2018 WL 6445989 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

TOSHIBA CORPORATION, Petitioner,

v.

AUTOMOTIVE INDUSTRIES PENSION TRUST FUND; New England Teamsters & Trucking Industry Pension Fund, Respondents.

No.

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December 6, 2018.

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

Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner

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***1** INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It ***2** represents 300,000 direct members, and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive

Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community, including cases under the federal securities laws.

The Chamber has a strong interest in the issues presented in this case. Private securities class action litigation generally imposes a significant burden on its members and adversely affects their access to capital markets. In addition, the Chamber's members transact business and make investments around the world. The Chamber accordingly has a strong interest in the proper application of the presumption against extraterritoriality to the federal securities laws, and also to many other federal statutes.

SUMMARY OF ARGUMENT

The petition correctly points out that there is now a direct conflict between the Second and Ninth Circuits on the question of whether a domestic securities transaction is a sufficient, and not simply a necessary, condition for establishing a domestic claim for relief under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5. This brief does not repeat the circuit-split arguments. Instead, it focuses on two points: the conflict between the Ninth Circuit's holding and this Court's extraterritoriality jurisprudence; and the far-reaching importance of this question across a variety of statutory schemes.

***3** In this case, unlike *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the securities transactions were domestic. The rub is that the defendant - Toshiba, a Japanese company, had *nothing* to do with them. The plaintiffs purchased *un*sponsored American Depositary Receipts (ADRs) referencing Toshiba stock, derivative securities that trade in the United States and entitle owners to receive Toshiba shares. Toshiba's shares trade on the Tokyo Stock Exchange and the Nagoya Stock Exchange - and *not* in the United States. Toshiba had nothing to do with issuing the ADRs or listing the ADRs or setting up the ADR facility or depositing the Toshiba shares in the ADR facility. Indeed, it had nothing to do with the plaintiffs' ADR purchases at all.

Yet the Ninth Circuit held below that the presumption against extraterritoriality posed no barrier at all to plaintiffs' claims - not even a speed bump. Under *Morrison,* the court of appeals held, "we are to examine the location of the transaction" - and nothing else whatsoever. Pet. App. 31a-32a.

That holding cannot be reconciled with this Court's conception of the presumption against extraterritoriality. In *Morrison* itself, the Court stressed that the presumption was a powerful one - that it was neither a "timid sentinel" nor a "craven watchdog" that "retreat [s] to its kennel whenever *some* domestic activity is involved in the case." 561 U.S. at 266. And here, Toshiba engaged in *no domestic activity* whatsoever that had *anything* to do with plaintiffs' domestic transactions. For that reason, it matters not that the "focus" of Section 10(b) is on domestic securities transactions. In *Kiobel* and *RJR,* this Court recognized that if " 'all the relevant conduct' regarding th[e] [alleged] violations 'took place outside the United ***4** States,' we [do] not need to determine, as we did in *Morrison,* the statute's 'focus.' " *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016) (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013)). The reason for that rule is that, if a defendant hasn't done anything in the United States, then it hasn't done anything that a domestically oriented statue can properly regulate or punish. And so here, because Toshiba engaged in no relevant domestic conduct, the imposition of class-action liability on Toshiba would amount to impermissible extraterritorial regulation of its *purely foreign conduct* no matter how one defines the statute's "focus." If the presumption against extraterritoriality means anything at all, it means that the decision below should be reviewed and reversed.

The decision below also warrants this Court's review because of its practical importance. Billions of dollars have been invested in unsponsored ADRs, and cases like this one could potentially impose billions of dollars in liability on foreign defendants who had nothing to do with the creation of those instruments. Beyond this, as *Parkcentral Global Hub Ltd.*

v. Porsche Automobile Holdings SE, 763 F.3d 198, 215 (2d Cir. 2014), illustrates, the principle established below threatens potentially limitless liability for foreign defendants who have nothing to do with other kinds of domestic derivative instruments that reference foreign securities. On top of all that, an analogous issue has arisen in cases involving derivatives regulated under the Commodity Exchange Act. See, *e.g., Prime Int'l Trading, Ltd. v. BP plc,* No. 17-2233 (2d Cir.) (to be argued Dec. 10, 2018).

