No. 18-486

In the Supreme Court of the United States

TOSHIBA CORPORATION, PETITIONER

v.

AUTOMOTIVE INDUSTRIES PENSION TRUST FUND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether respondents can allege an actionable violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), based on their domestic purchases of American Depositary Receipts creating an interest in securities issued by petitioner, a foreign corporation.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

Respondents are American investors who purchased domestically American Depositary Receipts (ADRs) creating an interest in securities issued by petitioner, a foreign corporation. Pet. App. 4a-12a, 24a. After petitioner admitted certain fraudulent accounting practices, *id.* at 5a, respondents filed a class action alleging violations of Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act or Act), 15 U.S.C. 78j(b), and Rule 10b-5 of the Securities and Exchange Commission (SEC or Commission), 17 C.F.R. 240.10b-5. The district

court dismissed respondents' first amended complaint (FAC) with prejudice, holding that respondents sought an impermissible extraterritorial application of Section 10(b) and that granting leave to amend would be futile. Pet. App. 40a-77a. The court of appeals reversed and remanded. *Id.* at 1a-37a. The court agreed with the district court that the FAC did not adequately allege a Section 10(b) violation, but it held that granting leave to amend would not be futile and that the dismissal therefore should be without prejudice. *Id.* at 37a.

1. For nearly a century, ADRs have provided a mechanism for Americans to invest in foreign securities without confronting the "regulatory and currency exchange difficulties" associated with direct purchases of shares on a foreign exchange. *Pinker* v. *Roche Holdings Ltd.*, 292 F.3d 361, 367 (3d Cir. 2002). In a typical ADR arrangement, a U.S. institution—often a bank or trust company—purchases the foreign securities on a foreign exchange, maintains custody of and legal title to the shares on behalf of the ADR holder, and performs services such as collecting dividends from the foreign issuer and converting them to U.S. dollars for the ADR holder. Pet. App. 11a.[1] ADR holders can sell their interests in the foreign shares in essentially the same manner as domestic securities. *Id.* at 14a. ADRs thus offer American investors a "simpler and more secure" way to own an interest in foreign securities and also

[1] "Technically, ADRs are receipts that evidence ownership of an 'American Depository Share' or 'ADS,' which is the actual negotiable certificate." Pet. App. 11a n.5. As a practical matter, the terms "ADR" and "ADS" are used "interchangeably." *Ibid.* This brief uses the term "ADRs" to refer to both foreign stock certificates and receipts evidencing their ownership. *Id.* at 272a n.4.

provide "significant benefits to foreign companies, allowing them to tap into the American capital market." *Pinker*, 292 F.3d at 367. ADRs accordingly have become the "most common form in which foreign securities trade in the United States." Pet. App. 274a.

The SEC has regulated ADRs since 1955. Pet. App. 279a; see SEC Staff, *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934*, at A3-A4 (Apr. 2012) (SEC Study), https://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf. The principal regulatory requirement is the filing of SEC Form F-6, which "elicits disclosure of the terms of deposit relating to the ADRs," such as the number of underlying securities, procedures for dividend collection and distribution, and fees and charges. SEC Study A4. Form F-6 "does not elicit any information about the foreign issuer itself, such as its financial statements or a description of its business." *Ibid.* That approach reflects Congress's judgment that, in this context, "registration of [a] foreign issuer's securities generally is not required." *Ibid.*

ADRs are divided into two categories: unsponsored and sponsored. Pet. App. 274a. An unsponsored ADR is established by a depositary institution, such as a bank, "acting on its own, usually in response to a perceived interest among U.S. investors in a particular foreign security that is not traded on a U.S. exchange or" the U.S. over-the-counter market. *Ibid.* 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" ADR. *Ibid.* An unsponsored ADR is thus "essentially a two-

party contract between the depositary and the ADR holders." *Id.* at 275a.

