No. 08-1191

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE NATIONAL ASSOCIATION OF SHAREHOLDER AND CONSUMER ATTORNEYS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The National Association Of Shareholder And Consumer Attorneys ("NASCAT"), as *amicus curiae*, respectfully urges this Court to grant Petitioners' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.[1]

IDENTIFICATION OF AMICUS CURIAE

NASCAT is a nonprofit membership organization founded in 1988. NASCAT's member law firms represent investors (both institutions and individuals) in securities fraud and shareholder derivative cases throughout the United States. NASCAT has previously filed *amicus curiae* briefs in this Court in cases involving the construction and application of the federal securities laws.[2]

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[1] In accordance with Rule 37.6, counsel for NASCAT represent that they authored this brief in whole and that no person other than the *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief.

[2] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006) (NASCAT-AARP); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) (AARP-NASCAT-Consumer

(Cont'd)

SUMMARY OF ARGUMENT

The cross-border functioning of financial markets is critical to the success of a global economy. Capital markets are not confined to national borders. The fact that capital markets transcend national boundaries, however, cannot mean that those markets transcend national laws. The United States has a vital interest in ensuring the smooth functioning of global capital markets and, in particular, preserving the integrity of its role in those markets. Moreover, the United States has an interest in ensuring that its securities laws prevent overseas actors from conducting activities within the United States in furtherance of global fraud.

Nearly all courts agree that the antifraud provisions of the United States securities laws apply to at least some transactions that occur even outside of the United States. A split has developed among the United States Circuit Courts of Appeal, however, as to the bounds of federal jurisdiction in class action lawsuits involving transnational securities fraud. This case squarely presents the issue for resolution by the Court.

Resolution of this conflict is highly important. Investors around the world have increasingly turned to the United States securities law to protect their

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Federation of America); *S.E.C. v. Zandford*. 535 U.S. 813 (2002) (AARP-NASCAT); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (NASCAT); *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286 (1993) (NASCAT).

interests. Recent examples of securities class actions predominantly composed of foreign plaintiffs include *Royal Ahold*, *Royal Dutch Shell*, and *Vivendi*, to name just a few. *See, e.g.*, *In re Vivendi Universal S.A. Sec. Litig.*, 241 F.R.D. 213 (S.D.N.Y. 2007); *Royal Dutch/Shell Transp. Sec. Litig.*, 380 F. Supp. 2d 509 (D.N.J. 2005); *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 351 F. Supp. 2d 334 (D. Md. 2004). Further, both domestic and foreign investors look to United States law to protect them both inside and outside of the United States. According to a 2008 Securities Litigation Study issued by PriceWaterhouseCoopers, federal securities law actions against foreign issuers reached an all time high in 2008 and, at the same time, "foreign investors and pension funds continue to seek recovery of losses from US courts by filing claims and participating in US class actions." PriceWaterhouseCoopers, *2008 Securities Litigation Study*, at 48, 55 (April 1, 2009), available at: http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF.

The reach of the United States securities laws has become increasingly important as news stories break almost daily about frauds of international scope, including the recent allegations of massive Ponzi schemes perpetrated by Bernie Madoff and Sir Allen Stanford which have deeply impacted investors worldwide.

The question of the reach of the United States securities law is ripe for resolution. As one commentator observed:

> Considering the stakes involved, one might expect the scope of subject-matter jurisdiction under the federal securities laws would by now be firmly established. Quite the opposite is true. *Congress has enacted no legislation on the point, the Supreme Court has declined to address the question, and lower federal courts apply in inconsistent and therefore unpredictable ways a pair of judicially created jurisdictional tests that are now almost 40 years old.*

Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 17 (2007) (emphasis added; footnote omitted).

Financial markets are well-served by accountability and predictability. This case will allow the Court to timely resolve a split among the circuits which undermines both.

ARGUMENT

A. A Three-Way Split Has Developed Among The Circuits

The Securities Exchange Act of 1934 (the "Exchange Act") is silent as to its extraterritorial application. Courts have recognized, however, that subject matter jurisdiction under the Exchange Act may extend to claims involving transnational securities frauds. *See, e.g., SEC v. Berger*, 322 F.3d 187, 192 (2d Cir. 2003). There are generally two tests employed to determine the reach of the antifraud provisions of the Exchange Act: the "effects test" and the "conduct test." *See Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995)

The "effects test" focuses on the situs of the effects of fraud. The effects test examines whether fraud which takes place abroad impacts shares registered on a national securities exchange and is detrimental to the interests of American investors. *Itoba*, 54 F.3d at 124.