***5** Finally - and most significantly - this case is important because its disposition affects not only the securities laws, and not only the commodities laws, but also potentially *all* federal statutes presenting extraterritoriality questions. That is because, as is shown below, the *ultimate* question here is not simply about domestic securities transactions and Section 10(b), it is about how the second step of *Morrison's* framework for extraterritoriality analysis - the statutory "focus" step - applies to *all* federal statutes. If an event or activity relevant to the "focus" of a domestically-oriented statute is domestic, is that *sufficient* to establish a domestic application of the statute, or merely necessary?

That is the bottom-line question presented by this case. And it potentially affects all manner of federal statutes that may be construed under the presumption against extraterritoriality. This simple case - where the transactions are unquestionably domestic, and the statutory "focus" is unquestionably the transactions - is the perfect vehicle to resolve it. The Court should take the opportunity to decide this critical question about the presumption against extraterritoriality now.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONTRADICTS THIS COURT'S EXTRATERRITORIALITY JURISPRUDENCE.

The question presented in this case is whether a domestic securities transaction is *sufficient,* and not simply necessary, to state a claim under Section 10(b) and Rule 10b-5. That question may also be stated more generally, in terms of how the presumption against extraterritoriality applies to *all* federal statutes: if the element corresponding to a domestically- ***6** oriented statute's "focus" occurred in the United States, then does the case automatically involve a permissible domestic application of that statute - regardless of whether foreign defendants had any connection with that "focus"? By answering that question affirmatively here, the Ninth Circuit fundamentally contradicted this Court's jurisprudence on the presumption against extraterritoriality.

A. Applying United States laws to defendants that engaged in *no* relevant domestic conduct is extraterritorial.

According to the Ninth Circuit, a foreign defendant that engaged in *no* relevant conduct in the United States, and did not even direct any relevant conduct toward the United States, can nevertheless face substantial class-action liability in the United States - simply because *others* have brought the defendant's securities to the United States, or have created derivatives of those securities here. The Ninth Circuit's decision effectively extends the U.S. federal securities laws to regulate far more than domestic transactions in unsponsored ADRs - transactions in which Toshiba played *no* part, directly or indirectly - and interprets those laws to regulate substantive conduct in *Japan.*

That result cannot be squared with the presumption against extraterritoriality, as articulated time and again by this Court. Above all else, the presumption stands for the proposition that "[f]oreign conduct is [generally] the domain of foreign law." *Microsoft Corp. v. AT&T Corp.,* 550 U.S. 437, 455 (2007) (citation and internal quotation marks omitted). It commands courts to " 'presum[e] that United States law governs domestically but does not rule the world.' " *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108, 115 (2013) (quoting *Microsoft,* 550 U.S. at 454); *accord, e.g.,* ***7** *RJR Nabisco, Inc. v. European Cmty.,* 136 S. Ct. 2090, 2100 (2016). The Court has taken pains, moreover, to emphasize the power of this venerable canon of construction: Neither a "timid sentinel" nor a "craven watchdog,"

the presumption against extraterritorial application does not "retreat[] to its kennel whenever *some* domestic activity is involved in the case." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010).

If the presumption against extraterritoriality doesn't go away if *some* domestic activity is involved, then it certainly can't go away when a defendant - like Toshiba here - has engaged in *no* relevant "domestic activity," and has not even engaged in relevant *foreign* activity directed at the United States. And if that is so, then the purely foreign conduct of such a defendant simply cannot be regulated by a federal statute unless the presumption against extraterritoriality has been overcome - in other words, unless there appears " 'the affirmative intention of the Congress clearly expressed' " to regulate that foreign defendant's foreign conduct. *Id.* at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*"Aramco"*) (citation and internal quotation marks omitted)). To hold otherwise would apply a purely domestic statute extraterritorially to a foreign actor's foreign conduct in defiance of the presumption - which is precisely what the Ninth Circuit has done, with the purely domestic Securities Exchange Act, to Toshiba, in Japan.

Beyond this, as the Second Circuit in *Parkcentral* pointed out, the fact that this case involves the purely foreign conduct of a foreign defendant heightens a major concern underlying the presumption against extraterritoriality. One reason why *Morrison* " 'reject[ed] the notion that the Exchange Act reaches conduct ***8** in this country affecting exchanges or transactions abroad,' was not that Congress lacked the power to do so." *Parkcentral,* 763 F.3d at 215 (quoting *Morrison,* 561 U.S. at 269). Rather, it was the danger of conflict with foreign law: "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.' " *Morrison,* 561 U.S. at 269 (quoting *Aramco,* 499 U.S. at 256).