By contrast, a sponsored ADR "is established jointly by a deposit agreement between the foreign company whose securities will be represented * * * and the depositary, with ADR holders as third-party beneficiaries." Pet. App. 275a. The foreign issuer is thus "able to exercise some control regarding the terms and operations of the" ADR. *Id.* at 332a n.108. A foreign issuer's creation of a sponsored ADR "precludes * * * issuance of an unsponsored ADR." *Id.* at 13a n.8.

2. Petitioner Toshiba is a global electronics and energy business incorporated and headquartered in Japan. Pet. App. 90a. Petitioner's common stock is traded on Japanese exchanges and is not listed on U.S. exchanges, *id.* at 9a, but petitioner's shares are available to U.S. investors through several unsponsored ADRs, *id.* at 12a.

In 2015, petitioner admitted "substantial institutional accounting fraud" and issued financial restatements that eliminated billions of dollars in profits and shareholder equity. Pet. App. 5a & n.1. Petitioner's stock price "declined by more than 40 percent," and "nine senior executives resigned." *Id.* at 5a n.1.

3. Respondents are U.S. investors who purchased in the United States unsponsored ADRs creating an interest in petitioner's shares. Pet. App. 5a-6a, 64a. After petitioner's accounting fraud was disclosed, respondents brought a class action alleging (as relevant here) violations of Section 10(b) of the Exchange Act, which makes it unlawful to "employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered," a

"manipulative or deceptive device or contrivance in contravention of" Rule 10b-5. 15 U.S.C. 78j(b).[2] Respondents further alleged that they had acquired "Toshiba ADRs 'in reliance upon the truth and accuracy' of [petitioner's] fraudulent financial statements, paid artificially inflated prices, and suffered economic loss when the ADRs declined in value." Pet. App. 6a.

4. The district court dismissed respondents' claims, finding that they sought an impermissible extraterritorial application of Section 10(b). Pet. App. 40a-76a. As the district court explained, this Court held in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), that Section 10(b) does not apply extraterritorially in a private action, but that it applies domestically to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." Pet. App. 52a (quoting *Morrison*, 561 U.S. at 267).[3] The district court held that respondents' claims did not constitute a permissible domestic application of Section 10(b) under *Morrison*'s first prong because the ADRs that respondents had purchased were traded over the counter rather than

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[2] Rule 10b-5 makes it unlawful to "employ any device, scheme, or artifice to defraud"; to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made * * * not misleading"; or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit * * * in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5.

[3] As explained further below, Congress amended the Exchange Act after *Morrison* to authorize some extraterritorial application of Section 10(b) in actions brought by the SEC or the Justice Department. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, § 929P(b)(1), 124 Stat. 1864 (15 U.S.C. 78aa(b)). That amendment does not apply to private suits.

on a "domestic exchange." *Id.* at 57a. The court also held that respondents' claims did not satisfy *Morrison*'s second prong because respondents had not identified "any affirmative act by [petitioner] related to the purchase and sale of securities in the United States." *Id.* at 65a. The court concluded that granting leave to amend the complaint would be "futile," and it therefore dismissed the suit with prejudice. *Id.* at 76a-77a.

5. The court of appeals reversed and remanded. Pet. App. 1a-37a.[4] The court agreed with the district court that Section 10(b) did not apply domestically to respondents' claims under *Morrison*'s first prong because the ADRs that respondents had purchased were traded over the counter rather than on "domestic exchanges." Pet. App. 27a; see *Morrison*, 561 U.S. at 267. The court of appeals held, however, that Section 10(b) could apply under *Morrison*'s second prong. Pet. App. 27a-33a. The court explained that a securities transaction is "domestic" under *Morrison*'s second prong when the buyer or seller "'incur[s] irrevocable liability'" for the transaction in the United States. *Id.* at 28a (quoting *Absolute Activist Value Master Fund Ltd.* v. *Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012)). The court observed that petitioner had acknowledged that the ADRs at issue were purchased in the United States, and that "an amended complaint could almost certainly" make "specific factual allegations" about the place where the transacting parties had incurred irrevocable liability. *Id.* at 30a-31a. The court concluded that, under *Morrison*, the existence of such a "domestic transaction" would be a sufficient ground for finding Section 10(b) to be applicable. *Id.* at 32a.

