial question of when application of the U.S. Securities Exchange Act is impermissibly extraterritorial.

I. The Second And Ninth Circuits, The Most Important Circuits In Securities Cases, Expressly Conflict Over The Rule For Applying *Morrison* Where A Claim Is Based On A Domestic Transaction

The Ninth Circuit's holding in this case has created an irreconcilable conflict with the Second Circuit over the rule for applying this Court's holding in *Morrison* that Section 10(b) has no extraterritorial reach.

A. This Court's Decision In *Morrison* Prohibits Extraterritorial Application Of Section 10(b)

Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010), involved a class-action lawsuit against a foreign securities issuer, National Australia Bank ("National"). 561 U.S. at 251. National traded its stock "on the Australian Stock Exchange Limited and on other foreign securities exchanges, but not on any exchange in the United States." *Id.* Australian purchasers of National's stock listed in Australia brought claims against National under Section 10(b) of the Exchange Act. *Id.* at 251-53. These purchasers alleged that National, in its annual reports in Australia and other public documents, had knowingly misstated the performance of a U.S.-based subsidiary. *Id.* at 251, 266. They further alleged that when National restated its U.S. subsidiary's performance, National's stock value dropped, thereby injuring them. *Id.* at 252.

This Court held that the Australian purchasers could not state an Exchange Act claim against National based on their foreign securities

transactions. The Court confirmed that "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Id.* at 255 (quoting *Aramco*, 499 U.S. at 248). Finding "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially," this Court "conclude[d] that it does not." *Id.* at 265. The Court relied in part on the Exchange Act's express provision in Section 30(b) for extraterritorial application "limited to those [SEC regulations] preventing 'evasion' of the Act, rather than all those preventing 'violation.'" *Id.* at 263-64 ("'The provisions of [the Exchange Act] 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 does so in violation of regulations promulgated by the Securities and Exchange Commission 'to prevent the . . . evasion of [the Act].'") (quoting 15 U.S.C. § 78dd(b) (App. 265a)); *id.* at 268.

Even though some conduct related to the alleged fraud occurred in the United States, the Court held that the claims at issue did not involve a "domestic application" of the Exchange Act but instead "affect[ed] exchanges or transactions abroad." *Id.* at 266, 269; *see also id.* at 271 n.11 (rejecting "proposition that domestic conduct with consequences abroad can be covered even by a statute that does not apply extraterritorially"). This Court explained:

> The probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended

> such foreign application "it would have addressed the subject of conflicts with foreign laws and procedures." Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.

Id. at 269 (quoting *Aramco*, 499 U.S. at 256).

This Court, considering Section 10(b)'s focus on transactions, further held that the statute must be read to reach fraud "only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." *Id.* at 273; *see id.* at 266-67 (quoting 15 U.S.C. § 78j(b)). The Court adopted this "transactional test" to "avoid" the "interference with foreign securities regulation that application of § 10(b) abroad would produce." *Id.* at 269-70.

Finding that the claims "involve[d] no securities listed on a domestic exchange, and all aspects of the purchases complained of by [the plaintiffs] occurred outside the United States," this Court concluded that

the Exchange Act did not apply to National. *Id.* at 273.

B. The Second Circuit Considers Certain Applications Of Section 10(b) To Be Impermissibly Extraterritorial, Even Where The Claim Is Based On A Domestic Transaction

The Second Circuit in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings, SE*, 763 F.3d 198 (2d Cir. 2014) (per curiam), addressed *Morrison*'s transactional test and held that a domestic transaction is necessary, but not sufficient, "to state a properly domestic claim" under Section 10(b) of the Exchange Act. 763 F.3d at 215.

The plaintiffs in *Parkcentral* were international hedge funds that bought and sold swap agreements, i.e., securities created in the United States by agreement between the funds and third parties. *Id.* at 201, 206-07. The swap agreements were "pegged to the price of [Volkswagen AG ("VW")] shares, which trade[d] on European stock exchanges, to bet that VW stock would decline in value." *Id.* The plaintiffs alleged that defendant Porsche, a major shareholder of VW, made false statements "primarily in Germany," although some statements were "made into the United States or were available here." *Id.* at 201, 207. The statements allegedly affected the price of VW stock and, thus, the funds' swaps. *Id.* at 204-06.

