

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ROBERT MORRISON, ET AL., :

4 Petitioners :

5 v. : No. 08-1191

6 NATIONAL AUSTRALIA BANK :

7 LTD., ET AL. :

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9 Washington, D.C.

10 Monday, March 29, 2010

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:07 a.m.

15 APPEARANCES:

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17 Petitioners.

18 GEORGE T. CONWAY, III, ESQ., New York, New York; on
19 behalf of Respondents.

20 MATTHEW D. ROBERTS, Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; for
22 the United States, as amicus curiae, supporting
23 Respondents.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next this morning in Case 08-1191, Morrison v.
5 National Australia Bank.

6 Mr. Dubbs.

7 ORAL ARGUMENT OF THOMAS A. DUBBS

8 ON BEHALF OF THE PETITIONERS

9 MR. DUBBS: Mr. Chief Justice, and may it
10 please the Court:

11 Given that the issue of subject matter
12 jurisdiction appears not to be in dispute, the issues
13 before the Court today are:

14 First, the scope of section 10(b) of the
15 1934 Exchange Act when applied to alleged fraudulent
16 conduct with respect to financial information that is to
17 be sent to Australia for incorporation into the
18 financial statements of the Respondent, National
19 Australia Bank.

20 And second, the reasonableness of the
21 application of the statute under these circumstances and
22 the norms of enforcement pursuant to the private cause
23 of action or otherwise.

24 JUSTICE SCALIA: I guess there's also the
25 issue of whether, if everybody is agreed that it is not

1 a jurisdictional question, that's the end of the case.
2 I mean, as I recall, the other side says we shouldn't
3 get to the merits.

4 MR. DUBBS: Your Honor, it's our view that
5 that -- that is a possible outcome, which of course as I
6 understand it would leave -- leave the decision below
7 standing. We have urged in the supplemental brief that
8 it may want to remand for consideration of the change of
9 position of the Securities and Exchange Commission with
10 respect to the tests that they have --

11 JUSTICE SCALIA: But you are not -- you are
12 not pressing that?

13 MR. DUBBS: No, we still believe that the
14 best way to handle the case is to remand; but we leave
15 that for the Court's discretion.

16 JUSTICE GINSBURG: Why wouldn't that simply
17 be going through the motions? The Second Circuit put
18 the wrong label on it, but everything it said could have
19 been plugged into: Our decision is under Rule 12(b)(6)
20 rather than 12(b)(1)?

21 MR. DUBBS: Well, Your Honor, the question
22 and the issue is inherently somewhat speculative as to
23 what the Second Circuit would do, but we would rely not
24 necessarily only on the subject matter jurisdiction
25 issues being addressed -- and Your Honor is quite right

1 that they may say, well, the label's changed, but
2 everything else stays the same. What we particularly
3 thought might be instructive for this Court is to hear
4 what the Second Circuit that sits in our nation's
5 financial capital thought of a new fact, and that new
6 fact is that for the first time the Securities and
7 Exchange Commission has come in and said as a matter of
8 administrative deference the Court should defer to our
9 test in cases like that.

10 Sure, they have submitted amicus briefs in
11 the past. They have done lots of things. But this is
12 the first time they have said: We as the agency
13 responsible for the statute have said this is how courts
14 should handle the case. That's what's new and
15 different, but if Your Honors don't wish to proceed
16 along that line we are prepared to go forward on -- on
17 the merits here today.

18 JUSTICE SCALIA: Well, it seems to me that
19 isn't worth anything, right? I mean, that's -- they
20 haven't conducted a rulemaking or anything.

21 MR. DUBBS: Well, they haven't conducted --

22 JUSTICE SCALIA: They just -- just appeared
23 in court.

24 MR. DUBBS: Well, they haven't conducted a
25 full rulemaking that would be entitled to Chevron

1 deference.

2 JUSTICE SCALIA: Right.

3 MR. DUBBS: But they have done something
4 less than that. And whether it's entitled to deference,
5 Skidmore deference, or something lesser than that is an
6 open point. But so we leave it to the Court's decision
7 as to whether it is just --

8 JUSTICE SCALIA: Except that they don't come
9 out on your side anyway, do they?

10 MR. DUBBS: Well, Your Honor, they come out
11 on our side except for that last turn they make at the
12 end, where they -- they bring in the intervening clause
13 at the end of the last act. Other than that --

14 JUSTICE GINSBURG: How could they come down
15 on your side if they say there is no private right of
16 action?

17 MR. DUBBS: Well, they didn't say there was
18 no private right of action. What they said was there
19 was no private right of action in this case because of
20 their application of the intervening clause test, which
21 we submit was error and clear error in light of the
22 factors that have to go into the intervening --

23 JUSTICE SCALIA: We are only talking about
24 this case. I mean --

25 MR. DUBBS: Sorry?

1 JUSTICE SCALIA: We are only talking about
2 this case, right? If we send it back, we send it back
3 to have this case decided and they'd come out against
4 you in this case.

5 MR. DUBBS: They --

6 JUSTICE SCALIA: So what could -- and that
7 is going to change the Second Circuit's view of things,
8 the fact that, in addition to their initial opinion, it
9 has been reconfirmed, although on different grounds,
10 by -- by the government?