If that concern holds when there is relevant "conduct in this country" by the defendants, *id.,* as there was in *Morrison,* it carries even greater force in a case like this one, where there is *none.* For here, if plaintiffs' trades in *un*sponsored ADRs could create liability for Toshiba, "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, in the absence of any congressional provision addressing the incompatibility of U.S. and foreign law nearly certain to arise" - "a result *Morrison* plainly did not contemplate and that the Court's reasoning does not … permit." *Parkcentral,* 763 F.3d at 215-16.

For all of these reasons, the Ninth Circuit's decision flies in the face of this Court's extraterritoriality jurisprudence. This Court should grant certiorari and hold that a domestic transaction is necessary, but *not* sufficient, to state a claim for relief - that some significant transaction-facilitating domestic conduct by the defendants, or at the very least, domesticallydirected transaction-facilitating conduct, is also required. In the case of ADRs, that necessary conduct might consist of setting up the depositary facility in the United States, as National Australia Bank had done ***9** in *Morrison* (see pp. 11-12, below); with the *Parkcentral*-type derivatives, the necessary conduct might entail participating in the transactions, or some other significant involvement advancing them. Whatever the precise standard may be, there must be *some* significant additional element of transaction-related domestic conduct - or else application of Section 10(b) and Rule 10b-5 would be impermissibly extraterritorial. Such a requirement, of course, would be entirely consistent with the text of Section 10(b), which prohibits the "use or employ[ment] … [of] any manipulative or deceptive device or contrivance" violative of SEC rules, "in connection with" the purchases and sales that *Morrison* deemed the focus of the statute. 15 U.S.C. § 78j(b); *see* 561 U.S. at 266-67. The "ordinary assumption about the reach of domestically oriented statutes," of course, is that these "phrase[s] appl[y] domestically, not extraterritorially." *Small v. United States,* 544 U.S. 385, 390-91 (2005).

This Court should not be deterred from such a holding by any suggestion that this would restore the circuits' various "conduct" tests that *Morrison* jettisoned. *Cf.* Pet. App. 33a. Any such suggestion would be fallacious. Apart from the

fact that a standard of the sort described here would vastly differ from the abrogated tests, the failing of those tests was *not* that they considered a defendant's conduct, but that they did so *without* considering either the presumption against extraterritoriality or even the text of Section 10(b). Instead of looking at the statute, and applying the presumption to the statute, the pre-*Morrison* lower-court cases tried to *guess,* on *policy* grounds, with no "textual or even extratextual basis," whether, " 'if Congress had thought about the point,' it would have wanted § 10(b) to apply." *Morrison,* 561 U.S. at 257, 258 (quoting ***10** *Leasco Data Processing Equip. Corp. v. Maxwell,* 468 F.2d 1326, 1337 (2d Cir. 1972)). The result of *that* misguided judicial policymaking foray was a capricious hash of extraterritorially overreaching litigation, *see id.* at 257 - one that disrupted international comity, as various foreign governments vigorously pointed out to the Court, *see id.* at 269.

A defendant's conduct certainly must remain relevant after *Morrison* - but in the proper way: Conduct must be considered in light of the presumption against extraterritoriality. By emphasizing that "United States law … does not rule the world," *RJR,* 136 S. Ct. at 2100 (citation and internal quotation marks omitted), that "[f]oreign conduct is [generally] the domain of foreign law," *Microsoft,* 550 U.S. at 455, and that a statute may "apply to foreign conduct" *only* when "Congress has affirmatively and unmistakably instructed that [it] will," *RJR,* 136 S. Ct. at 2100, the Court has taught that any construction of a statute that regulates a defendant's purely foreign conduct, in the absence of an affirmative and unmistakable Congressional instruction to that effect, must be rejected. To hold that there must be at least *some* significant and relevant domestic conduct before a domestic statute may properly apply thus entirely comports with - indeed, reflects the *essence of* - the presumption against extraterritoriality.

B. *Morrison's* "focus" analysis does not support the decision below.

Nothing about the "focus" analysis adopted by this Court in *Morrison* and applied in later cases, when correctly understood, supports the Ninth Circuit's reasoning below.