The plaintiffs did "not allege, however, that Porsche was a party to any securities-based swap agreements referencing VW stock, or that it

participated in the market for swaps in any way." *Id.* at 207. Although the swap agreements "may have been concluded domestically," the VW shares they referenced traded exclusively on foreign exchanges, and not on any U.S. exchanges. *Id.* Additionally, Porsche's allegedly fraudulent conduct had been "the subject of investigation by German regulatory authorities and adjudication in German courts." *Id.* at 216.

Given *Morrison*'s admonition against interfering with foreign securities regulation, the Second Circuit held that the "predominat[ing]" consideration in determining whether application of Section 10(b) was impermissibly extraterritorial would be the "potential for incompatibility between U.S. and foreign law." *Id.* at 216-17. The Second Circuit reasoned that "if an application of the law would obviously be incompatible with foreign regulation, and Congress has *not* addressed that conflict, the application is one which Congress did not intend." *Id.* at 215-16 (stating a "corollary" of *Morrison*'s conclusion that "if an extraterritorial application of federal law would likely be incompatible with foreign law, and that application was intended by Congress, Congress would have addressed the conflict" (citing 561 U.S. at 269)).

The Second Circuit also pointed to *Morrison*'s description of its transactional test in terms of "necessary elements rather than sufficient conditions," and emphasized that this Court "never said that an application of § 10(b) *will* be deemed domestic *whenever* such a transaction is present." *Id.* at 215 (emphases in original) (observing that no

domestic transactions were before this Court in *Morrison*). The Second Circuit therefore held that *Morrison* does not permit "treating the location of a transaction as the definitive factor in the extraterritoriality inquiry." *Id.*

The Second Circuit determined that "the relevant actions in this case are so predominantly German as to compel the conclusion that the complaints fail to invoke § 10(b) in a manner consistent with the presumption against extraterritoriality." *Id.* at 216 (citing *Morrison*, 561 U.S. at 266). The court considered it irrelevant whether Porsche's false statements had been "intended to deceive investors worldwide." *Id.*

If decided under *Parkcentral*, the Exchange Act claims against Toshiba would have been dismissed: as in *Parkcentral*, (1) Plaintiffs here have not alleged that Toshiba "was a party" to any domestic transactions in unsponsored ADRs "referencing [Toshiba] stock, or that it participated in the market for [unsponsored ADRs] in any way," 763 F.3d at 207; (2) although the ADR transactions "may have been concluded domestically, the [Toshiba] shares they referenced" traded exclusively on foreign exchanges, and not on U.S. exchanges, *id.*; (3) the Exchange Act claims here "concern[ed] statements made primarily in [Japan] with respect to stock in a [Japanese] company traded only on exchanges in [Japan]," *id.* at 216; and (4) "the fraudulent acts alleged in the complaint" were "the subject of investigation by [Japanese] regulatory authorities," *id.* Indeed, the district court in this case followed *Parkcentral*'s

reasoning in dismissing the case, only to be reversed by the Ninth Circuit.

C. The Ninth Circuit Does Not Consider Any Applications Of Section 10(b) To Be Impermissibly Extraterritorial Where The Claim Is Based On A Domestic Transaction

The Ninth Circuit expressly rejected *Parkcentral*: "the principal reason that we should not follow the *Parkcentral* decision is because it is contrary to Section 10(b) and *Morrison* itself." App. 33a. The Ninth Circuit held that a geographically domestic transaction alone is sufficient to avoid extraterritorial application of the Exchange Act. *See* 31a-32a. Thus, under the Ninth Circuit's rule, *Morrison*'s transactional test *requires* application of Section 10(b) to *any* defendant if the claim is based on a domestic transaction. For the Ninth Circuit, it does not matter that the foreign defendant did not issue the transacted security and had no involvement with the underlying domestic securities transaction, or that the foreign defendant's allegedly fraudulent conduct occurred abroad and was being investigated by foreign regulators. *See* App. 31a-32a ("[I]t does not matter that a foreign entity was not engaged in the transaction. For the Exchange Act to *apply*, there must be a domestic transaction." (emphasis in original)).