11 MR. DUBBS: Your Honor --

12 JUSTICE SCALIA: There is no reason to send
13 it back.

14 MR. DUBBS: Well, Your Honor, it's -- it's
15 up to the Court. I mean, it's your -- you're basically
16 educating -- making an educated guess as to whether the
17 Second Circuit would pay attention to the SEC. In the
18 past, they have. They may not now.

19 JUSTICE GINSBURG: Mr. Dubbs, you said
20 something that I thought quite revealing in this -- in
21 your brief. I mean, this case is Australian plaintiff,
22 Australian defendant, shares purchased in Australia. It
23 has "Australia" written all over it. And in your reply
24 brief you said: "If the Plaintiff is a foreign
25 securities purchaser as this one is, Sinochem makes it

1 clear that forum non conveniens may dictate dismissal of
2 an action brought in the U.S."

3 And taking that, why not -- of the
4 applicable laws to this transaction, to this alleged
5 fraud, isn't the most appropriate choice the law of
6 Australia rather than the law of the United States?

7 MR. DUBBS: No --

8 JUSTICE GINSBURG: Not just a question of
9 proper forum, but the proper law?

10 MR. DUBBS: No, Your Honor. We think that,
11 given the scope of section 10(b), American law can and
12 should be applied here. And we respectfully disagree
13 with the observation that this case has "Australia"
14 written all over it. Indeed, from our point of view it
15 has "Florida" written all over it because Florida is
16 where the numbers were doctored, Florida is where the
17 fraudulent conduct in putting the phony assumptions into
18 the valuation portfolio were done. Everything
19 happened --

20 JUSTICE GINSBURG: If all that were done and
21 it were never communicated, there wouldn't be any
22 violation.

23 MR. DUBBS: That's correct, Your Honor.

24 JUSTICE GINSBURG: And the communication was
25 done in Australia by the Australian bank.

1 MR. DUBBS: The communication was done
2 between Florida and -- and Australia, and the senior
3 management of HomeSide in Florida created those numbers
4 with the expectation and the knowledge that those would
5 go into the financial statement. So that means there is
6 substantial conduct in Florida in terms of the fraud.
7 They made the misrepresentation pursuant to what "make"
8 means, pursuant to the 1934 dictionary.

9 They engaged in hard-core fraudulent conduct
10 by doctoring the books, by putting the phony assumptions
11 into the computer model. Without that there wouldn't
12 have been a phony number. In one sense it's a one-issue
13 case, or a one-number case, which is the mortgage
14 servicing rights number that appears on -- on the
15 balance sheet at page 11 --

16 JUSTICE GINSBURG: Let's -- let's go back to
17 the question that I asked you about the appropriate
18 forum. You -- you seem to give this very case -- the
19 plaintiff is a foreign securities purchaser. When the
20 plaintiff's choice is not -- is not its home forum, the
21 presumption in the plaintiff's favor applies with less
22 force, et cetera. But you have an Australian plaintiff
23 suing in the United States based on shares purchased in
24 Australia and the lead defendant is the Australian bank.

25 So what -- what did you mean when you were

1 referring to Sinochem and forum non conveniens?

2 MR. DUBBS: We meant two things, Your Honor.

3 The first thing we meant was that, in addition to the
4 other tests that are proposed, putting Sinochem at the
5 beginning of the train would sort out some of these
6 questions in general. That's in general.

7 As to our particular case, we believe we
8 would win a forum non conveniens argument, though one
9 was never made and that was not explored by any district
10 judge. And we would win that because the statute
11 specifically provides in section 10(b) that fraud can be
12 caused in any number of ways -- three ways, including
13 through the mails, through foreign or interstate
14 commerce, or over an exchange. And that fraud was
15 caused in Florida and the mails were used and it was in
16 foreign or interstate commerce.

17 And the people who committed the fraud on a
18 nuts-and-bolts level are the senior management who are
19 defendants from HomeSide bank in Florida, so to that
20 extent it is a Florida case. And we also think that any
21 district judge in looking at a forum non motion would
22 also look at the various interests of National Australia
23 Bank in HomeSide in the United States to judge the
24 overall fairness of letting the suit proceed against
25 them and to counter the issue that this is really all

1 about Australia.

2 JUSTICE ALITO: Well, wouldn't your clients
3 have an adequate remedy under Australian law in
4 Australia, in the Australian court system?

5 MR. DUBBS: We might or we might not. But
6 that is not determinative.

7 JUSTICE ALITO: Well, let's assume that --
8 that they do not. Let's assume that on the facts of
9 this case they could not prevail under Australian law in
10 the Australian court system. Then what United States
11 interest is there --

12 MR. DUBBS: There --

13 JUSTICE ALITO: -- that should override
14 that?

15 MR. DUBBS: There is a strong United States
16 interest. It's on two levels. The first strong United
17 States -- United States interest deals with the conduct
18 at issue here, namely the conduct in Florida by
19 HomeSide. This was the sixth largest mortgage service
20 provider in the United States.

21 JUSTICE GINSBURG: If we had only HomeSide's
22 conduct, nothing else, there wouldn't be any violation
23 of 10(b); is that right?

24 MR. DUBBS: We do not agree with that, Your
25 Honor. We believe that they made a representation by

1 creating the false numbers, or otherwise it's within the
2 scope of the statute. What they did is create a
3 deceptive device --

4 JUSTICE GINSBURG: But nothing has happened.
5 Suppose it had been caught by the Australian bank, and
6 they didn't act on it?

