IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IN RE INFINEON TECHNOLOGIES AG SECURITIES LITIGATION

JAMES DOLAN, on behalf of himself and all others similarly situated,

Plaintiffs-Appellees,

—v.—

INFINEON TECHNOLOGIES AG, INFINEON TECHNOLOGIES NORTH AMERICA CORP., ULRICH SCHUMACHER, and PETER J. FISCHL,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
Hon. James Ware, District Judge, Presiding
(D.C. Master File No. 5:04-cv-04156-JW)

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amici curiae the Securities Industry and Financial Markets Association and the Chamber of Commerce of the United States of America state that they have no parent corporations and that no publicly held corporation owns ten percent or more of their stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of more than 600 securities firms, banks, and asset managers in the United States and throughout the world. Its mission is to champion policies and practices that benefit investors and issuers, to expand and perfect global capital markets, and to foster the development of new products and services. SIFMA has offices in New York, Washington, D.C., and London, and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses and associations, with an underlying membership of more than 3,000,000 United States businesses and professional organizations of every size and in every economic sector and geographical region of the Nation. Chamber members transact business and raise capital throughout the United States and around the world. An important function of the Chamber is the representation of its members' interests by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

All parties have consented to the filing of this brief.

PRELIMINARY STATEMENT

The principal issue on this appeal is whether the so-called "conduct test" should be construed expansively to permit a "foreign-cubed" or "f-cubed" securities class action—an action in which *foreign* plaintiffs seek to recover fraud-on-the-market damages against a *foreign* issuer for trades that occurred on a *foreign* exchange. *Amici* SIFMA and the Chamber submit that this Court should *not* apply the conduct test at all. Instead, for the reasons that follow, the Court should instead apply a bright-line rule—a rule making clear that foreign-cubed cases should be resolved in foreign courts under foreign law, and not in American courts under the federal securities laws.[1]

First, the conduct test directly conflicts with the Supreme Court's current approaches to extraterritoriality and to implied rights of action. Specifically, the Supreme Court has repeatedly made clear—and most emphatically in recent years—that American law must ordinarily be construed to apply *only* in the United States. Federal courts "must assume" that "Congress … would *not* have tried to impose" its policies upon foreign countries "in an act of legal imperialism, through

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[1] The defendants' brief fully explains why the foreign plaintiffs have not met the conduct test, and those reasons will not be repeated here. In addition, although this brief will not address the issue, *amici* also agree with the defendants' contention that, because a United States class action judgment would have no preclusive effect in foreign countries, the f-cubed class should not have been certified. As the Chamber has explained elsewhere, American businesses have an acute interest in the proper resolution of that question. *See generally* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae*, *In re Vivendi Univ. S.A. Sec. Litig.*, No. 07-1463 (2d Cir. Apr. 17, 2007), *available at* http://bit.ly/3DLwvx.

legislative fiat." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004) (emphasis added). Accordingly, only if "the affirmative intention of the Congress" to apply a statute extraterritorially is "clearly expressed" may a statute apply extraterritorially. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted). No such intent may be found in the Securities Exchange Act; in fact, when it created the conduct test, the Second Circuit "freely acknowledge[d]" that the test had *no* basis in the "language in the statutes, or even in the legislative history." *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir. 1975).

The effect of the presumption against extraterritoriality is enhanced here, moreover, by the Supreme Court's strict interpretive approach to implied rights of action. Again, the touchstone is congressional intent. "The decision to extend the cause of action is for Congress, not for [the courts]," and, because it is a purely implied "judicial construct that Congress did not enact," "the § 10(b) private right should not be extended beyond its present boundaries." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772-73 (2008). The conduct test constitutes exactly the sort of impermissible extension the Court rejected in *Stoneridge*.

Second, the reasoning behind these interpretive canons confirms that the conduct test must be rejected. The presumption against extraterritoriality seeks to eliminate even the "*risk* of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165 (emphasis added). The conduct test creates exactly this sort of interference, as it "unjusti-

fiably permit[s] [foreign] citizens to bypass their own [home countries'] less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic … laws embody." *Id.* at 167. Beyond this, f-cubed litigation threatens exactly the sort of harm to the United States economy that the Supreme Court pointed to in refusing to expand the Section 10(b) implied right in *Stoneridge*: "Overseas firms with no other exposure to our securities laws could be deterred from doing business here," which, "in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets." 128 S. Ct. at 772. If the conduct test governs exposure to liability under United States law, foreign firms will avoid doing business here.