The Ninth Circuit's decision has established in the nation's largest circuit a rule that directly conflicts with the Second Circuit's decision in *Parkcentral* and undermines *Morrison*'s holding that Section 10(b) does not apply extraterritorially. *See Hart v.*

Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001) ("[T]he first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals").

D. The Second And Ninth Circuits' Respective Rules For Applying Section 10(b) To A Domestic Transaction Are Irreconcilable

The Second Circuit in *Parkcentral* squarely held that "while [*Morrison*] unmistakably made a domestic securities transaction (or transaction in a domestically listed security) necessary to a properly domestic invocation of § 10(b), such a transaction is not alone sufficient to state a properly domestic claim under the statute." 763 F.3d at 214-15. The Ninth Circuit, in contrast, squarely held that a domestic transaction is all that is needed to apply Section 10(b): "because we are to examine the location of the transaction, it does not matter that a foreign entity was not engaged in the transaction. For the Exchange Act to *apply*, there must be a domestic transaction." App. 31a-32a. The resulting circuit split is irreconcilable, and cannot fairly be minimized or explained away.

The Ninth Circuit's statement that "no Second Circuit case, nor any other Circuit, has applied *Parkcentral*'s rule," App. 33a n.22, is incorrect. *Parkcentral* is hardened authority in the Second Circuit. Shortly before the Ninth Circuit issued its decision in this case earlier this year, the Second Circuit reaffirmed and applied *Parkcentral* in *Giunta v. Dingman*, 893 F.3d 73 (2d Cir. 2018):

> In *Parkcentral* [], we qualified the scope of the *Absolute Activist* decision. We held that while the presence of a "domestic transaction" in a security is a necessary element of a section 10(b) claim (unless the transaction is in a security listed on a domestic exchange), it is not necessarily sufficient to make the invocation of section 10(b) appropriately domestic. In certain cases, the facts may be so predominantly foreign as to render the application of section 10(b) impermissibly extra-territorial.

893 F.3d at 82 (citing *Parkcentral*, 763 F.3d at 215). *Giunta* also reaffirmed *Parkcentral*'s reasoning, stating: "we found that the application of section 10(b) to the *Parkcentral* defendants 'so obviously implicate[d] the incompatibility of U.S. and foreign laws' that Congress could not have intended it in 'a manner consistent with the presumption against extraterritoriality.'" *Id.* (quoting *Parkcentral*, 763 F.3d at 216). Applying *Parkcentral*, the court in *Giunta* held that the plaintiffs' Section 10(b) claims were not "impermissibly extraterritorial" where the defendant, a U.S. citizen, was a party to the domestic transaction, and the allegedly fraudulent conduct occurred in the United States. *Id.* at 76-78, 82-83 ("The facts in this case, however, do not present nearly the same level of foreign entanglement as presented in *Parkcentral*.").

In the Second Circuit, *Parkcentral*'s holding, reaffirmed by *Giunta*, binds future Second Circuit

panels and district courts deciding Section 10(b) claims against foreign issuers. *See Johnson v. United States*, 779 F.3d 125, 128 (2d Cir. 2015) ("[A] panel of this Court is 'bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court.'"); *see also Robbins v. DeBuono*, 218 F.3d 197, 201 (2d Cir. 2000) (stating a Second Circuit order with per curiam opinion had "precedential value").