***11** When it considered the territorial scope of Section 10(b) and Rule 10b - 5 in *Morrison,* this Court actually addressed only what *exceeded* that scope in that particular case - and did *not* definitively establish what came *within* it. For as the case came to this Court, the only question presented was whether the three Australian named plaintiffs who had purchased National Australia Bank's "Ordinary Shares" - equity securities that "traded on the Australian Stock Exchange Limited and on other foreign securities exchanges, but not on any exchange in the United States" - stated a claim. 561 U.S. at 251. The Court concluded that they did not, because "all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States." *Id.* at 273. The Court accordingly affirmed the dismissal of the Australian named plaintiffs' claims. *Id.*

There was an ADR purchaser lurking in the background - the first named plaintiff, Robert Morrison - but he *didn't* have a "live claim." Morrison was an American who had purchased National Australia's ADRs on the New York Stock Exchange. *Id.* at 252 n.1; *In re Nat'l Austl. Bank Sec. Litig.,* No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *9 (S.D.N.Y. Oct. 25, 2006), *aff'd sub nom. Morrison v. Nat'l Austl. Bank Ltd.,* 547 F.3d 167 (2d Cir. 2008), *aff'd,* 561 U.S. 247 (2010). The district court dismissed his claims for an unrelated reason, involving the Private Securities Litigation Reform Act's so-called "look-back" damages-limitation provision, 15 U.S.C. § 78u-4(e)(1). *See* 2006 WL 3844465, at *9. In the Second Circuit, Morrison did not challenge that dismissal, and he thus forfeited any grounds for appeal he may have had. 547 F.3d at 170 n.3. Still, as this Court noted: "Inexplicably, Morrison continued to be listed as

[an appellant] in the ***12** Court of Appeals and [as a petitioner] here," 561 U.S. at 252 n.1, and he thereby secured his place in transnational legal lore.

Morrison's dismissed and forfeited claim foreshadowed this case. In contrast to the unsponsored Toshiba ADRs at issue here, National Australia had *sponsored* the ADRs Morrison had bought - it had set up the ADR facility, and, in doing so, had registered both the ADRs and the underlying ordinary shares both on the NYSE and with the SEC.[2] Having done all that, National Australia Bank conceded in the district court[3] and again at oral argument in this Court that there was no doubt that National Australia Bank's sponsored ADR holders could sue. Transcript of Oral Argument at 34-35, *Morrison,* 561 U.S. 247 (No. 08-1191).[4]

Against that backdrop, *Morrison* instructed that courts should look to "the 'focus' of congressional concern" and to whether that element, under the circumstances, was domestic or not. 561 U.S. at 266. For Section 10(b), that "focus" was "purchases and ***13** sales of securities in the United States." *Id.* The Court concluded that "only transactions in securities listed on domestic exchanges, and domestic transactions in other securities," are governed by Section 10(b). *Id.* at 267. And this certainly meant that transactions *outside* the United States could not provide a basis for liability under Section 10(b) and Rule 10b-5, which was enough to dispose of the Australian named plaintiffs' claims, and thus the case.

Some may have construed this holding to mean that the converse was true as well: that, if a domestic transaction were found, then the statute would automatically apply. The presumption would dissolve, and there would be no remaining extraterritoriality defense. One commentator even went so far as to suggest that the Court had created a new "effects test" - that, under *Morrison,* "Section 10(b) reaches fraudulent conduct anywhere in the world so long as the sale occurs on an American exchange or otherwise takes place in the United States."[5] *Cf.* ***14** *RJR Nabisco v. European Community,* 136 S. Ct. at 2101 ("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 ...."). But that is a clear misreading of *Morrison.* For the only issue before the Court in *Morrison* was whether claims based on foreign purchases *exceeded* the territorial scope of Section 10(b). The Court thus had *no* occasion to decide that any other claims (such as Morrison's) came *within* the statute's scope and constituted a permissible domestic application. *See* *Parkcentral,* 763 F.3d at 215. That question simply wasn't presented.