7 MR. DUBBS: Your -- Your Honor, that goes to
8 a different element of the cause of action. That
9 doesn't go to the scope of the statute. That goes to
10 how the private cause of action is enforced.

11 JUSTICE GINSBURG: Now, I concede your
12 argument that a big component of this fraud was what
13 went on in Florida, but it needed to be disclosed to the
14 public. It needed to be put out there. And that wasn't
15 done in Florida by the Florida defendants.

16 MR. DUBBS: It was done in Australia and we
17 can prove that. And -- the point is we are not -- all
18 we are proving through doing that is the effects of the
19 fraud in Florida. To use Professor Beale's example,
20 where you have poison candy in one jurisdiction, that
21 poison candy is sent to another jurisdiction, and in the
22 first jurisdiction there is a law that says "thou shalt
23 not make poison candy;" through the exercise of
24 legislative jurisdiction that statute in the first
25 jurisdiction is appropriate, and both jurisdictions have

1 an interest in that.

2 Now, if we are in the poison candy
3 jurisdiction and we are bringing a case about poison
4 candy, if the statute in addition says, "you have to
5 show some harm from the poison candy," indeed you might
6 as a matter of proof have to show effects from that
7 other forum. But that's different than regulating
8 conduct in the second forum or anything else in the
9 second forum. That is simply looking at the statute or
10 the legal prescription against making poison candy. And
11 we say section 10(b) is like the poison candy statute.

12 JUSTICE ALITO: Which of your standards --

13 JUSTICE BREYER: Now, that's -- I would like
14 you to follow that up specifically. That is, in my mind
15 the difficult issue in this case is not the
16 jurisdictional issue under principles of international
17 law. It's the question of the scope of the statute.
18 And there the things against you are three. One is
19 Professor Sachs's argument, which I would like to know
20 your answer to. The second is in Judge Friendly's two
21 opinions.

22 The first opinion -- the second one, rather,
23 Bersch, he says if you had a foreign exchange and
24 foreign plaintiffs as -- and there was no foreign
25 plaintiff, the security issued over a foreign exchange,

1 even if that fraud takes place totally in the United
2 States, the statute wouldn't cover it. That's Friendly,
3 which started this.

4 And the third thing is what he says in
5 Leasco. He says: We cannot see any sound reason for
6 not taking your position, at least for the plaintiffs
7 who are Americans. Okay?

8 Now, France, Britain and Australia have
9 filed briefs in this case giving what they consider very
10 sound reasons, which are reasons that Judge Friendly
11 never considered. And those three reasons, as we know,
12 is they point to a number of conflicts, that if you win,
13 how that will interfere with their efforts to regulate
14 their own securities markets, right?

15 That's all one question: Professor Sachs,
16 Friendly in Bersch, and Friendly in Leasco. But that's
17 what I'd like to hear your answer to.

18 MR. DUBBS: I will try to keep the subparts
19 in mind. Why don't we start from the end and try to
20 work backwards. Perhaps one of the most important parts
21 of the record is the Solicitor General's view that as a
22 general matter -- and I will get to the specifics; I'm
23 not ducking that. But as a general matter the
24 enforcement of the securities laws, unlike the antitrust
25 laws, has not historically and today they do not believe

1 runs -- raises a substantial risk of interstate
2 conflict.

3 Now, as to the specific briefs that Your
4 Honor referenced, if we look at those briefs and we look
5 at those compared to what happened in Hartford Fire,
6 those briefs -- and let's focus on Australia's for the
7 moment because that's the country we are talking about.
8 Australia's brief essentially says they have a
9 regulatory system that may -- that we may or may not
10 have been able to litigate this cause of action in
11 Australia, but let's assume that we could.

12 They are not saying -- they did not say in
13 that brief that there was some fundamental conflict,
14 like the plurality found in Hartford Fire; nor did they
15 say that there was the kind of conflict that comes up in
16 the application of 403(h) of the Restatement, which
17 Justice Scalia looked to in his opinion in Hartford
18 Fire. So there is not the kind of conflict that leads
19 necessarily -- necessarily -- to not reasonably applying
20 the statute.

21 The reason there's not is that because, one,
22 there is not a rule in Australia that one has to abide
23 by and a rule in the United States that one has to abide
24 by that are contradictory. At most, what you have is
25 you have a clear rule in the United States that says

1 thou shalt not commit fraud in Florida through either
2 the Florida through either -- for or in interstate
3 commerce, the mails or through an exchange. And on the
4 other side of the equation what you have is maybe they
5 could have brought suit over here and we have a robust
6 regulatory system and a robust litigation system; more
7 power to them.

8 But that doesn't mean -- saying that, that
9 doesn't mean that the first State where the poison candy
10 was made suddenly has no interest in that.

11 JUSTICE SCALIA: Well, but -- but Australia
12 says: Look, it's up to us to decide whether there has
13 been a misrepresentation, point one; and whether it's
14 been relied upon by the -- by the plaintiffs, point two.
15 And we should be able to decide that and we don't want
16 it decided by a foreign court.

17 You are talking about a misrepresentation,
18 if there was one in this case, made in Australia to
19 Australian purchasers; it ought to be up to us to decide
20 that issue; and here you are dragging the American
21 courts into it.