Contrary to the Ninth Circuit's suggestion, App. 33a n.22, *Parkcentral* is not somehow undermined by Second Circuit cases in which the extraterritorial reach of Section 10(b) was never before the court. In *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016), the defendants, appealing a decision issued before *Parkcentral*, challenged the proof of fraud but not the extraterritorial application of Section 10(b). *See* 838 F.3d at 239, 243, 253, 260. In *In re Petrobras Sec. Litig.*, 862 F.3d 250 (2d Cir. 2017), the court never reached the issue of extraterritoriality, but considered whether establishing a "domestic" transaction (by evidence, under *Absolute Activist*, of where a party incurred irrevocable liability or where title passed) was susceptible to class-wide proof. *See* 862 F.3d at 257, 270-75. Similarly, in *Choi v. Tower Research Capital LLC*, 890 F.3d 60 (2d Cir. 2018), the Second Circuit, addressing Commodity Exchange Act ("CEA") claims, ruled on the narrow issue of whether irrevocable liability had been incurred in the United States. *See* 890 F.3d at 67-68 (reversing dismissal for failure to allege a domestic transaction, holding "parties incur irrevocable liability on [Korea Exchange] night market trades at the moment of

matching" on the Chicago Mercantile Exchange platform in Illinois).

The Ninth Circuit is also mistaken in suggesting that *Parkcentral* is an anomaly. App. 33a n.22. *See, e.g.*, *In re London Silver Fixing, Ltd., Antitrust Litig.*, No. 14-MD-2573 (VEC), 2018 U.S. Dist. LEXIS 124856, at *73-75 (S.D.N.Y. July 25, 2018) (relying on *Parkcentral* in dismissing CEA claims, stating: "*Parkcentral* recognizes the possibility that a claim based on a technically 'domestic' transaction can be so rooted in foreign conduct that the claim itself is an extra-territorial application of the statute" (citing 763 F.3d at 215-16)); *In re N. Sea Brent Crude Oil Futures Litig.*, 256 F. Supp. 3d 298, 307-10 (S.D.N.Y. 2017) (dismissing CEA claims, stating that, where "crux" of defendants' alleged conduct did not "touch the United States," applying CEA "raises the same concern motivating *Parkcentral* and *Morrison* that individuals and entities will be subject to multiple, and potentially incompatible, laws in the absence of clear congressional intent to do so" (citing *Parkcentral*, 763 F.3d at 215 (discussing *Morrison*, 561 U.S. at 269))); *Eng v. AKRA Agric. Partners*, No. 5:16-cv-00994 (RCL), 2017 U.S. Dist. LEXIS 215952, at *4-8 (W.D. Tex. Aug. 9, 2017) (relying on *Parkcentral* and finding allegations of fraud in the United States inducing agreement with defendants in the United States to invest in a U.S. company "not 'so predominantly foreign'" as to render application of Section 10(b) "impermissibly extraterritorial" (quoting 763 F.3d at 216)).

While the Ninth Circuit purported to identify certain distinctions between this case and

Parkcentral, none is relevant and some are simply erroneous.

The Ninth Circuit had no basis to distinguish the swap agreements in *Parkcentral* from the ADRs at issue here, regardless of whether either type of security represents an "investment" in the foreign issuer, conveys beneficial "ownership" of the issuer's stock, or is privately traded. App. 32a. In 2000, Congress amended Section 10(b) to expressly cover "*any* securities-based swap agreement," and appended the following clarification to the statute to ensure equivalent application to swaps as to other securities: "Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading . . . and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements *to the same extent as they apply to securities*." Consolidated Appropriations Act, 2001, Pub. L. 106-554, App. E, sec. 303A(d)(1)-(2), 114 Stat. 2763, A-454 (2000) (emphases added); 15 U.S.C. § 78j (App. 262a-263a).

Next, in attempting to distinguish *Parkcentral* on the basis that, unlike ADRs, the swaps' "value is wholly unconstrained by the amount of reference security available and is not directly pegged to the value of the reference security," App. 32a, the Ninth Circuit overlooked the Second Circuit's account of the allegations in *Parkcentral*. The *Parkcentral* swaps, like ADRs, were "pegged to the price of VW shares," and the plaintiffs' injury resulted precisely from "a severe shortage" in VW shares created by the

defendants' alleged fraud. 763 F.3d at 201, 204-05 (describing "Short-Squeeze" on VW shares).