For these reasons, as set out below, the implied right of action under Section 10(b) should extend only to plaintiffs who purchased securities on American exchanges: "Courts should presume jurisdiction over all investors trading in a company's securities within the United States, and presume no jurisdiction for [Section 10(b)] lawsuits for foreign investors trading outside the United States." Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 465. This rule comports not only with the presumptions against extraterritoriality and against the expansion of the Section 10(b) implied right, but also with common sense and the reasonable expectations of investors. And it fits comfortably with this Court's prior private securities extraterritoriality decisions. Indeed, through its simplicity and clarity, this bright-line rule would best prevent American courts from becoming exactly

what this Court has emphatically said they should not become—the preferred "host for the world's victims of securities fraud." *Butte Mining PLC v. Smith*, 76 F.3d 287, 291 (9th Cir. 1996).

ARGUMENT

I. THE PRESUMPTIONS AGAINST EXTRATERRITORIALITY AND AGAINST EXPANDING THE SECTION 10(b) IMPLIED RIGHT BAR THE FOREIGN PLAINTIFFS' CLAIMS.

A. The presumption against extraterritoriality

The Supreme Court has consistently upheld the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply *only* within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (emphasis added; quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)). This "presumption that United States law governs domestically but does not rule the world," *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007), means that if American regulatory "policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat," and that courts must "ordinarily construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164, 169 (2004).

The presumption serves important purposes. *First*, it "'protect[s] against … unintended clashes between our laws and those of other nations which could result in international discord.'" *Gushi Bros. v. Bank of Guam*, 28 F.3d 1535, 1540 (9th Cir. 1994) (quoting *Aramco*, 499 U.S. at 248). *Second*, it "reflects the deference of courts to Congress, which 'alone has the facilities necessary to make fairly such … important policy decision[s].'" *Van Blaricom v. Burlington N. R.R. Co.*, 17 F.3d 1224, 1226 (9th Cir. 1994) (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). *Third*, it reflects "'the commonsense notion that Congress generally legislates with domestic concerns in mind.'" *ARC Ecology v. U.S. Dep't of the Air Force*, 411 F.3d 1092, 1097 (9th Cir. 2005) (quoting *Small v. United States*, 544 U.S. 385, 388 (2005); citation and internal quotation marks omitted).

The presumption may be overcome *only* by showing """the *affirmative* intention of the Congress *clearly* expressed."""" *Subafilms, Ltd. v. MGM-Pathe Commc'ns Co.*, 24 F.3d 1088, 1095 (9th Cir. 1994) (en banc) (emphasis added; quoting *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285)). Accordingly, before a court may apply a statute extraterritorially, it must "look to see whether 'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.'" *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285). The requirement of a "'clear expression' of Congressional intent to apply legislation extraterritorially" thus "mak[es] this

presumption difficult to overcome." *Van Blaricom*, 17 F.3d at 1226. "In essence, then, courts must resolve restrictively any doubts concerning the extraterritorial application of a statute." *ARC Ecology*, 411 F.3d at 1097. In short, if the text of a statute leaves *any* doubt as to whether Congress intended it to apply extraterritorially in a given case, the statute must be construed *not* to so apply.

And here the existence of such doubt is beyond question. In fact, the doubt is overwhelming: if there is one proposition here that cannot be disputed, it is that "the Securities Exchange Act is silent as to its extraterritorial application." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citation and internal quotation marks omitted), *petition for cert. filed*, 77 U.S.L.W. 3562 (U.S. Mar. 23, 2009) (No. 08-1191); *accord*, *e.g.*, *In re CP Ships Ltd. Sec. Litig.*, No. 08-16334, 2009 WL 2462367, at *3 (11th Cir. Aug. 13, 2009). Indeed, to the extent that any relevant evidence of legislative intent exists, it indicates that Congress "chose to protect *only* those investors whose trades occur *inside* the United States." Margaret V. Sachs, *The International Reach of Rule 10b-5: The Myth of Congressional Silence*, 28 COLUM. J. TRANSNAT'L L. 677, 681 (1990) (emphasis added).