22 MR. DUBBS: Well, let me deal with the
23 dragging in part in a minute, because that's
24 subliminally very important to the case.

25 But let me address the direct question. He

1 Australians may believe that, but the question is was
2 there a misrepresentation both in the United States and
3 possibly in Australia? If there was in Australia,
4 that's for the Australians. That's dealing with the
5 effects of eating the poison candy. But we say a
6 misrepresentation was made in the United States --

7 JUSTICE SCALIA: Not to these plaintiffs.

8 MR. DUBBS: Sir --

9 JUSTICE SCALIA: You -- you have to join the
10 misrepresentation to the plaintiff.

11 MR. DUBBS: We have joined --

12 JUSTICE SCALIA: The only misrepresentation
13 to these plaintiffs was made in Australia by an
14 Australian company.

15 MR. DUBBS: There are two ways to connect
16 the fraud to the plaintiffs. The one is the "in
17 connection with" requirement that deals with conduct,
18 which we meet, and this Court has construed very broadly
19 in Dabit, in Zandford and any other number of cases.
20 That's number one.

21 Number two, assuming that the scope of the
22 statute is broad enough to cover the conduct in Florida,
23 we then get to the second question, which is the
24 reasonableness of the application of the statute, and
25 without a conflict, we would then look at -- to the

1 interest of the United States and compare them to the
2 Australians. And the Australians can say, we can -- you
3 know, we can go after eating that poison candy. And we
4 say, fine, if you want to, that's great. But that
5 doesn't mean we can't go after the act of poisoning the
6 candy in Florida.

7 JUSTICE SCALIA: But that -- that isn't the
8 issue. The -- the -- the issue for the Australians is:
9 We want to determine whether there has been a
10 misrepresentation or not.

11 MR. DUBBS: They --

12 JUSTICE SCALIA: We don't want the
13 determination of whether there has been a
14 misrepresentation on the Australian exchange and whether
15 Australian purchasers relied upon that misrepresentation
16 to be determined by an American court.

17 MR. DUBBS: And we say more power to you,
18 you can decide that question. The question --

19 JUSTICE GINSBURG: Not if it's decided here,
20 unless you want to say, the Australian court to say, the
21 United States taking this case is so outrageous that we
22 will not respect its judgment. And that's a factor,
23 too. It's -- what conflict of laws is all about is you
24 have two jurisdictions, both with an interest in
25 applying their own law, but sometimes one defers to the

1 other.

2 MR. DUBBS: That's correct, Your Honor. And
3 the question is should there be deferral in this case.
4 And we say if you apply the standards of -- of Hartford
5 Fire or the standards of the Restatement, you don't end
6 up in deferral. You end up in prosecution of the
7 Section 10(b) cause of action in Florida. And you do
8 that for a couple of different reasons.

9 First, you look at the magnitude of the
10 conduct in Florida, the size of this. This is a
11 \$1.75 billion writedown in a portfolio. You have a
12 portfolio of \$187 billion worth of mortgages sitting
13 down in Jacksonville, Florida. Those are all mortgages
14 on American homes, 2 million American homes. So, this
15 is not just Australia, Australia, Australia. That's
16 what's in the portfolio and that's what's being
17 misrepresented. And when they doctor the numbers and
18 send them to Australia, it's a misrepresentation of
19 that.

20 In addition, you have the overarching
21 consideration of is it appropriate to sue National
22 Australia Bank in the United States at -- at a -- at a
23 more abstract level? And the answer to that, we submit,
24 is yes. They have invested -- if you care to look, it's
25 on the SA-11 and SA-41 of the supplemental appendix,

1 they have invest -- they have \$25 billion worth of
2 assets here. They own a bank in Michigan, they have a
3 huge trading operation on Park Avenue that trades
4 billions of dollars in derivatives every day. This is
5 not the situation -- this is not the stereotype of a
6 gotcha where you have --

7 CHIEF JUSTICE ROBERTS: Those derivatives
8 are not at issue here, right?

9 MR. DUBBS: Well, they are only --

10 CHIEF JUSTICE ROBERTS: I presume -- I'm
11 sorry, go ahead.

12 MR. DUBBS: They are only at issue in the
13 following sense, which is that the position on the
14 mortgage servicing rights was hedged in New York. When
15 the hedge came undone, there were losses in New York on
16 the other side of the hedge. That goes to the point of
17 were there any affects in the United States, because
18 there seems to be some confusion on that. There were
19 some effects here from the hedge. There were some
20 effects on -- in the ADR market, but we are not -- we
21 are not --

22 JUSTICE GINSBURG: I thought Morrison --

23 MR. DUBBS: -- disputing that most of the
24 effects were over there.

25 JUSTICE GINSBURG: Mr. Dubbs, Morrison, the

1 first-named plaintiff, was a derivative holder.

2 MR. DUBBS: No, Your Honor. He was the
3 holder of an ADR. The derivatives come in because they
4 are the activity in New York that is the other side of
5 the transaction. HomeSide --

6 JUSTICE GINSBURG: But do you have -- you
7 have two classes of plaintiffs, one the Australians, who
8 bought their shares in Australia; then you have
9 Morrison, who has an ADR, and who is dismissed because
10 he wasn't able to show damages.