The Ninth Circuit further neglected to acknowledge that, just as the *Parkcentral* swaps referenced VW shares that were "traded entirely on foreign exchanges," App. 32a, the unsponsored ADRs here reference Toshiba stock listed only on exchanges in Japan. This fact, in the Ninth Circuit's words, should "implicat[e] concerns that incompatible U.S. and foreign law would almost certainly regulate the same security." App. 32a.

Finally, the Ninth Circuit failed to distinguish *Parkcentral* in observing that the swap agreements were created without VW's knowledge or facilitation. App. 32a. As the Ninth Circuit observed elsewhere in its opinion, the depositary banks created the unsponsored ADRs at issue here "without Toshiba's 'formal participation' and possibly without its acquiescence," and the Amended Complaint failed to allege any Toshiba involvement with the ADRs. App. 12a-13a.

None of these purported distinctions, in any event, is germane to the Ninth Circuit's holding or its conflict with the Second Circuit, which the Ninth Circuit expressly held it "should not follow." App. 33a (characterizing *Parkcentral* as "contrary to Section 10(b) and *Morrison* itself"); *see also United States v. Hussain*, No. 16-cr-00462-CRB-1, 2017 U.S. Dist. LEXIS 178675, at *8-9, *11, *13-14 (N.D. Cal. Oct. 27, 2017) (addressing "whether a particular application [of 18 U.S.C. § 1343 (wire fraud)] is extraterritorial" and discussing, favorably,

Parkcentral and Judge Leval's "forceful[]" and "quite persuasive" concurring arguments, but assuming Ninth Circuit would focus on the location of wire transmission). The Ninth Circuit further characterized the Second Circuit's decision in *Parkcentral* as engaging in "an inquiry *Morrison* rebukes," applying a "test . . . akin to the vague and unpredictable tests that *Morrison* criticized," and basing its analysis on "the foreign location of the allegedly deceptive conduct, which *Morrison* held to be irrelevant." App. 33a.

The Second Circuit, conversely, warned that applying Section 10(b) based on a strictly geographic transactional test, as adopted by the Ninth Circuit here, "would require courts to apply the statute to wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely unaware of it." 763 F.3d at 215. That approach, according to the Second Circuit, "seriously undermine[s] *Morrison*'s insistence that § 10(b) has no extraterritorial application." *Id.*

Whereas the Second Circuit in *Parkcentral* held that "Congress did not intend" *any* application of Section 10(b) "obviously . . . incompatible with foreign regulation," *id.* at 215-16, the Ninth Circuit held that the risk of "undermin[ing] *Morrison*'s animating comity concerns," is "not a basis" for declining to apply the Exchange Act to any claim based on a domestic transaction, App. 33a-34a.

Whereas in the Second Circuit comity concerns justify *dispositive* non-application of the Exchange Act in the first place, in the Ninth Circuit the comity concerns central to *Morrison* may be considered only as a factor "*relevant*" to liability after the Exchange Act already has been applied. App. 34a. Permitting Plaintiffs to advance this litigation under Section 10(b) against Toshiba has subjected the company to legal uncertainty and the cost of litigation under U.S. law, and already has interfered with Japan's prerogative to regulate its securities markets and issuers — the very result *Morrison* proscribes.

E. The Conflict Between The Second And Ninth Circuits' Rules Invites Forum Shopping And Will Spur Further Class-Action Litigation

The conflict between the Second and Ninth Circuits will significantly alter securities fraud litigation in the United States, with global effects. When foreign issuers like Toshiba are involved, opportunistic plaintiffs' lawyers will exploit this conflict by bringing suits in the Ninth Circuit, instead of the Second Circuit or any other circuit. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 820 (1988) (recognizing that "lack of uniformity in federal appellate construction of [federal] laws" had "generated" forum shopping); *see also Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (explaining that forum shopping was "of particular concern" in decision to grant certiorari).