Nor can the conduct test properly fill this void of legislative intent. For the 1970s courts that created that test were quite honest about what they were doing: they were applying their *own* policy preferences—*not* Congress's. The Second Circuit put it bluntly: "We freely acknowledge that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond." *Bersch v. Drexel Firestone, Inc.*,

519 F.2d 974, 993 (2d Cir. 1975). The cases applying the conduct test turned largely on courts' own "policy decision[s]," *Cont'l Grain (Austl.) Pty. Ltd. v. Pac. Oilseeds, Inc.*, 592 F.2d 409, 421 (8th Cir. 1979), were decided "for reasons that are essentially legislative," *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987), and were "based more on policy considerations than on the language of the securities statutes or the Supreme Court's teachings on extraterritoriality," *Robinson v. TCI/US W. Cable Commc'ns Inc.*, 117 F.3d 900, 906 (5th Cir. 1997). The courts were *guessing* at "what Congress *would have wished* if the[] problem[] [of extraterritoriality] had occurred to it." *Bersch*, 519 F.2d at 993 (emphasis added). In short, the conduct test arose from a "dubious" effort to "discern[] a purely hypothetical legislative intent." *Zoelsch*, 824 F.2d at 30.

But that is exactly what courts are *not* permitted to do under the Supreme Court's extraterritoriality cases. If a statute is silent on extraterritoriality, as here, that ends the matter; the law does not apply outside the United States. What courts think Congress might have done, or what courts think Congress should have done, is irrelevant; judges must not "forecast[] Congress' likely disposition" of the question—and must instead leave the issue "in Congress' court" for "focused legislative consideration." *Microsoft*, 550 U.S. at 458-59.

B. *Empagran* and *Microsoft*

The power and significance of the presumption against extraterritoriality are illustrated by the Supreme Court's two most recent decisions applying it. These cases involved *far stronger circumstances* than exist here for extraterritorial

application of United States law, because the statutes at issue in those cases—*unlike the silent statute at issue here*—actually provided for *some* degree of extra-territoriality. Yet in *both* cases, the Supreme Court *rejected* interpretations that would have given the statutes extraterritorial effect.

F. Hoffmann-La Roche v. Empagran upheld the dismissal of what essentially was an f-cubed antitrust case—a case involving foreign plaintiffs, foreign defendants, and foreign purchases and damages. The foreign plaintiffs invoked an *explicit statutory provision* that at least arguably supported their claim. They relied on a section of the Foreign Trade Antitrust Improvements Act of 1982 that specifically placed "within the Sherman Act's reach" conduct that "has a 'direct, substantial, and reasonably foreseeable effect'" on American commerce, where the effect "'gives rise to a [Sherman Act] claim.'" 542 U.S. at 162 (quoting 15 U.S.C. §§ 6a(1), (2)).[2]

Justice Breyer's majority opinion even noted that the foreign plaintiffs' interpretation was arguably "the more *natural* reading" of the language. *Id*. at 174 (emphasis added). The foreign plaintiffs had alleged a global price-fixing conspiracy in which "some of the anticompetitive price-fixing conduct alleged here took place in *America*," and they alleged that this global conspiracy, as a whole, had

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[2] The district court distinguished *Empagran* here because the FTAIA provides that the Sherman Act generally does not apply extraterritoriality, whereas the securities laws contain no such limitation. *See* Excerpts of Record 9 n.8. This holding stands the presumption against extraterritoriality on its head: it presumes that statutes *do* apply extraterritoriality unless Congress expressly states otherwise.

harmed *both* domestic and foreign purchasers. *Id.* at 159, 165 (emphasis in original). The foreign plaintiffs argued that, because the domestic effects of this global conspiracy had unquestionably "give[n] rise" to Sherman Act claims of American purchasers, the conspiracy as a whole was subject to the Sherman Act, and so foreign purchasers could sue as well. This was a decent textual argument, and more circuits than not had accepted it. *See id.* at 160-61 (noting circuit conflict).

Yet the Supreme Court *unanimously* reversed—and held that the foreign plaintiffs could not sue. Justice Breyer explained that "a purchaser in the United States could bring a … claim … based on domestic injury, but a purchaser in Ecuador could not bring a … claim based on foreign harm." *Id.* at 159. The Court so held, even though, as noted, "some of the anticompetitive price-fixing conduct alleged here took place in *America.*" *Id.* at 165 (emphasis in original). Justice Breyer rhetorically asked:

> Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?

Id. The answer, the Court held, was that "[w]e can find no good answer to the question." *Id.* at 166.

Microsoft v. AT&T, a patent case, similarly involved a substantial domestic connection and a statute explicitly providing for some degree of extraterritoriality—and yet, once again, the Court refused to give the statute extraterritorial effect.