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[4] The petition appendix appears to omit that Judge Wardlaw was the author of the panel opinion. See 896 F.3d 933, 936.

Petitioner contended that "the existence of a domestic transaction is necessary but not sufficient" to establish a permissible domestic application of Section 10(b), and that respondents were required to allege a "connection between [petitioner] and the * * * ADR transactions." Pet. App. 31a. The court of appeals rejected that argument, explaining that extraterritoriality analysis under *Morrison* turns on "the location of the transaction," not on whether a "foreign entity was * * * engaged in the transaction." *Id.* at 31a-32a. The court explained that, although petitioner "may ultimately be found not liable for causing the loss in value to the ADRs," that possibility "does not mean that the Act is inapplicable to the transactions." *Id.* at 32a.

Petitioner relied in part on the Second Circuit's decision in *Parkcentral Global Hub Ltd.* v. *Porsche Automobile Holdings SE*, 763 F.3d 198 (2014) (per curiam), which held that Section 10(b) did not apply to claims that involved a domestic transaction but were "so predominantly foreign as to be impermissibly extraterritorial." *Id.* at 216; see Pet. App. 32a-33a. The court of appeals explained that *Parkcentral* was "distinguishable on many grounds," including that it "did not involve ADRs." Pet. App. 32a. The court also viewed *Parkcentral*'s reasoning as "contrary to" *Morrison*, because the Second Circuit had relied "heavily on the foreign location of the allegedly deceptive conduct, which *Morrison* held to be irrelevant to [Section 10(b)]'s applicability," and because the *Parkcentral* court had adopted "an open-ended, under-defined multi-factor test akin to the vague and unpredictable tests that *Morrison* criticized." *Id.* at 33a (citations omitted).

Petitioner also asserted that it had played no role in the ADR transaction. Although the court of appeals

viewed that assertion as irrelevant to the extraterritoriality analysis, it described the argument as "directly relevant to whether [respondents] have sufficiently alleged an Exchange Act claim." Pet. App. 34a. The court explained that an actionable Section 10(b) claim must allege that the fraud occurred "*in connection with* the purchase or sale" of a security. *Ibid.* (quoting 15 U.S.C. 78j(b)). The court found respondents' allegations concerning that requirement insufficient because the FAC had failed to allege key facts about the ADR transactions and petitioner's potential involvement in them. *Id.* at 35a. The court concluded, however, that "allowing leave to amend would not be futile," and it accordingly remanded the case with instructions that the district court "allow [respondents] to amend their complaint." *Id.* at 37a.

DISCUSSION

The court of appeals correctly held, based on a straightforward application of this Court's decision in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), that respondents' claims involve a permissible domestic application of Section 10(b). The *Morrison* Court held that Section 10(b)'s "exclusive focus" is on "purchases and sales of securities in the United States," and that Section 10(b) "applies" to such "domestic transactions." *Id.* at 266-268. Respondents' purchases of ADRs in the United States were undisputedly "domestic transactions" and thus fall within *Morrison*'s description of Section 10(b)'s permissible domestic scope. *Id.* at 267. Petitioner contends in part that it cannot be held liable under Section 10(b) because it played no role in the U.S. transactions. As the court of appeals correctly explained, however, petitioner's involvement or non-involvement in the unsponsored ADRs has no bearing

on the extraterritoriality analysis, but instead should be considered in determining whether petitioner's fraud was "in connection with" respondents' ADR purchases, 15 U.S.C. 78j(b), a determination that the court of appeals left for the district court on remand.