11 MR. DUBBS: That's true. There -- there are
12 no Americans left. This is strictly Australians.

13 JUSTICE GINSBURG: So what U.S. investor was
14 harmed?

15 MR. DUBBS: The -- the question is, were
16 there effects on the U.S. market? There were U.S.
17 investors who were, in all likelihood, harmed but none
18 have stepped forward with respect to ADR holders. But
19 if the question in the abstract is were there economic
20 effects from this transaction in the United States, the
21 answer is -- is yes, there were fallout from -- on -- on
22 the derivative side, which is the other side -- which
23 was the other side, in effect, the short side of what
24 the long position was, which was \$187 billion worth of
25 mortgages in Florida that what is -- what the portfolio

1 consisted of.

2 JUSTICE BREYER: What do you -- do you want
3 to finish?

4 MR. DUBBS: No, Your Honor.

5 JUSTICE BREYER: Then -- I mean, I can see.
6 I will give you all that. That isn't what is bothering
7 me. I think you are right so far as what you have
8 argued. But the part that I think is most difficult is
9 why I -- I shorthand referred to Professor Sachs'
10 article.

11 MR. DUBBS: Yes.

12 JUSTICE BREYER: Because what Australia is
13 actually saying is what we don't like about -- about the
14 American system, you know, their -- their common
15 criticisms of class actions. We say, first of all, the
16 American rule means even if our companies here are
17 right, that they are going to have to pay their legal
18 fees. We don't like punitive damages. We don't like
19 that we have the opt-out. And these are all our
20 citizens, and we don't want to subject our companies on
21 our exchange to that stuff.

22 Now, fine, they have a reason on their side.
23 Then Professor Sachs says: Read the statute, because
24 they argue -- it was never intended to cover that kind
25 of stuff. Now, that's what I would like you to address

1 specifically.

2 MR. DUBBS: Well, it was -- there are two
3 issues. The statute was intended to cover that kind of
4 stuff if the antecedent of "stuff" is fraud in Florida.
5 Now, that's a separate question from how we deal with
6 the private right of action in these circumstances.

7 Now, let's back up. The general criticism
8 of these cases is that they are gotcha cases. You put
9 in a little bit and all of a sudden the private bar
10 comes and attacks you. I mean, that's the stereotype.
11 Well, the stereotype is wrong and it's important to
12 understand why the stereotype is wrong. Because if all
13 you have is a very modest investment in the ADR market,
14 1 percent like my friends from NAB, those cases get
15 bounced at the beginning on personal jurisdiction as
16 they did in the district of New Jersey in SCORS and the
17 Novagold case. We are not aware of any case where if
18 all you've got is that little toehold that you stay in.
19 You get bounced by -- on personal jurisdiction.

20 And to pick up on the discussion that I was
21 having with Justice Ginsburg, we thought that in
22 addition to that, if the Court wanted to send signals
23 with respect to these kinds of cases, if you put, as you
24 can, Sinochem at the beginning of the train, even more
25 of these cases if they are fallacious are going to be

1 screened out of the system.

2 So, the point is that we can all tell our
3 Australian friends that there are very rigid safeguards
4 in place so that this horror story in reality doesn't
5 happen and it has not been proven to happen. It is an
6 attractive myth, but it hasn't happened. Those cases go
7 out and they go out early.

8 JUSTICE KENNEDY: I'm not sure that it
9 happens in advance of considerable discovery. I -- I --
10 I would agree that the judge can confine discovery to
11 forum non conveniens or for personal jurisdiction, but
12 in -- in these cases one of the things we are really
13 talking about is the burden of discovery. That's the
14 cost of litigation. You know that.

15 MR. DUBBS: I do know that and let me answer
16 briefly, because I want to reserve my time for rebuttal.
17 I disagree with your fundamental observation, Justice
18 Kennedy. These cases are paid attention to by the
19 district judges and they go out early. They go out
20 early on personal jurisdiction; there is not a lot of
21 discovery on that. They go out early -- if Sinochem
22 gets applied faithfully, it would go out early on that
23 if there is a close question. And then you go to the
24 12(b)(6).

25 And pursuant to the Private Securities

1 Litigation Reform Act, one of the purposes of that is no
2 discovery, no discovery until after the motion to
3 dismiss is decided.

4 So it is not true that there is a lot of
5 discovery, there is a lot of transaction costs, before
6 we know the answer to one of the threshold questions,
7 which is: Should this case be in our system or not?
8 That can be handled and it is being handled on a daily
9 basis, notwithstanding, you know, some stereotypes.

10 Now, my final point with respect to
11 Professor Sachs' articles and some of the other articles
12 is they in effect -- if they advocate a rule, which many
13 of them do, which it should be limited to exchanges,
14 that goes back to my threshold point of the scope of the
15 statute. And it takes an eraser to the statute and it
16 says: It's only exchanges; it's not in connection with
17 foreign or interstate commerce or through the mails;
18 it's limited, contrary to the express words of the
19 statute, in a way that the statutory construction we
20 don't believe can stand it.

21 Now, there are other legitimate ways of
22 cabining the private cause of action. But that -- if
23 you are faithful to the statute, we submit that is not
24 one of them.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Dubbs.

2 Mr. Conway.

3 ORAL ARGUMENT OF GEORGE T. CONWAY, III,

4 ON BEHALF OF THE RESPONDENTS

5 MR. CONWAY: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 The judgment of the court of appeals should
8 be affirmed for two reasons.