As in *Empagran*, the plaintiff made an argument—quite a reasonable one—relying upon the actual text of the statute. AT&T sought to hold Microsoft liable for extra-territorial patent infringement on the basis of a provision in the Patent Act, 35 U.S.C. § 271(f), that "Congress enacted … *specifically to extend* the reach of United States patent law to cover certain activity *abroad*." *Microsoft*, 550 U.S. at 455 (emphasis added). Section 271(f) provides that anyone who "supplie[s] … from the United States" any of "the components of a patented invention," and thereby "actively induce[s] the combination of such components outside of the United States," is just as liable as anyone who induces such a combination "within the United States." *Id*. at 445 (quoting 35 U.S.C. § 271(f)(1)). The specific question presented was whether the "master" copy of software code shipped abroad could constitute a "component" under Section 271(f). On the basis of the statutory text alone, the Court found this a close question, observing that "*[p]lausible arguments can be made for and against*" the parties' competing constructions of Section 271(f). *Id.* at 442 (emphasis added).

But by a 7-1 vote, the Supreme Court ruled in favor of Microsoft—largely because of the presumption against extraterritoriality. Justice Ginsburg's majority opinion emphasized "[t]he presumption that United States law governs domestically but does not rule the world," as well as the fact that "'[f]oreign conduct is [generally] the domain of foreign law,' and … 'may embody different policy judgments'" than those made by Congress. *Id.* at 454-55 (citation omitted). Rejecting the argument that the presumption did not apply because Section 271(f)

specifically provided for extraterritorial application, the Court held that "'the presumption is not defeated … just because [a statute] specifically addresses [an] issue of extraterritorial application,'" but rather "remains instructive in determining the *extent* of the statutory exception." *Id.* at 455-56 (emphasis in original; citation omitted). The Court thus made clear that, even though it was addressing a statute that *expressly* provided for *some* degree of extraterritoriality, the presumption against extraterritoriality *still* required it to "*resist* giving the [statutory language] an expansive interpretation." *Id.* at 442 (emphasis added).

C. The presumption against expanding implied rights of action

Here, unlike the antitrust and patent laws at issue in *Empagran* and *Microsoft*, Section 10(b) is utterly silent on the question of extraterritoriality. It follows, without more, that under *Empagran* and *Microsoft* the foreign plaintiffs' bid to invoke Section 10(b) extraterritorially here must fail.

But there is more. Section 10(b) may be said to be *doubly* silent. Not only is it silent on extraterritoriality, it is also silent even as to its *domestic* application to private suits. The Section 10(b) private right is entirely "a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008).[3] Courts created the Section 10(b) implied right under an "*ancien regime*" of law "that held

[3] *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 729-30, 737 (1975) (describing the implied Section 10(b) private right as "a judicial oak which has grown from little more than a legislative acorn").

sway [over] 40 years ago," a regime under which federal courts indulged "the habit of venturing beyond Congress's intent" to invent unexpressed rights of action in order to better effectuate, in the policy calculations of judges, "'the congressional purpose' expressed by a statute." *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

But the Supreme Court has long since "abandoned that understanding" and "sworn off [that] habit," "ha[s] not returned to it since," and has repeatedly refused to accept "invitation[s] to have one last drink." *Id.* And so federal courts must hew strictly to the principle that judicial creation or expansion of an implied right "conflicts with the authority of Congress under Art[icle] III to set the limits of federal jurisdiction." *Stoneridge*, 128 S. Ct. at 772 (citations and internal quotation marks omitted). "Statutory intent" to create a private right is thus "determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander*, 532 U.S. at 286-87 (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 23 (1979), and *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979)).

And even though the implied right of Section 10(b) survives the fall of the *ancien regime*, the current approach nevertheless controls its scope. A strong presumption now exists against its expansion. As the Supreme Court explained in *Stoneridge*:

> *The decision to extend the cause of action is for Congress, not for us. Though it remains the law, the § 10(b) private right should not be extended beyond its present boundaries.*

128 S. Ct. at 773 (emphasis added). In short, the fact that the Section 10(b) private right is *implied* reinforces the presumption against extraterritoriality—and makes this case an even stronger case than *Empagran* and *Microsoft* for the application of that presumption. Accordingly, the foreign plaintiffs cannot invoke Section 10(b) extraterritorially here.

II. THE CONSIDERATIONS UNDERLYING THE PRESUMPTIONS AGAINST EXTRATERRITORIALITY AND EXPANDING THE SECTION 10(b) IMPLIED RIGHT REINFORCE THE PRESUMPTIONS' APPLICABILITY HERE.