The current procedural posture of this case, in which the court of appeals held that respondents' FAC was deficient but that respondents should be given leave to amend, provides a further reason to deny certiorari. If this Court granted review, the only question properly before it would be whether respondents' FAC should have been dismissed *with prejudice* because leave to amend would be futile. Contrary to petitioner's contention, moreover, no clear conflict exists between the decision below and the Second Circuit's decision in *Parkcentral Global Hub Ltd.* v. *Porsche Automobile Holdings SE*, 763 F.3d 198 (2014) (per curiam). And while petitioner and its foreign amici raise significant comity concerns, numerous safeguards—including Section 10(b)'s "in connection with" requirement, the need for plaintiffs to show reliance and loss causation in private securities actions, and personal-jurisdiction constraints—ensure that the decision below will not disrupt foreign securities regulation in any meaningful way. The petition for a writ of certiorari should be denied.

A. The Decision Below Is Correct

The court of appeals correctly held that respondents' claims involve a permissible domestic application of Section 10(b), Pet. App. 27a-33a, and the court correctly remanded for amendment of the complaint and further analysis of whether respondents can adequately allege fraud by petitioner "in connection with" respondents' unsponsored-ADR purchases, *id.* at 34a (quoting 15 U.S.C. 78j(b)). Petitioner's contrary arguments are

inconsistent with *Morrison*, the text of Section 10(b), and subsequent developments in this Court and Congress.

1. The court of appeals correctly applied Morrison

a. Federal statutes "apply only within the territorial jurisdiction of the United States" unless "a contrary intent appears." *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949). Until this Court decided *Morrison*, lower courts generally had agreed that the "text of Section 10(b) sheds little light on when a transnational securities fraud falls within the statute's substantive prohibition." U.S. Amicus Br. at 13, *Morrison*, *supra* (No. 08-1191) (U.S. *Morrison* Br.). Rather than applying the presumption against extraterritoriality, courts "sought to ascertain Section 10(b)'s transnational reach by considering" perceived congressional intent. *Id.* at 15; see, *e.g.*, *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972) (Friendly, J.). The courts "uniformly agreed that Section 10(b) can apply to a transnational securities fraud either when fraudulent conduct has effects in the United States or when sufficient conduct relevant to the fraud occurs in the United States." U.S. *Morrison* Br. at 15. That approach was called the "conduct-and-effects test." *Morrison*, 561 U.S. at 275 (Stevens, J., concurring in the judgment).

In *Morrison*, the Court considered whether Section 10(b) applied to an alleged fraud involving misstatements, made by the Florida subsidiary of an Australian bank, that were reflected in the bank's financial statements and relied on by Australian investors who purchased the bank's shares on the Australian Stock Exchange. 561 U.S. at 251-253. In deciding that question, the Court thoroughly repudiated the conduct-and-effects test. *Id.* at 255-261. The Court explained that the test

"disregard[ed] * * * the presumption against extraterritoriality," was "not easy to administer," and had produced "unpredictable and inconsistent" results. *Id.* at 255, 258, 260. The Court instead relied exclusively on the text of the statute, found "no affirmative indication * * * that § 10(b) applies extraterritorially," and "therefore conclude[d] that it does not." *Id.* at 265.

The Court then considered the argument that the claims involving alleged misstatements by the Florida subsidiary of the Australian bank "seek no more than domestic application" of Section 10(b). *Morrison*, 561 U.S. at 266. In rejecting that contention, the Court stated that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Ibid.* The Court explained that "Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" *Ibid.* (quoting 15 U.S.C. 78j(b)). Accordingly, the Court concluded, "it is * * * only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." *Id.* at 267.[5]

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[5] The *Morrison* litigation initially involved claims by "an American investor in [the bank's] ADRs." 561 U.S. at 252 n.1. Those claims were not before this Court. *Ibid.* The bank, however, conceded that "the securities law extends to protect domestic investors who purchase securities in domestic markets," including investors "who purchased the [b]ank's ADRs." *In re National Austl. Bank Sec. Litig.*, No. 03-cv-6537, 2006 WL 3844465, at *2 n.6 (S.D.N.Y. Oct. 25, 2006); see Resps. Br. at 9, 51, *Morrison*, *supra* (No. 08-1191). And in holding that applying Section 10(b) to the Australian transactions would be impermissibly extraterritorial, the Court was careful to distinguish the domestic ADR purchases. See 561 U.S. at 273