The "conduct test" examines the situs of the conduct giving rise to fraud. The conduct test examines whether the conduct related to a securities transaction occurs predominantly within the United States even though the transaction takes place outside the United States. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 416(1)(d) (1987).

> "The conduct test does not center its inquiry on whether domestic investors or markets are affected, but on the nature of conduct within the United States as it relates to carrying out

> the alleged fraudulent scheme, on the theory that Congress did not want 'to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners.'"

Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir. 1983) (*quoting IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975)). The conduct test is directly at issue in this case.

A three-way split has developed among the Circuits as to the proper scope of jurisdiction under the Exchange Act where conduct within the United States results in fraud in connection with a transaction outside the United States. "The predominant difference among the circuits, it appears, is the degree to which the American-based conduct must be related causally to the fraud and the resulting harm to justify the application of American securities law." *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 665 (7th Cir. 1998).

The Third, Eighth and Ninth Circuits have held that jurisdiction may be exercised when conduct within the United States furthered the alleged fraud. *See S.E.C. v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977) (holding that jurisdiction exists "where at least some activity designed to further a fraudulent scheme occurs within this country."); *Cont'l Grain (Austl.) Pty. Ltd. v. Poe Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979) ("where defendants' conduct in the United States was in furtherance of a fraudulent scheme and was significant with respect to its accomplishment, . . . the district court

has subject matter jurisdiction."); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 424 (9th Cir. 1983) (adopting "the test used by the Third and Eighth Circuits" because it "advances the policies underlying federal securities laws.").

The Second, Fifth and Seventh Circuits have established a more restrictive test, holding that jurisdiction may be exercised only when conduct occurring within the United States directly caused the alleged losses. *Psimenos,* 722 F.2d at 1046 ("where conduct within the United States directly caused the loss . . . a district court have jurisdiction over suits by foreigners who have lost money through sales abroad.") (internal quotations omitted); *Robinson v. TCI/US W. Commc'ns., Inc.*, 117 F.3d 900, 906 (5th Cir. 1997) (adopting the Second Circuit test); *Kauthar SDN BHD*, 149 F.3d at 667 (jurisdiction is appropriate when "conduct occurring in the United States directly causes the plaintiff's alleged loss in that the conduct forms a substantial part of the alleged fraud and is material to its success.").

Finally, the District of Columbia Circuit has adopted the most stringent test, holding that jurisdiction is proper only "when the fraudulent statements or misrepresentations originate in the United States, are made with scienter and in connection with the purchase or sale of securities, and directly cause the harm to those who claim to be defrauded, even if reliance and damages occur elsewhere." *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987) (internal quotations omitted).

B. This Court Should Grant The Petition For Writ of Certiorari In Order To Resolve The Split

In its amicus brief submitted to the Second Circuit in this case, the Securities and Exchange Commission ("SEC") noted that the issue of jurisdiction for transnational fraud was in need of greater clarity.[3] Because of tension in the law, district courts have "largely resorted to engaging in case-by-case comparison of the specific fact patterns to those of existing Circuit precedent." *See* Appendix at 49a.

Both the SEC and NASCAT are dedicated to the protection of investors. Resolution of this jurisdictional issue will eliminate uncertainty which impacts this goal in the case of transnational fraud. There is no reason why a transnational fraud should be subject to jurisdiction under the Exchange Act in New Jersey but not New York.

Moreover, the Court should ensure that the United States not "be used as a base for effectuating the fraudulent conduct of foreign companies." *Tamari v. Bache & Co. S.A.L.*, 730 F.2d 1103, 1108 (7th Cir. Ill. 1984) (citations omitted). The United States has a critical interest in ensuring the integrity of its participation in global capital markets.

The current economic crisis will undoubtedly result in the continued uncovering of frauds, like the alleged Madoff and Stanford Ponzi schemes, where both the

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[3] The SEC's amicus brief submitted to the Second Circuit is attached as Appendix C to the Petition for Writ of Certiorari.

conduct and the effects occur around the world. This case presents an opportunity for the Court to clarify the reach of the United States securities laws at a time when many similar cases are at their inception. Without such clarification, the law will be subject to continued uncertainty and inconsistency.

CONCLUSION

For all of the foregoing reasons, NASCAT respectfully submits that the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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