A. The conflict with foreign law is manifest.

Before the district court, the plaintiffs casually dismissed the idea that extraterritorial application of Section 10(b) could interfere with the sovereign authority of other nations. They blithely argued that, because "[d]efendants could easily have complied with the antifraud laws of both the U.S. and Germany simply by not committing fraud under U.S. law," "there is no conflict between the laws of Germany and the laws of the U.S." in this case. Pl's.' Opp. to Def'ts' Mot. for Judgment on the Pleadings 21 (Nov. 14, 2008) (docket no. 261). And they suggested more broadly that, because foreign governments "'are generally in agreement that fraud should be discouraged,'" "international comity is less of a concern in the context of fraud." *Id.* (quoting *Nat'l Austl. Bank*, 547 F.3d at 175).

The Supreme Court squarely rejected indistinguishable arguments in *Empagran*. The Court observed that conflict could arise because foreign nations may impose differing legal standards and defenses, and because "even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies." *Empagran*, 542 U.S. at 167. The Court emphasized foreign governments' concerns "that to apply [American] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody." *Id.* And the Court squarely rejected the argument that proof of *actual* conflict with foreign law was needed to trigger the presumption against extraterritoriality. Instead, the Court held that it is the "*risk* of interference with a foreign nation's ability independently to regulate its own commercial affairs" that must be avoided. *Id.* at 165 (emphasis added).

Such interference with other nations' regulatory authority is manifest here. The design of a securities enforcement system poses a plethora of policy questions that can be, and have been, answered differently by different nations' regulatory regimes. For example: Should public enforcement be supplemented with private lawsuits at all? If so, what are the elements of a private claim? What information is material? What are the duties of disclosure? What level of scienter should be required to establish liability? Must a plaintiff show reliance? If so, how? Should a "fraud-on-the-market" presumption of reliance apply, or must actual, "eyeball" reliance be proven? Should an issuing company, and hence its cur-

rent shareholders, pay damages for losses suffered by shareholders who did not purchase their shares from the company but from other shareholders on the open market? What is the standard for causation? How do you measure damages? Should there be a "lookback" cap on losses, limiting damages on the basis of a recovery in a security's price after it drops? Who can be sued? Should specialized tribunals hear the cases? Or juries? What are the statutes of limitation and repose? Should class actions be allowed? Opt-out? Or opt-in? Who decides what for the class? Should losers pay winners' attorneys' fees? Should contingency fees be allowed? Other sovereign nations have decided these questions for themselves—and *not* the way the United States has decided them.[4]

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[4] For example, "[w]hen adopting securities class action mechanisms, EU member states have taken divergent approaches in an attempt to avoid the procedural flaws of U.S.-style securities class actions." Stefano M. Grace, *Strengthening Investor Confidence in Europe: U.S.-Style Securities Class Actions and the* Acquis Communautaire, 15 J. TRANSNAT'L L. & POL'Y 281, 283-84 (2006). In particular, Germany has adopted a potent group-litigation mechanism to be employed in securities cases, which was designed specifically as "a way to handle capital market mass proceedings *without transferring existing [procedures] from foreign jurisdictions, such as the American class action, into German law*." German Ministry of Justice, The German "Capital Markets Model Case Act," http://bit.ly/1nWnEP (emphasis added); *see also* Mark C. Hilgard & Jan Kraayvanger, *Class actions and mass actions in Germany*, LEGAL PRACTICE DIV. LITIG. COMM. NEWSLETTER (Int'l Bar Ass'n, London), Sept. 2007, at 40, *available at* http://bit.ly/1urIWK. Other nations have likewise taken approaches that diverge from the U.S. model. *See generally*, *e.g.*, Grace, 15 J. TRANSNAT'L L. & POL'Y at 290-300 (2006); Ted Allen, More Nations Open the Door to Securities Lawsuits (Mar. 7, 2006), *available at* http://bit.ly/pOFWm; Michael Duffy, *"Fraud on the Market": Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada and Australia*, 29 MELB. U. L. REV. 621, 639-63 (2005); Ted Allen, Interest in Class Actions Grows Outside the U.S. (June 14, 2005), *available at*
(footnote continued)

Indeed, "[m]ost other countries" distrust the American answers to these questions; they "tend to react negatively to the American litigation landscape" and in particular "view American class actions as a Pandora's box that they want to avoid opening."[5] The prevailing view among Europeans, for example, is that "U.S.-style class action litigation" is wasteful, unfair, fosters an undesirable "'litigation-driven society,'" and that "Europe neither needs nor wishes to import" the American system.[6] "U.S. entrepreneurial-style lawyering is viewed with hostility in many other countries," and "[w]hen coupled with class actions—whose opt-out mechanism is seen as contrary to public policy in most countries—it triggers particularly adverse reactions."[7]

(footnote continued)

http://bit.ly/HR73O; Peta Spender, *Securities Class Actions: A View from the Land of the Great White Shareholder*, 31 COMMON L. WORLD REV. 123, 135-45 (2002); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 418-32 (2002). Notably, no nation appears to have adopted the unique United States system of opt-out class actions based on a fraud-on-the-market presumption of reliance. *See*, *e.g.*, Duffy, 29 MELB. U. L. REV. at 639-40, 655 (discussing Canadian and Australian law).