In subsequent decisions, the Court has confirmed *Morrison*'s approach to identifying the permissible "domestic application[s] of [a] statute" that does not apply extraterritorially. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016). Courts "do this by looking to the statute's 'focus.'" *Ibid.* "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *Ibid.* By contrast, "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Ibid.*; see *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) ("[If] the conduct relevant to [the statute's] focus occurred in United States territory * * * , then the case involves a permissible domestic application of the statute.") (citation omitted).

b. The court of appeals correctly applied *Morrison* to respondents' claims. The *Morrison* Court concluded that, because the text of Section 10(b) "exclusively focuses on '*domestic* purchases and sales,'" the provision applies only to "'domestic transactions'" in securities. Pet App. 27a (quoting *Morrison*, 561 U.S. at 268). The court of appeals construed that holding to require it "to examine the location of the transaction"—respondents' purchase of the unsponsored Toshiba ADRs. *Id.* at 31a-32a. Given the absence of any dispute that those ADRs "were purchased in the United States," *id.* at 30a, the court correctly held that respondents' claims did not

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("This case involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States.").

seek an impermissible extraterritorial application of Section 10(b).[6]

Petitioner's core contention below was that "the existence of a domestic transaction is necessary but not sufficient under *Morrison*." Pet. App. 31a. In petitioner's view, a permissible domestic application of Section 10(b) also requires a "connection between" the defendant and domestic "transactions." *Ibid.* As the court of appeals correctly explained, that assertion conflates the question whether Section 10(b) *applies* with the question whether it has been *violated*. *Id.* at 32a. Respondents can ultimately obtain relief only if they show that petitioner engaged in fraud "in connection with the purchase or sale of" a security. 15 U.S.C. 78j(b). But the fact "that [petitioner] may ultimately be found not liable for causing the loss in value to the ADRs does not mean that [Section 10(b)] is inapplicable to the transactions." Pet. App. 32a.

In arguing that a defendant's connection (or lack thereof) to the relevant securities transaction bears on the extraterritoriality analysis, *Morrison*, 561 U.S. at 266-267, petitioner seeks to revisit *Morrison*'s holding

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[6] The court of appeals held that, for purposes of determining whether a securities transaction is "domestic," *Morrison*, 561 U.S. at 267, the transaction occurs where the parties incur "irrevocable liability" for the sale, Pet. App. 28a (quoting *Absolute Activist Value Master Fund Ltd.* v. *Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012)). The court also observed that respondents' FAC did not contain "specific factual allegations regarding where the parties to the transaction incurred irrevocable liability." *Id.* at 30a. The court stated, however, that in light of the locations of the relevant actors, "an amended complaint could almost certainly allege sufficient facts to establish that [respondents] purchased [their] Toshiba ADRs in a domestic transaction." *Id.* at 31a. Petitioner does not dispute that aspect of the decision.

as to the "focus" of Section 10(b). The *Morrison* Court explained that "the focus of the Exchange Act"—the "object[] of the statute's solicitude"—was not on the "deceptive conduct" of the defendant, but on "purchases and sales of securities in the United States." *Id.* at 266; see *RJR Nabisco*, 136 S. Ct. at 2100 ("[*Morrison*] concluded that the statute's focus is on domestic securities transactions."). That was not the only conceivable reading of the statute; the government argued that Section 10(b) should apply when the case involves "significant conduct in the United States that is material to" a fraudulent transaction abroad. *Morrison*, 561 U.S. at 270 (quoting U.S. *Morrison* Br. at 16). But the Court rejected that interpretation, holding instead that Section 10(b)'s "exclusive focus [is] on *domestic* purchases and sales." *Id.* at 268. Petitioner's argument here is irreconcilable with that square holding. Because the "conduct in this case that is relevant to [Section 10(b)'s] focus clearly occurred in the United States," the claims involve a "domestic application" of the statute. *WesternGeco*, 138 S. Ct. at 2138.