9 First, Petitioners have identified nothing
10 in the text of section 10(b) that overcomes the
11 presumption against extraterritoriality or the Charming
12 Betsy Rule. The statutes should thus be construed not
13 to apply to transactions and shares of foreign issuers
14 on foreign exchanges.

15 Second, unlike the rights of action that
16 this Court has addressed in other extraterritoriality
17 cases, the section 10(b) right is purely implied.
18 Congress didn't intend for this right of action to exist
19 even domestically, let alone extraterritorially.

20 Given the threat that the section 10(b)
21 implied right presents to the sovereign authority of
22 other nations, as reflected in the amicus briefs of
23 Australia, the United Kingdom, France, and the
24 diplomatic note from the Swiss government, the Court
25 should construe the implied right not to extend to

1 claims of purchasers and sellers of securities of
2 foreign issuers on foreign markets.

3 The two clear statement rules are,
4 obviously, the presumption against extraterritoriality
5 and the Charming Betsy Rule require that the Congress.
6 Both require an affirmative intention of the Congress
7 clearly expressed before the statute can be applied to
8 apply to foreign transactions or to, you know, matters
9 that it infringes on the sovereign authority on other
10 nations.

11 My friends don't identify anything in the
12 statute that comes even close to a clear statement.
13 They principally rely on the definition of "interstate
14 commerce," but as this court said in *Aramco*, that kind
15 of boilerplate simply doesn't suffice to overcome the
16 presumption against extraterritoriality.

17 JUSTICE SCALIA: Well, what is your test for
18 whether -- whether it's being applied internationally or
19 not?

20 MR. CONWAY: Well, our test is that, at a
21 minimum, section 10b should be held not to apply to
22 transactions involving shares of foreign issues on
23 foreign exchanges, because that presents the greatest
24 danger of conflict of foreign law, particularly in the
25 context of the modern section 10b implied right, which

1 has the fraud on the market presumption and holds
2 issuers liable, as here for example, for two and a half
3 years of trading, all on an Australian exchange. That
4 is massive transfer of wealth that the Petitioners here
5 are seeking an American court to effect, and that is --
6 basically, it's a direct form of market regulation that
7 Australia has not seen fit to impose upon itself.

8 JUSTICE STEVENS: May I ask you on that
9 point: Supposing the class of plaintiffs included a
10 group of Americans who were shareholders of the
11 Australian bank and who -- but who purchased their stock
12 over the Australian exchange.

13 MR. CONWAY: We would -- well, we would
14 submit that that rule should be the same. That they
15 should -- they should not also, they should not be
16 allowed to sue under section 10b. They -- they -- you
17 know, those people chose to purchase on the Australian
18 exchange. And in terms of the threat to international
19 comity, I think it would be probably take -- I don't
20 think other countries would take nicely to a -- to a
21 rule of law that would allow Americans, essentially, to
22 bring their rules, their law, their remedies, fraud, on
23 the market, what have you to foreign countries --

24 JUSTICE BREYER: Give me reasons for it.
25 The strongest one for it, the strongest example against

1 you it seems to me, is Judge Friendly's example.
2 Schmidt, a citizen of Germany, flies to New York and
3 meets Jones in the hotel. And Jones says, I have a
4 bridge I want to sell you. Look out the window. Say,
5 Do you own the Brooklyn Bridge? Yes. And that's a lie.

6 Here's what you do. You invest in buying
7 shares of my company sold on the German exchange. Okay?

8 MR. CONWAY: Yes.

9 JUSTICE BREYER: Conduct took place in the
10 United States, a terrible fraud. This is contrary to
11 fraud and, says, I think, Judge Friendly and others, it
12 should apply at least where Schmidt is an American
13 citizen and Professor Sachs says no, not even then.

14 What do you do with that case? The fraud
15 took place totally here.

16 MR. CONWAY: Well, I disagree with that,
17 Your Honor, I think the fraud is carried out when the
18 transaction occurs in a foreign country. But I do agree
19 that Professor Sachs is absolutely right --

20 JUSTICE BREYER: Sign the paper here in New
21 York.

22 MR. CONWAY: Yes.

23 JUSTICE BREYER: Sign the paper, right here,
24 and give me the money, because I have an urgent
25 appointment.

1 MR. CONWAY: Yes, sir.

2 (Laughter.)

3 MR. CONWAY: That's a much different case,
4 obviously, than the fraud in the market case that we
5 have here. But Your Honor, yes, that is a stronger
6 circumstance.

7 JUSTICE BREYER: Yes, but your position and
8 hers is: That's no more a valid claim than this one or
9 any other one we dream up. That's why it's a pure
10 example, and I want to know how you feel about it.
11 And --

12 MR. CONWAY: Well, I think that -- I think
13 the problem is, in order to have that conduct swept
14 within the statute, you have to ignore the language and
15 the presumption against extraterritoriality.