5 Sherman, 52 DEPAUL L. REV. at 403.

6 Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 343, 346 (2001).

7 Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 63 (2007). Many foreign nations and legal scholars believe that opt-out class actions "violat[e] … the rights of absent class members," Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1580 (2005), and give plaintiffs' lawyers "too much leverage that may encourage large corporate defendants to settle 'speculative claims' in the form

(footnote continued)

F-cubed securities litigation thus supplants important policy choices made by foreign nations, and thus constitutes exactly the sort of "legal imperialism" the Supreme Court so roundly condemned in *Empagran*, 542 U.S. at 169. Indeed, "to the extent the United States seeks to regulate investment activity abroad, it cannot help but interfere with the regulatory systems of other countries."[8] F-cubed fraud-on-the-market class actions pose exactly the sort of danger threatened by the massive potential antitrust liability in *Empagran*. As one commentator has put it, "other countries may not view the United States as a 'good neighbor' when a billion-dollar [securities] class action settlement threatens the solvency of one of their major corporations."[9]

F-cubed litigation generates conflict with foreign law in other ways as well. It produces parallel, conflicting litigation between the same parties in foreign countries. *See*, *e.g.*, *In re CP Ships*, 2009 WL 2462367, at *1-*2 (objection to f-cubed United States class settlement by plaintiff in Canadian class litigation). It

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(footnote continued)

of 'legal blackmail,'" Grace, 15 J. TRANSNAT'L L. & POL'Y at 289. As a result, many foreign nations not only do not recognize opt-out class actions, they also deny preclusive effect to American class action judgments. *See*, *e.g.*, Buschkin, 90 CORNELL L. REV. at 1579-81. As noted above (p. 2 n.1), *amici* fully agree with the defendants' contention that, because a United States class judgment would not be preclusive abroad, the f-cubed class here should not have been certified.

[8] Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903, 914 (1998).

[9] John C. Coffee, Jr., *Securities Policeman to the World? The Cost of Global Class Actions*, N.Y.L.J., Sept. 18, 2008, at 5, 6; *see also* John C. Coffee, Jr., *Global Class Actions*, NAT'L L. J., June 11, 2007, at 12.

creates the risk that foreign countries might condone reciprocal litigation in foreign courts against American multinational companies—by subjecting those companies to securities litigation wherever they conduct operations, even if their shares are traded exclusively in the United States. It fosters arbitrariness and inequity—with foreign companies being subject to both United States and foreign laws for disclosures relating to their operations in the United States, but only to foreign laws for disclosures relating to their other operations.

And all of these conflicts are exacerbated by the conduct test's unpredictability. Under the conduct test, the "presence or absence of [a] factor which was considered significant" in one case "is not necessarily dispositive" in the next. *Cont'l Grain*, 592 F.2d at 414. As a result, the test has become not "a cohesive doctrine," but rather a set of "potentially incompatible statements of applicable rules," *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 346, 375 (S.D.N.Y. 2005), with "cases [being] decided on very fine distinctions," *In re Nat'l Austl. Bank Sec. Litig.*, No. 03 Civ. 6537 (BSJ), 2006 WL 3844465, at *4 (S.D.N.Y. Oct. 25, 2006), *aff'd*, 547 F.3d 167 (2d Cir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3562 (U.S. Mar. 23, 2009) (No. 08-1191).[10]

As the D.C. Circuit observed twenty years ago, "any test that makes jurisdiction turn on a welter of specific facts" is a test that is "difficult to apply and … inherently unpredictable, … thus present[s] powerful incentives for increased liti-

[10] *Compare*, *e.g.*, *CP Ships*, 2009 WL 2462367, at *5-*6, *with Nat'l Austl. Bank*, 547 F.3d at 176-77.

gation." *Zoelsch*, 824 F.2d at 32 n.2. Such uncertainty and increased litigation are exactly what have come to pass. Given the conduct test's "unpredictability," "the filing of foreign-cubed claims continues to increase," "generat[ing] excessive levels of conflict with other countries."[11] Unbridled international forum-shopping has resulted, with "major [American] plaintiffs' firms … open[ing] offices in Europe," and with foreign plaintiffs "shop[ping] for a U.S. forum … to take advantage of liberal discovery rules" and "more favorable law."[12] The conduct test is a recipe for precisely the sort of international legal conflict that so concerned the Supreme Court in *Empagran*.