c. Relying on passages in *Parkcentral*, several of petitioner's amici contend that, even when a particular suit involves domestic securities transactions, application of Section 10(b) will still be impermissibly extraterritorial unless the defendant has engaged in some degree of domestic conduct with respect to the transaction. See, *e.g.*, Chamber of Commerce Amicus Br. 9 (Chamber Amicus Br.); Securities Indus. & Fin. Mkts. Ass'n & Competitive Enter. Inst. Amici Br. 7-10 (SIFMA Amici Br.) The court of appeals correctly rejected that line of argument as "contrary to Section 10(b) and *Morrison*." Pet. App. 33a. The *Parkcentral* court relied on amorphous and atextual presumptions

about Congress's intent, and it acknowledged that its approach would not "reliably determine when a particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial," 763 F.3d at 216-217, thus replicating several principal defects that this Court identified in earlier Second Circuit law, see *Morrison*, 561 U.S. at 258-259. Likewise, the suggestion that courts should distinguish between "allegedly deceptive conduct by *domestic* actors and allegedly deceptive conduct by *foreign* actors," SIFMA Amici Br. 12, runs squarely into *Morrison*'s holding that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States," 561 U.S. at 266. The Ninth Circuit in this case rightly declined the invitation to adopt a repackaged version of the conduct-and-effects test that the *Morrison* Court had rejected, and that raises the same practical concerns as the lower courts' pre-*Morrison* approach.

Efforts to reintroduce the conduct-and-effects test also contradict Congress's judgment. Shortly after the decision in *Morrison*, Congress amended the Exchange Act to codify the conduct-and-effects test in actions brought by the SEC or the Justice Department. See p. 5 n.3, *supra*; *SEC* v. *Scoville*, 913 F.3d 1204, 1215 (10th Cir. 2019). Applying a conduct-and-effects test to private securities-fraud actions would negate Congress's decision to limit that amendment to government enforcement suits. Cf., *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion.") (citation omitted; brackets in original).

2. The court of appeals correctly remanded this case to allow the district court to determine whether respondents can adequately allege a Section 10(b) violation

After correctly holding that respondents' claims involve a permissible domestic *application* of Section 10(b), the court of appeals correctly remanded to the district court to address whether respondents can adequately allege a *violation* of Section 10(b). Pet. App. 33a-37a. In particular, the court noted that Section 10(b) requires an allegation that a defendant's fraud was "*in connection with*" the securities transaction that underlies the claim. *Id.* at 34a (quoting 15 U.S.C. 78j(b)).

Here, Section 10(b) requires respondents to allege and ultimately prove that petitioner "use[d]" or "employ[ed]" its fraudulent accounting practices "in connection with" respondent's purchase of the unsponsored ADRs in the United States. 15 U.S.C. 78j(b); see, *e.g.*, *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002). The court of appeals held that respondents have not yet made adequate allegations on this point. Pet. App. 35a. And many of the strongest arguments advanced by petitioner and its amici against allowing this suit to go forward, although currently framed as grounds for concluding that application of Section 10(b) to these facts would be impermissibly extraterritorial, may be more persuasive in challenging respondents' efforts to satisfy the "in connection with" requirement. *Ibid.*; see, *e.g.*, Chamber Amicus Br. 20-21 (suggesting that ADR purchases were a "domestic event to which [petitioner had] no connection"). In particular, the distinction between sponsored and unsponsored ADRs, while irrelevant to

the determination whether respondents' ADR purchases were "domestic" for purposes of *Morrison*, 561 U.S. at 267, may be relevant to whether petitioner "use[d]" or "employe[d]" fraudulent accounting practices "in connection with" respondents' purchases of the unsponsored ADRs, 15 U.S.C. 78j(b). For example, if petitioner can show that it "ch[o]se to list and transact [its] securities only in foreign markets precisely to avoid U.S. securities regulation and litigation," it would be more difficult for respondents to prove that petitioner's accounting fraud was "in connection with" domestic ADR purchases. Pet. 35 (emphasis omitted).