16 If you go to petition appendix 78, that has
17 its text in section 10b, and section 10b refers to the
18 use or employment of any manipulative device or
19 contrivance, and it's in connection with the purchase or
20 sale of any security registered on a national securities
21 exchange. And that's --

22 JUSTICE BREYER: Or any other. Or -- read
23 the next word.

24 MR. CONWAY: That's correct. Any security
25 not so registered. And this Court has held -- it has

1 held in cases like Aramco, American Banana, Moritson,
2 that the words "any" and "every," words of universal
3 scope, do not -- do not mean that these -- that
4 something referred to is anything, anywhere else in the
5 world. And for example, the Court is small against the
6 United States. In the case where the presumption of
7 extraterritoriality didn't really apply the court held
8 that in a statute, you normally assume that things being
9 referred to are thing in the United States. Now --

10 JUSTICE KENNEDY: Is the government going to
11 tell us that its test, which differs from the foreign
12 exchange test, is based on considerations like those
13 suggested in Justice Breyer's Brooklyn Bridge
14 hypothetical?

15 MR. CONWAY: I think they do. I think they
16 look to -- I think their view is that the statute is
17 vague and you have to do essentially what Judge Friendly
18 did and the Seventh Circuit did for many years, is you
19 have to make do and decide what the best rule is. And
20 with respect to the government, that is essentially
21 doing what this Court has said under the presumption
22 against extraterritoriality the Court shouldn't do.
23 That's essentially legislating, trying to figure out
24 what Congress would have done, had "a particular
25 problem" --

1 JUSTICE GINSBURG: What about the --

2 JUSTICE KENNEDY: Would the limitations on
3 discovery give you substantial protection were we to
4 adopt the government's test or say the foreign exchange
5 test with the subset exceptions for the -- that takes
6 account of the government's test?

7 MR. CONWAY: Your Honor, I think the problem
8 with the government's test and with the Second Circuit's
9 test, is that it would still allow the application of
10 U.S. law in a manner that would infringe the sovereign
11 authority of other nations.

12 And I can give an example. There was a case
13 over the summer that the Petitioners attached to their
14 first supplemental brief on the petition for certiorari.
15 And it's a case called PC shifts. And it's an
16 interesting case because it involved a Canadian company
17 with headquarters in Britain and most of whose shares
18 traded on the Toronto Stock Exchange.

19 And what happened there was that the
20 CEO spent time in Florida -- it was a shipping company.
21 We spent time in, Miami running the show from Miami.
22 And the court of appeals for the Eleventh Circuit, in a
23 ruling that it held was consistent with the Second
24 Circuit decision in this case held that nonetheless, the
25 application of U.S. law could be applied to transactions

1 of -- of foreign plaintiffs on the Toronto Stock
2 Exchange.

3 JUSTICE KENNEDY: Is it a consideration that
4 this discovery alone would be an offense to foreign --

5 MR. CONWAY: Yes, discovery alone. Yes,
6 Your Honor. Discovery alone. I think the French brief,
7 for example, points that out. I think a number of the
8 brief -- there have been blocking statutes that have
9 been enacted by various countries because of the -- what
10 they deem to be the offensive scope of discovery. In
11 France, you are really only allowed to obtain evidence
12 that is actually admissible in trial.

13 JUSTICE SCALIA: I'm not sure how you
14 interpret the language that you -- that you just read,
15 when you say to use or employ in connection with the
16 purchase or sale of any security registered on the
17 National Security Exchange or any security not so
18 registered.

19 Now, is it your point that in order to avoid
20 an international extension of it, it should apply only
21 to securities? What?

22 MR. CONWAY: It should only be applied --

23 JUSTICE SCALIA: Securities purchased and
24 sold in the United States? Is that it?

25 MR. CONWAY: That -- that's correct, Your

1 Honor. I think that's a fair reading of the statute.
2 And this Court is required, under both the presumption
3 against extraterritoriality under its decision and the
4 Charming Betsy Rule to interpret a statute, take the
5 permissible construction of the statute that is least
6 likely to result in an extraterritorial of the law.

7 JUSTICE GINSBURG: Purchased -- purchased or
8 sold?

9 MR. CONWAY: Purposed or sold, Your Honor.

10 JUSTICE SCALIA: What if it's not -- what if
11 it -- what if the fraud produces neither a purchase or a
12 sale but induces somebody to hold on to stock that
13 otherwise the person would dispose of?

14 MR. CONWAY: Well, I -- I don't know that
15 that would state a claim, a private claim under Blue
16 Chip Stamps. And any -- and if the share or the
17 securities are held abroad, if it's a foreign security,
18 and I think the liability in that hypothetical -- I'm
19 assuming that if it's a foreign security held by a
20 foreigner -- that really would be something that would
21 be subject to foreign law, whether or not Australia
22 wants to represent -- recognize holder claims of the
23 sort that this Court rejected in Blue Chip Stamps.
24 That's a question for Australia to decide.

25 CHIEF JUSTICE ROBERTS: Under these same

1 facts if you had -- altering according to the
2 hypothetical, you had U.S. plaintiffs who purchased
3 National Australia Bank ADRs on the New York exchange,
4 you don't doubt that they can sue, do you?

5 MR. CONWAY: No, and in fact, we told the
6 district court, we did not move to defense on
7 extraterritoriality grounds the claims of Mr. Morrison,
8 who inexplicably is still here.

9 CHIEF JUSTICE ROBERTS: Right.

10 MR. CONWAY: We argued that Mr. Morrison's
11 claims should be defeated on the grounds that he had no
12 damages, which was an absolutely ironclad calculation
13 best based on a -- on a provision of the PSLRA, and we
14 also argued that all of the claims should be dismissed
15 for failure to plead fraud with the requisite
16 particularity of the PSLRA.