B. Applying Section 10(b) to f-cubed litigation would harm American businesses and markets.

F-cubed securities litigation also threatens to harm United States businesses and markets. Because judges created the Section 10(b) private right, such harm is something this Court must consider as well. "[C]oncerns about the practical consequences of allowing recovery" under an implied right—such as the potential for "strike suits, and protracted discovery, with little chance of reasonable resolution by pretrial process"—are "good reasons to deny recognition to such claims in the absence of any apparent contrary congressional intent." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1105 (1991); *accord*, *e.g.*, *Stoneridge*, 128 S. Ct. at 772.

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[11] Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 67.

[12] *Id.* at 62, 66.

Without a doubt, private Section 10(b) litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general," *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975), and "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Such vexatiousness, exported through f-cubed litigation, threatens precisely the kind of harm that the Supreme Court in *Stoneridge* cited when it declined to broaden the scope of the Section 10(b) implied right there:

> Overseas firms with no other exposure to our securities laws could be deterred from doing business here. This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets.

Stoneridge, 128 S. Ct. at 772.

Under plaintiffs' theory here, if a foreign company conducted just five percent of its business in America, or issued just five percent of its stock in America, it would risk *global* fraud-on-the-market liability in the United States—liability provided for nowhere else in the world—for *all trading of its securities, all over the world.* That potential for massive liability creates a significant disincentive for foreign businesses to conduct business or to raise capital in the United

States.[13] And to the extent foreign firms decline to do either, that harms American businesses and citizens.

This is not mere conjecture. A report issued two years ago by New York City Mayor Michael Bloomberg and United States Senator Charles Schumer found that "the prevalence of meritless securities lawsuits" and the "increasing extraterritorial reach of US law" have caused growing concern among international businesses and have made them less likely to purchase assets in the United States.[14] Similarly, the Committee on Capital Markets Regulation, composed of distinguished members of academia and the business community, observed that "[f]oreign companies commonly cite the U.S. class action enforcement system as the most important reason why they do not want to list in the U.S. market."[15] Put another way, due to the potential for f-cubed litigation, foreign companies consid-

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[13] *See*, *e.g.*, W. Barton Patterson, Note, *Defining the Reach of the Securities Exchange Act: Extraterritorial Application of the Antifraud Provisions*, 74 FORDHAM L. REV. 213, 236-37 (2005); Kellye Y. Testy, *Comity and Cooperation: Securities Regulation in a Global Marketplace*, 45 ALA. L. REV. 927, 935 (1994); Louise Corso, Note, *Section 10(b) and Transnational Securities Fraud: A Legislative Proposal To Establish a Standard for Extraterritorial Subject Matter Jurisdiction*, 23 GEO. WASH. J. INT'L L. & ECON. 573, 601 (1989).

[14] MICHAEL R. BLOOMBERG & CHARLES E. SCHUMER, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP ii, 73 (2007), *available at* http://bit.ly/dA2kU.

[15] COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT 11 (2006), *available at* http://bit.ly/2nLtP; *see also*, *e.g.*, COMMISSION ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY, REPORT AND RECOMMENDATIONS 30 (2007) ("international observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing the U.S. markets"), *available at* http://bit.ly/qjDMQ.

ering whether to list securities or to do other business here may well conclude that "it is not worth risking potential liability in the *billions*" to do so.[16]

Again, all of these concerns are exacerbated by unpredictability of the conduct test. For without a coherent applicable standard that provides a "clear path towards the resolution of a jurisdictional challenge in a complex case," *Alstom*, 406 F. Supp. 2d at 375, foreign companies can only assume that any sort of activity in the United States will create the risk of massive f-cubed liability, or, at the very least, costly litigation brought by forum-shopping plaintiffs and lawyers. And that is bad for business in the United States.

III. THIS COURT SHOULD HOLD THAT SECTION 10(b) DOES NOT APPLY TO TRANSACTIONS ON FOREIGN EXCHANGES.

Accordingly, this Court should not construe Section 10(b) to apply to f-cubed actions. As in *Empagran*, foreign "purchaser[s] [alleging] foreign harm" against foreign defendants should be relegated to foreign law, even if that law is "less generous." *Empagran*, 542 U.S. at 159, 167. And the only claims that should be heard in United States courts are those of "purchaser[s] in the United States" who allege claims "based on domestic injury." *Id.* at 159. That is what "[t]he presumption that United States law governs domestically but does not rule the world" requires. *Microsoft*, 550 U.S. at 454. Put another way, "[c]ourts should presume jurisdiction over all investors trading in a company's securities within the

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[16] John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 304 (2007) (emphasis added).