Indeed, to the extent this Court's extraterritoriality cases say anything specific about that question, they make clear that the Ninth Circuit got it wrong. The Court in *Kiobel* and *RJR* arguably anticipated the situation in this case when it noted that the "focus" analysis can be dispensed with *altogether* when the defendants have engaged in *no* relevant conduct in the United States. As this Court explained, if " 'all the relevant conduct' regarding th[e] [alleged] violations 'took place outside the United States,' we [do] not need to determine, as we did in *Morrison,* the statute's 'focus.'b1" *RJR,* 136 S. Ct. at 2101 (quoting *Kiobel,* 569 U.S. at 124). The reason for this rule is simple. If the defendants haven't done anything in or directed at the United States, then there isn't anything for a domestic statute to regulate or to punish - and no possibility of a proper domestic application of the domestic statute. Which is precisely the case here.

***15 II. THIS CASE IS EXCEPTIONALLY IMPORTANT IN NUMEROUS CONTEXTS, BECAUSE IT IMPLICATES HOW *MORRISON'S* "FOCUS" FRAMEWORK APPLIES TO *ALL* FEDERAL STATUTES.**

The Court should review the decision below not only because it creates a circuit split and contravenes this Court's extraterritoriality precedents, but also because the case presents a question of extraordinary importance. The decision below affects not only unsponsored ADRs, but, as *Parkcentral* illustrates, all manner of derivative investment

instruments as well - and thus affects global markets involving *trillions* of dollars a year. Beyond this, derivatives trading faces regulation not only under the federal securities laws, but under the Commodity Exchange Act. Analogous questions under the CEA have already arisen in the lower courts about the application of *Morrison* and the presumption against extraterritoriality. Finally, because the resolution of this case dictates how *Morrison's* "focus" analysis applies across the board, this case potentially affects the interpretation of *all* federal statutes invoked in transnational disputes.

To begin with, even if this case affected only unsponsored ADRs, it would have tremendous significance and would warrant this Court's review. As of September 30, 2017, there were 1,642 unsponsored ADR programs in existence, referencing foreign securities issued by companies from 40 foreign countries. Deutsche Bank, Unsponsored ADRs: 2017 Market Review 2-5, *available at* http://bit.ly/2reeuk3 (Pet. App. 412a, 414-16a.) Institutional investments in these programs at the end of September 2017 amounted to $11.9 billion, *id.* at 3, 8 (Pet. App. 412a, 418-19a) - up ***16** from $7.9 billion in 2016, and $3.6 billion in 2008, *id.* at 8 (Pet. App. 418-19a).

That remarkable growth in unsponsored ADR investments was facilitated by a relatively recent change in SEC rules. As the petition correctly observes, the SEC in 2008 decided to make it much easier to establish ADR programs without foreign issuers' participation or permission. *See* Pet. 36; 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) (Pet. App. 282a, 333a). The SEC did this because "several significant developments," "includ[ing] the increased globalization of securities markets," "advances in information technology," and the growth in "the number of foreign companies engaged in cross-border activities," had all "increased the amount of U.S. investor interest in the securities of foreign companies." *Id.* at 52,753 (Pet. App. 292a).

In particular, demand for unsponsored ADRs "was driven by smaller US asset managers, as well as those running retail funds, managed accounts and exchange traded funds that are restricted to buying US-traded securities." Steve Johnson, *Unprecedented demand for unsponsored ADRs,* Fin. Times, June 1, 2014, *available at* https://on.ft.com/2RoePfb. " 'Smaller fund managers want to do what the bigger managers can,' " *id.,* and, by enabling the smaller managers indirectly to make foreign investments through U.S.-traded securities, unsponsored ADRs permit the smaller managers to do just that.

As a result, unsponsored ADRs matter a great deal, and so this case would matter a great deal even if it implicated nothing else. The amounts invested - and, ***17** if the Ninth Circuit's decision stands, the potential liabilities for unwitting foreign issuers of the underlying foreign securities - are enormous in and of themselves. And if the threat of liability becomes too large, some foreign issuers may, as the petition points out, try to take steps that, under SEC Rule 12g3-2, would prevent depositaries from setting up unsponsored ADR facilities with their securities (for example, by refusing to publish English-language financial statements). *See* Pet. 38; 17 C.F.R. § 240.12g3-2(b). That would frustrate the SEC's policy of encouraging the development of unsponsored ADRs. One way or the other, because of its potential effects on the market for unsponsored ADRs, this case is an important one.