To succeed on their claims, moreover, private securities-fraud plaintiffs like respondents also must establish materiality, scienter, reliance, and loss causation. See *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341-342 (2005). Petitioner's contention that it had no involvement in the unsponsored ADRs at issue here may be relevant to those elements of respondents' cause of action. For example, the loss-causation inquiry is based on common-law proximate-causation principles, *id.* at 344-345, which require consideration of the directness of the link between the defendant's conduct and the plaintiff's injury, see *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992), as well as the foreseeability of the harm, see *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 532-533 (1983). Respondents therefore must demonstrate that the injuries they suffered were not impermissibly indirect and were foreseeable results of petitioner's conduct. Although the United States takes no position on whether respondents can satisfy

those requirements, the need for those additional inquiries further belies petitioner's predictions that the decision below will have extreme practical effects.

B. This Court's Review Is Not Warranted

In addition to the fact that the court of appeals' decision is correct, this Court's review is unwarranted for at least three reasons. The decision below is interlocutory, it does not create a square circuit conflict, and as a straightforward application of *Morrison* it has limited practical significance.

1. The decision below is interlocutory, and proceedings on remand may either eliminate the need for further review or clarify the proper disposition of this case

As explained above, the court of appeals agreed with the district court that respondents' FAC should be dismissed, but held that the dismissal should be without prejudice because "allowing leave to amend would not be futile." Pet. App. 37a. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (*VMI*) (Scalia, J., respecting the denial of the petition for writ of certiorari), and that approach would be especially appropriate here.

Respondents still face numerous hurdles, and their claims could fail for a number of reasons, see pp. 16-17, *supra*, thereby obviating any need for this Court's review. If respondents ultimately prevail on the merits, petitioner can "rais[e] the same issues" that are presented here "in a later petition, after final judgment has been rendered." *VMI*, 508 U.S. at 946. Such review, moreover, would focus on a new complaint drafted in light of the court of appeals' expressed concerns, and on

a developed factual record clarifying, among other salient factors, the connection between petitioner and the unsponsored ADRs. See Pet. App. 36a. That record would give the Court a more accurate picture of whether imposition of liability would give rise to the serious concerns expressed by petitioner (Pet. 30-38) about forum shopping, disruption of foreign securities regulation, and setbacks to the market for ADRs.

If the Court grants certiorari now, by contrast, the question before it will not be whether respondents' FAC adequately alleged a Section 10(b) violation. Both courts below concluded (albeit for different reasons) that the FAC's allegations are inadequate, and respondents have not challenged that conclusion. Rather, the Court's review will be limited to the question whether leave to amend respondents' FAC would be futile—*i.e.*, whether a new complaint *could* be drafted that would adequately allege a domestic violation of Section 10(b), as well as the other elements of a private Section 10(b) claim. The abstract and hypothetical nature of that question weighs against review at this time.

2. The decision below does not create a square circuit conflict

Petitioner relies heavily (Pet. 19-33) on an asserted conflict between the decision below and the Second Circuit's decision in *Parkcentral*. Although there is some tension between the two opinions, no square conflict exists.

Parkcentral involved a distinctive financial instrument, a security-based swap agreement. The Second Circuit cautioned that it was not "lay[ing] down * * * a rule that will properly apply the principles of *Morrison* to every future § 10(b) action involving the regulation of securities-based swap agreements," let alone to suits involving "more conventional securities." 763 F.3d at 217.

The decision below stated that "*Parkcentral* is distinguishable on many grounds," including that it "did not involve ADRs" but rather security-based swap agreements that have numerous different characteristics. Pet. App. 32a; see *Parkcentral*, 763 F.3d at 207 n.9 (explaining that the case did not involve ADRs).