United States, and presume no jurisdiction for [R]ule 10b-5 lawsuits for foreign investors trading outside the United States." Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 465; *accord* Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 68 (suggesting a "rule that simply limits subject-matter jurisdiction under the anti-fraud provisions to claims arising out of transactions on U.S. markets").

Such "a uniform, bright-line exchange-based" rule not only is required as a matter of law, but also makes sense: it would "provide[] an easily understandable and, importantly, intuitively appealing rule for investors" that "is likely to comport with most investors' a priori views on when U.S. laws apply (*i.e.*, primarily inside the United States)"; it would allow issuers and investors to "structure their transactions to apply the level of regulatory protection they desire"; it would "give[] courts a simple rule of thumb to follow in determining prescriptive jurisdiction"; and it would acknowledge the fact that "the United States simply lacks the ability to extend its jurisdiction around the world." Choi & Silberman, 2009 WIS. L. REV. at 465, 500-02; *see also* Buxbaum, 46 COLUM. J. TRANSNAT'L L. at 68-69.

An exchange-based rule also comports with this Court's precedent. The critical consideration in *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983), where this Court upheld the application of the federal securities laws, was the *location* where the fraudulent transaction was executed—in Los Angeles. This Court held that "*the execution of the agreement in Los Angeles* itself constituted an act that strongly supports our assertion of jurisdiction." *Id.* at 425 (emphasis added).

And it emphasized that the "actual signing of the agreement" was "significant, material and in furtherance of the fraudulent scheme." *Id.* Likewise, the dispositive fact in favor of applying American law in *Des Brisay v. Goldfield Corp.*, 549 F.2d 133, 136 (9th Cir. 1977), was that "the transaction in question … involved the improper use of securities of an American corporation which were registered and listed on a national exchange"—the American Stock Exchange, in New York—and "proximately resulted in the collapse of the American market" for those securities. *Id.* at 136.[17]

In contrast, this Court in *Butte Mining PLC v. Smith*, 76 F.3d 287 (9th Cir. 1996), *refused* to apply the federal securities laws because the transaction occurred *abroad*. In words that equally well describe the foreign purchases made by the foreign plaintiffs here, the Court in *Butte Mining* explained:

> *The sale occurred outside the United States*. Neither the purchaser nor the sellers were United States entities. The securities markets of the United States were neither used nor affected. The fraud alleged

[17] *SEC v. United Financial Group, Inc.*, 474 F.2d 354 (9th Cir. 1973), is not to the contrary; it was an SEC enforcement action, not a private claim under an implied right. The SEC's enforcement authority does not depend on the existence of any actual securities transaction: the agency may act prophylactically, *see SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 697 (9th Cir. 1978), and need not prove that "any investor actually relied on the misrepresentations or that the misrepresentations caused any investor to lose money," *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985); *cf. Empagran*, 542 U.S. at 170-71 (government may obtain broader relief than private parties). Moreover, the equitable relief in *United Financial* was directed at a "complex" of companies that were "directed and controlled as an integrated whole from the United States" and targeted "American citizens"—*including* "a number of shareholders with addresses in the United States." *United Fin.*, 474 F.2d at 356.

> was a fraud committed by foreign individuals on a foreign corporation *in a foreign country*.

Id. at 290 (emphasis added). As a result, the alleged fraud "was a transaction wholly outside the scope of our securities laws." *Id.* at 291.

As this Court explained in *Butte Mining*, the United States must not become "a host for the world's victims of securities fraud." *Id.* at 291. The only way to avoid that result is through a bright-line rule that makes clear that foreign purchasers who buy shares of foreign companies on foreign exchanges should bring their claims exactly where they should have expected to bring them—in foreign courts, and under foreign law.

CONCLUSION

To paraphrase one of Justice Breyer's rhetorical questions in *Empagran*:

> *Why should American law supplant Germany's own determination about how best to protect German and other foreign investors from allegedly fraudulent conduct engaged in significant part by a German company?*

Cf. 542 U.S. at 165. Here as well, there is "no good answer to the question." *Id.* at 166. It is respectfully submitted that the order of the district court should be reversed.

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 6,936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 9, 2009.

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