But the impact of the case goes far beyond that. The Ninth Circuit's reasoning affects derivatives of foreign reference securities as well, as that court's explicit condemnation of *Parkcentral* makes clear. And the world of derivatives is vast and seemingly limitless, comprehending virtually any imaginative contractual relationship whose financial result could be made to hinge upon another, separate event or investment. The swaps referencing Porsche's shares provide merely one example. The derivatives market is huge, so large that arguably no one knows precisely how large it really is. According to one set of estimates, as of 2017, the total notional value of derivatives was $480 trillion, and the total market value was $15 trillion. Int'l Swaps & Derivatives Ass'n, *How Big is the Derivatives Market?* (Sept. 28, 2017), http://bit.ly/ 2zwySS0. As the facts of *Parkcentral* make clear, any number of American investors (or speculators, or bettors, call them what you will) could enter into private investment contracts that turn on the stock price of any unwitting foreign company anywhere in the world, and they could agree to payouts in any ***18** amount, not limited by even the actual market capitalization of the selected foreign company. By the reasoning of the Ninth Circuit's decision below, these investors

could potentially sue that foreign company under the United States federal securities laws. The potential for liability under the federal securities laws seems limitless.

And *not* just under the federal securities laws. Derivatives can implicate the Commodity Exchange Act if commodities are involved, and so the same kind of issues could arise under that law as well. Suppose, for example, some people were alleged, through purely foreign conduct, to have manipulated the European price of a European commodity on a European market - say, Brent crude oil. And then suppose that conduct had "ripple effects" around the world - including in the United States, where some parties traded oil futures whose prices may have been affected by the price manipulation in Europe. Do those domestic transactions mean, notwithstanding the presumption against extraterritoriality, that the U.S. futures purchasers can sue the alleged manipulators under the Commodity Exchange Act?

That's *not* a hypothetical - it's an actual case pending in the Second Circuit, to be argued on December 10, 2018. *Prime Int'l Trading, Ltd. v. BP plc,* No. 17-2233 (2d Cir. docketed July 20, 2017). The defendants and their *amici curiae* (including the Chamber) argue, among other things, that *Parkcentral* controls, and that the plaintiffs' CEA claims are foreclosed by the presumption against extraterritoriality. [6] The plaintiffs and *amicus curiae* the CFTC argue precisely the ***19** contrary - that there's no extraterritoriality issue because the plaintiffs are suing to recover losses on domestic transactions, and that *Parkcentral* should not apply. [7] *Prime International Trading,* which thus could be controlled by this case, does not stand alone: at least one other Commodity Exchange Act case currently being litigated in the lower courts presents similar issues as well. [8]

Finally, this case raises implications far beyond the securities and commodities laws. For as explained above, the question presented in this case can be phrased in terms of the presumption against extraterritoriality writ large: If an element corresponding to a domestically oriented statute's "focus" occurred in the United States, then does the case automatically involve a permissible domestic application of that statute - regardless of whether foreign defendants had any connection with that "focus"? Put more succinctly, is an event that coincides with the domestic "focus" of congressional concern a sufficient, and not simply necessary, condition for avoiding the presumption?

That this question could arise in a myriad of contexts is illustrated by the variety of statutes whose territorial scope this Court has defined in recent years ***20** under the presumption against extraterritoriality: the Patent Act (twice); [9] the Stored Communications Act; [10] RICO; [11] the Alien Tort Statute; [12] the Securities Exchange Act; [13] the wire-fraud statute; [14] and the Civil Rights Act of 1964. [15] For their part, the courts of appeals have been called upon to apply the presumption to, among other laws, the Bankruptcy Code, [16] the Foreign Corrupt Practices Act, [17] the Comprehensive Drug Abuse Prevention and Control Act of 1970, [18] the Trafficking Victims Protection Reauthorization Act, [19] the Internal Revenue Code of 1954, [20] and the Commodity Exchange Act. [21]

With these statutes or others, cases analogous to this one could well arise - where the "focus" of the statute corresponds to a domestic event to which the ***21** defendants have no connection. This case accordingly presents an important question as to how *Morrison's* "focus" framework should work as to all federal statutes. And with its simple and straightforward factual and legal predicate - the securities transactions having indisputably been domestic, and securities transactions indisputably being the statutory "focus" under *Morrison* - there could not possibly be a better vehicle to address this critical question about the presumption against extraterritoriality.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 6, 2018

Footnotes

1 No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae,* its members, or its counsel contributed money to fund the briefs preparation or submission. Counsel of record for the parties received notice at least ten days before the due date of *amicus's* intent to file this brief, and all parties have consented to the filing of this brief.