To be sure, the understanding of *Morrison* reflected in the decision below is inconsistent with the *Parkcentral* court's statement that a domestic securities transaction is "not alone sufficient" to establish a domestic application of Section 10(b). 763 F.3d at 215; see Pet. App. 33a; pp. 13-16, *supra*. But that statement in *Parkcentral* predated this Court's decisions in *RJR Nabisco* and *WesternGeco*, which indicated that when claims involve domestic conduct "relevant to [a] statute's focus * * * [,] then the case involves a permissible domestic application." *RJR Nabisco*, 136 S. Ct. at 2101; see *WesternGeco*, 138 S. Ct. at 2136. In light of that clarification from intervening decisions of this Court, the Second Circuit may revisit *Parkcentral*'s contrary statements. See, *e.g.*, *Lotes Co.* v. *Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014). Indeed, it is unclear what precedential scope *Parkcentral* currently has within the Second Circuit. See, *e.g.*, *Myun-Uk Choi* v. *Tower Research Capital LLC*, 890 F.3d 60, 66 (2d Cir. 2018) (explaining that a "plausible allegation" of a domestic transaction was "a sufficient basis to resolve the extraterritoriality question," without citing *Parkcentral*); *Giunta* v. *Dingman*, 893 F.3d 73, 82 (2d Cir. 2018) (relying on *Parkcentral* but concluding that claims were permissibly domestic).

3. The decision below has limited significance

Despite petitioner's efforts (Pet. 33-36) to imbue the decision below with broad significance, that decision is

a straightforward application of this Court's analysis and holding in *Morrison*. Many of the concerns expressed by petitioner and its amici amount to disagreements with *Morrison* or policy arguments in favor of pre-*Morrison* law. Those concerns are properly directed to Congress, which could reinstate the pre-*Morrison* framework (as it has for actions brought by the Commission and the United States, pp. 15-16, *supra*), but they are not a sound basis for this Court's review.

Petitioner and some amici suggest that the decision below could have adverse consequences for foreign securities regulation and international comity. See Pet. 5, 35-36; Ministry of Econ., Trade & Indus. of Japan Amicus Br. 2; Gov't of the U.K. of Gr. Brit. & N. Ir. Amicus Br. 4-14 (U.K. Amicus Br.). Those concerns are weighty, and the United States takes them seriously. In the government's view, however, the decision below is unlikely to produce such adverse effects, and proceedings on remand may further clarify its limited practical scope. See pp. 16-18, *supra*.

Of particular relevance to the concerns raised by some foreign amici, foreign issuers may be able to obtain dismissal of some securities-fraud suits based on lack of specific personal jurisdiction.[7] U.S. courts can exercise specific personal jurisdiction over a foreign defendant only if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Helicopteros Nacionales de Colombia, S. A.* v. *Hall*, 466 U.S. 408, 414 (1984) (citation and internal quotation marks omitted; brackets in

[7] In this case, petitioner has disclaimed any argument based on personal jurisdiction. Pet. App. 34a n.23.

original).[8] Among other requirements, specific personal jurisdiction "must arise out of contacts that the 'defendant *himself*' creates with the forum." *Walden* v. *Fiore*, 571 U.S. 277, 284 (2014) (citation omitted). If a foreign issuer can establish that it sought "*to avoid*" the U.S. securities market (Pet. 35), or that its participation in that market was "*involuntary*" (U.K. Amicus Br. 8), a court will not likely find specific personal jurisdiction. Cf. *Pinker* v. *Roche Holdings Ltd.*, 292 F.3d 361, 373 (3d Cir. 2002) (finding specific personal jurisdiction where foreign issuer sponsored ADRs and took "affirmative steps to market" them in the United States).

As explained above, moreover, numerous other safeguards—including the "in connection with" element of a Section 10(b) cause of action and the loss-causation and reliance requirements—may prevent the imposition of liability in private securities actions. 15 U.S.C. 78j(b); see pp. 16-17, *supra*. Evidence that a particular foreign issuer sought to avoid contact with the United States may prevent private plaintiffs from satisfying those requirements, which further diminishes the prospect that private securities actions in the United States will meaningfully interfere with foreign securities regulation.

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[8] Federal courts can also exercise personal jurisdiction over a defendant pursuant to "general jurisdiction," but only if the defendant's contacts with the forum "are so 'continuous and systematic' as to render" the defendant "essentially at home in the forum." *Daimler AG* v. *Bauman*, 571 U.S. 117, 127 (2014) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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