The Ninth Circuit's decision not only will draw suits against foreign issuers away from the Second Circuit and other circuits, but also is likely to spur

growth in the volume of class-action securities litigation in the United States. Plaintiffs' lawyers will take advantage of the "essentially limitless reach of § 10(b) claims" in the Ninth Circuit, App. 64a-65a, to file numerous new cases in the United States, which, for various reasons, is the most attractive forum in the world for securities class-action litigation. *See* Nathan W. Bear et al., *The Rise of Global Securities Litigation*, Robbins Geller Rudman & Dowd LLP, Feb. 24, 2016, https://www.rgrdlaw.com/news-item-Rise-of-Global-Securities-Litigation-022416.html (App. 420a-431a) (stating "[c]ases to recover [securities fraud] losses are pursued in just a small number of jurisdictions — predominantly in the United States," citing factors including permissibility of contingent fee arrangements and absence of fee shifting risk in the United States, while other jurisdictions impose caps on recovery, prohibit class action, and/or fail to recognize a fraud-on-the-market proof of reliance). Foreign purchasers and sellers of foreign securities may structure their dealings to technically qualify as domestic transactions so as to be able to avail themselves of the remedies and favorable litigation procedure under U.S. securities law. This Court in *Morrison* identified material differences between U.S. and foreign securities litigation and acknowledged the concern that extraterritorial application of Section 10(b) would make the United States the "the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." 561 U.S. at 270; *see also id.* (characterizing volume of litigation from extraterritorial application of the

Exchange Act as an "adverse consequence[]" that "repulsed" the Court).

This Court should not wait to resolve this important conflict, because the Second and Ninth Circuits are the most important circuits for securities litigation in the United States. Over the last two decades, the Second and Ninth Circuits have handled more securities cases than all other circuits combined. *See* Stanford Law School, Securities Class Action Clearinghouse, *Filings Database, Heat Maps & Related Filings*, http://securities.stanford.edu/circuits.html?page=10 (last visited Oct. 13, 2018) (App. 433a-436a) (reporting 1475 and 1187 securities class actions filed after 1995 in Second and Ninth Circuits, respectively, totaling over 230 more cases than in the remaining circuits, combined). Considering that even their sister courts recognize that the Second and Ninth Circuits "traditionally see the most securities cases," *Publ. Pension Fund Grp. v. KV Pharm Co.*, 679 F.3d 972, 987 (8th Cir. 2012), it is not surprising that these circuits are widely viewed as the "most influential circuits for securities cases." 1 Jonathan Eisenberg & Scott Musoff, Litigating Securities Class Actions § 2.14 (2017); *see Morrison*, 561 U.S. at 260 (recounting D.C. Circuit decision, despite doubts, to "defer[] to the Second Circuit because of its 'preeminence in the field of securities law'" (quoting *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987))). Given the importance of these circuits in the field of securities law, this Court has granted certiorari to resolve conflicts in securities cases between only the Second and Ninth Circuits. *See, e.g.*, *Leidos, Inc. v. Indiana Public Ret. Sys.*, 137 S. Ct. 1395, 1396 (2017) (granting certiorari

in securities case involving split between Second and Ninth Circuits); *Salman v. United States*, 137 S. Ct. 420, 425 (2016) ("We granted certiorari to resolve the tension between the Second Circuit's *Newman* decision and the Ninth Circuit's decision in this case.").

Allowing further percolation of the question presented is unlikely to clarify the conflict or stem forum shopping in favor of the Ninth Circuit. Future Ninth Circuit panels are bound to follow *Stoyas*, while future Second Circuit panels are bound to follow *Parkcentral*, and the remaining circuits see relatively few securities class-action cases. It may happen that no other circuits address the question presented here for some time, if at all, because experienced plaintiffs' lawyers likely will file claims in the Ninth Circuit when foreign issuers like Toshiba are involved, avoiding other circuits entirely. *See* 28 U.S.C. § 1391(c)(3) (providing that foreign defendants "may be sued in any judicial district"); *cf.* Stanford Law School, Securities Class Action Clearinghouse, *Filings Database, Top Ten*, http://securities.stanford.edu/top-ten.html?filter=plaintiff_firm (last visited Oct. 13, 2018) (showing just four firms representing plaintiffs in securities class-action suits, including counsel for Plaintiffs here, involved in over 50% of all class-action suits after 1995).