2 Supplemental Joint Appendix at 58, *Morrison,* 561 U.S. 247 (No. 08-1191) (SEC Form 20-F filed by National Australia Bank).

3 *See* 2006 WL 3844465 at *2 n.6 ("Defendants do not advance the same jurisdictional *[sic]* defense against the Lead Domestic Plaintiff … who purchased the Bank's ADRs.")

4 "CHIEF JUSTICE ROBERTS: Under these same facts if you had - altering according to the hypothetical, you had U.S. plaintiffs who purchased National Australia Bank ADRs on the New York exchange, you don't doubt that they can sue, do you?
"MR. CONWAY: No, and in fact, we told the district court, we did not move to [dismiss] on extraterritoriality grounds the claims of Mr. Morrison, who inexplicably is still here.
"CHIEF JUSTICE ROBERTS: Right."

5 William S. Dodge, Morrison's *Effects Test,* 40 Sw. L. Rev. 687, 690-91 (2011); *see also* William S. Dodge, *The Presumption Against Extraterritoriality After Morrison,* 105 Am. Soc'y Int'l L. Proc. 396, 397-98 (2011). *But see* George T. Conway III, *Extraterritoriality's Watchdog After Morrison v. National Australia Bank,* 105 Am. Soc'y Int'l L. Proc. 394, 396 (2011)

(*Morrison's* " 'focus' analysis was about restricting what can be considered *domestic:* it was an effort to demonstrate why particular domestic conduct was *not* enough to cause extraterritoriality's watchdog to lose its bite.... *Morrison* should thus be understood to mean that having domestic conduct that coincides with the domestic 'focus' of congressional concern is a necessary, but not always sufficient, condition for avoiding the presumption"); George T. Conway III, *Applying* Morrison: *Statutory "Focus" and "Context,"* N.Y.L.J., May 30, 2012 (same).

6 *See* Joint Brief for Defendants-Appellees BP America, Inc., *et al.,* at 19-39, *Prime Int'l Trading, Ltd. v. BP plc,* No. 17-2233 (2d Cir. filed Jan. 31, 2018) (ECF no. 154); Brief for the Chamber of Commerce of the United States of America *et al.* as *Amici Curiae* at 7-24, *Prime Int'l Trading, Ltd. v. BP plc,* 17-2233 (2d Cir. Nov 7, 2018) (ECF no. 242).

7 *See* Brief of Appellants at 43-59, *Prime Int'l Trading, Ltd. v. BP plc,* No. 17-2233 (2d Cir. filed Nov 1, 2017) (ECFno. 114); Brief for *Amicus Curiae* U.S. Commodity Futures Trading Commission at 11-28, *Prime Int'l Trading, Ltd. v. BP plc,* No. 17-2233 (2d Cir. filed Nov 22, 2017) (ECF no. 146).

8 *See In re London Silver Fixing, Ltd., Antitrust Litig.,* No. 14 md 2573 (VEC), 2018 WL 3585277, at *20-*23 (S.D.N.Y. July 25, 2018).

9 *WesternGeco LLC v. ION Geophysical Corp.,* 138 S. Ct. 2129 (2018); *Microsoft,* 550 U.S. 437.

10 *United States v. Microsoft Corp.,* 138 S. Ct. 1186 (2018).

11 *RJR,* 136 S. Ct. 2090.

12 *Kiobel,* 569 U.S. 108.

13 *Morrison,* 561 U.S. 247.

14 *Pasquantino v. United States,* 544 U.S. 349 (2005).

15 *Aramco,* 499 U.S. 244.

16 *In re Picard,* No. XXXXXXX (2d Cir. argued Nov. 16, 2018).

17 *United States v. Hoskins,* 902 F.3d 69, 95-97 (2d Cir. 2018).

18 *United States v. Vasquez,* 899 F.3d 363, 373-78 (5th Cir. 2018), *petition for cert. filed,* No. 18-6672 (U.S. Nov. 13, 2018).

19 *Adhikari v. Kellogg Brown & Root, Inc.,* 845 F.3d 184, 200-01 (5th Cir. 2017).

20 *Validus Reinsurance, Ltd. v. United States,* 786 F.3d 1039, 1046-50 (D.C. Cir. 2015).

21 *Loginovskaya v. Batrachenko,* 764 F.3d 266, 270-75 (2d Cir. 2014).

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