II. The Question Presented Is Of Significant And Immediate National Importance

Apart from the conflict between the Second and Ninth Circuits, this case presents an important and

recurring issue of significant and immediate national importance. The Ninth Circuit's decision permits private plaintiffs to interfere with foreign sovereigns' regulation of their own securities markets and issuers, a result Congress did not intend. *See Morrison*, 561 U.S. at 269. The Ninth Circuit decision also threatens to harm U.S. investors by undermining a successful federal policy fostering the market in unsponsored ADRs.

A. The Ninth Circuit's Rule Interferes With Foreign Securities Regulation

The stock of over a thousand foreign issuers from approximately 40 countries is referenced in unsponsored ADRs traded over the counter in the United States. Deutsche Bank, Unsponsored ADRs: 2017 Market Review at 5 (2017), https://tss.gtb.db.com/FileView/Data.aspx?URL=dbdr/cms/DB%20DR%20Unsp%20ADR%20Review%202017%20Final.pdf [hereinafter "Deutsche Bank Rep."] (App. 416a); *see* Deutsche Bank Depositary Receipt Services, *Depositary Receipt Directory*, https://www.adr.db.com/drwebrebrand/druniverse/dr_universe_type_e.html (last updated July 7, 2018) [hereinafter "Deutsche Bank Depositary Receipt Directory"] (App. 368a-411a) (listing 1462 foreign companies whose foreign stock is referenced in unsponsored ADRs traded in the United States). The Ninth Circuit's decision ensures that these companies, as well as any other foreign issuer, even though subject to primary regulation abroad, now will face securities class-action litigation risk in the United States from private plaintiffs invoking Section 10(b) of the Exchange Act. Indeed, even privately held foreign

companies are at risk, because their securities, too, may be brought into the United States and transacted here without the foreign companies' permission, participation or even knowledge.

Perversely, the Ninth Circuit's decision makes the Exchange Act applicable even to companies that choose to list and transact their securities only in foreign markets *precisely to avoid* U.S. securities regulation and litigation. The Ninth Circuit's decision thus invites private plaintiffs and U.S. courts to override the policy choices of foreign regulators as overseers of their markets and issuers. The district court below warned that under Plaintiffs' reading of *Morrison* ultimately adopted by the Ninth Circuit, no foreign issuer could escape application of the Exchange Act, "because even if the foreign defendant attempted to keep its securities from being sold in the United States, the independent actions of depositary banks selling on OTC markets could create liability." App. 64a-65a. As the district court concluded: "This is inconsistent with the spirit and law of *Morrison*." App. 65a. The Ninth Circuit nevertheless expressly refused to limit application of the Exchange Act despite Toshiba's "forceful[]" arguments that "that applying the Exchange Act to these unsponsored ADRs would undermine *Morrison*'s animating comity concerns." App. 33a.

This Court also should be troubled that foreign regulators in jurisdictions around the world, invoking reciprocity, may subject U.S. issuers to claims under foreign securities laws, regardless of whether those U.S. issuers have entered foreign securities markets. *See Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108,

124 (2013) (warning extraterritorial application of U.S. law implies other nations "could hale our citizens into their courts"); *see also* Brief of the Government of the Commonwealth of Australia as *Amicus Curiae* in Support of the Defendants-Appellees [on the Merits] at 26, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (No. 08-1191) (reminding this Court of "'blocking' statutes that Australia and other countries enacted" in response to U.S. antitrust laws, stating: "Comity concerns more than mere politeness. 'If other nations believe that American policy unfairly disadvantages their citizens . . . they are apt to resist enforcement efforts and perhaps to retaliate with countermeasures of their own.'") (citation omitted).

B. The Ninth Circuit's Rule Undermines Federal Policy Of Fostering The U.S. Market In Unsponsored ADRs

The SEC has determined to facilitate U.S. investors' access to ADRs in part because of "increased . . . U.S. investor interest in the securities of foreign companies." Exemption from Registration under Section 12(g) 52,753 (App. 292a). In 2008, the SEC amended its rules to make it easier to "establish unsponsored ADRs on [an] expanded group of foreign private issuers," without the foreign issuers' participation. *Id.* at 52,762 (App. 333a). The SEC sought to "foster the trading of foreign companies' equity securities in the U.S. over-the-counter market." *Id.* at 52,767 (App. 356a-357a).

The SEC revised its rules to allow a depositary institution to create an unsponsored ADR referencing

a foreign issuer's securities — without the foreign issuer's permission, participation or even knowledge — if: (1) the foreign issuer's securities are listed on a foreign exchange, and (2) the foreign issuer publishes English-language versions of public disclosures required under the foreign securities regulations governing the issuer. *See id.* at 52,754-55 (App. 297a-301a); 17 C.F.R. § 240.12g3-2(b) (App. 267a-269a). According to the SEC, "The purpose of the foreign listing condition is to help assure that there is a non-U.S. jurisdiction that principally regulates and oversees the trading of the issuer's securities and the issuer's disclosure obligations to investors." Exemption from Registration under Section 12(g) 52,755 (App. 301a).

While a depositary must register its ADRs with the SEC using a Form F-6, the SEC, consistent with its expectation that the foreign issuer is subject to foreign — not U.S. — regulation, imposes no filing obligations on the foreign issuer. The foreign issuer of a foreign security referenced in an unsponsored ADR in fact has no right to review, approve, or even receive notice regarding the unsponsored ADR. *See id.* at 52,762 & nn.113-14 (App. 333a-334a & nn. 113-14).

Since the SEC allowed depositaries to unilaterally create unsponsored ADRs, the U.S. market in unsponsored ADRs has grown markedly. *See* Deutsche Bank Rep. at 3 (App. 414a) ("These [SEC] changes have encouraged the formation of many new UADR programmes."). The number of unsponsored ADRs multiplied almost tenfold from 169 in 2008 to 1,642 as of September 2017. *Id.* at 4 (App. 415a).

The value of the market in unsponsored ADRs also grew substantially, reaching US $11.9 billion at the end of September 2017, a 51% increase from just the prior year. *Id.* at 3 (414a).

Many internationally renowned companies do not list their stock in the United States, yet their stock is referenced in unsponsored ADRs. *See* Deutsche Bank Depositary Receipt Directory (App. 368a-411a). These companies are not only attractive to U.S. investors, but also are attractive targets for aggressive U.S. class-action lawyers. The Ninth Circuit's decision subjects all of these companies, whose stock is listed only overseas, to securities fraud class-action litigation in the United States under Section 10(b) of the Exchange Act.

Foreign issuers, even if unable to completely block domestic transactions by holders of derivative securities or foreign-purchased shares, may well take steps in their home jurisdictions or in the United States to prevent trading in unsponsored ADRs referencing their stock. Plaintiffs suggest, for example, that foreign issuers could (1) cease publishing financial statements in English (an option presumably not available in English-speaking countries) or (2) establish a sponsored ADR security but refuse to sell any ADRs. *See* Appellants' Reply Brief at 7, *Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018) (No. 16-56058), ECF No. 28. These steps could undermine the thriving U.S. market in unsponsored ADRs that has developed significantly over the past decade consistent with the objectives of SEC policy. Thus, the Ninth Circuit decision creates

incentives for foreign issuers to take steps undermining federal policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER M. CURRAN
Counsel of Record
NICOLE ERB
ERIC GRANNON
JAIME M. CROWE
REUBEN J. SEQUEIRA
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
(202) 626-3600
ccurran@whitecase.com

Counsel for Petitioner

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