17 But we certainly do not dispute that when a
18 company like ours registers shares on -- registers
19 shares with the SEC, ADRs with its SEC and lists them on
20 a New York stock exchange, it's subjecting itself to New
21 York -- I mean, U.S. law for purposes of those --

22 CHIEF JUSTICE ROBERTS: And presumably that
23 would impose the same discovery on the bank as the
24 Sudanese case.

25 MR. CONWAY: It could, Your Honor, that's

1 absolutely true. But on the other hand, I mean, a lot
2 of the other aspects of -- of this litigation, which
3 this Court has, you know, noted that is potentially
4 highly vexatious, I mean, that is only 1.1 percent of
5 the flow -- of the total equity securities of the -- the
6 National Australia Bank. So the dangers of -- of a
7 threat of -- of coerced settlements is much, much less.

8 It's a much, much easier case to deal with
9 if -- if -- if you are only dealing with the ADRs. Now
10 if another company decides to list half its equity on
11 the New York Stock Exchange, well, it can -- it makes
12 the determination for itself, how much of this kind of
13 litigation it wants to subject itself to.

14 JUSTICE KENNEDY: Suppose there were
15 litigation with substantial allegations of wire fraud
16 violations as predicate for RICO violations, and the
17 case begins to proceed, and then there is a second cause
18 of action under the securities law. Would -- would the
19 fact that there is going to be discovery and substantial
20 litigation in the -- in the United States courts be a
21 factor in retaining the -- the securities violation in
22 this suit? Or would the test be just the same in your
23 view?

24 MR. CONWAY: I think the -- I think you have
25 to take each statute separately. You have to look at

1 what the language of the statute says, whether it -- it
2 admits fault in an extraterritorial reading, and whether
3 that -- frankly whether that extraterritorial reading is
4 required or compelled. If there is any other possible
5 construction, as the Court said in -- in Charming Betsy,
6 the court is required to accept that construction,
7 accept the construction that doesn't result in
8 extraterritorial application or doesn't result in --

9 JUSTICE GINSBURG: On the -- on the
10 extraterritorial presumption against it, your colleague
11 on the other side tells us that in all the cases where
12 the presumption applied, all of the conduct was
13 someplace else, and they give the Aramco case and say
14 that was an employee hired in -- was it Saudi Arabia --

15 MR. CONWAY: That --

16 JUSTICE GINSBURG: -- and everything
17 happened outside the country.

18 MR. CONWAY: Well, my --

19 JUSTICE GINSBURG: Here, I mean, you have to
20 concede that a component of the alleged fraud occurred
21 in Florida.

22 MR. CONWAY: We do concede that some of the
23 conduct that ultimately, you know, led -- in a but-for
24 causal relationship to what happened in the Australia
25 occurred in the United States, but that's true in a lot

1 of other cases. For example, Aramco, Mr. Boureslan was
2 hired in Houston. So was the cook in Foley Brothers v.
3 Filardo. And in Microsoft v. AT&T, basically all of the
4 conduct, the relevant conduct was in the United States,
5 because what the -- what section 271(f) proscribed in
6 Microsoft was the shipment -- the supply in or from the
7 United States of a component of a patented invention.

8 And what this Court held in Microsoft was
9 that notwithstanding AT&T's argument that, "Hey, the
10 presumption against extraterritoriality doesn't really
11 apply because this is just regulating the supply in and
12 from the United States," this Court held that the
13 presumption against extraterritoriality applied because
14 what would happen is, a single act of supply would
15 result in a springboard for liability each time a -- a
16 disk was put into a computer abroad.

17 And that is exactly analogous to the
18 circumstances in this case, where what we -- what
19 happened was some -- some allegedly false information
20 was transmitted to Australia; it was then republished in
21 annual reports, print, print, print; sent out to the --
22 sent out to the Australian market, and resulted in --
23 allegedly, as they would have it -- resulted in
24 liability every single time somebody purchased --
25 purchased a share of stock of the National Australia

1 Bank on the Australian securities exchange. And so that
2 is exactly analogous to -- to Microsoft v. AT&T.

3 Again, another point I think that's relevant
4 is the, section 30 of the Exchange Act. Congress did
5 not make a clear statement in section 10. It did make
6 clear statements in section 30. Section 30(a) addresses
7 transactions on foreign exchanges. Section 30 as a
8 whole is entitled Foreign Exchanges, and section 30(a)
9 makes it -- makes -- gives the SEC power to promulgate
10 regulations that -- that apply to brokers and dealers
11 who effect transactions of securities on foreign
12 exchanges, if those transactions are transactions of
13 shares of shares of U.S. issuers.

14 And that's at -- for reference, the text of
15 section 30 is at page 19 of the law professors' brief.
16 And section 30(b) also, it says that the SEC can
17 regulate the -- regulate businesses in securities of --
18 of businesses -- securities that are abroad, but only to
19 the extent the SEC finds it necessary to prevent evasion
20 of the Act domestically.

21 And so Congress made two clear statements in
22 section 30. It did not make any clear statement in
23 section 10.

24 JUSTICE SCALIA: Well, is that your only
25 point? Or is your point also that you wouldn't need

1 section 30 if -- if 10(b) were --

2 MR. CONWAY: That's --

3 JUSTICE SCALIA: -- were read as broadly.

4 MR. CONWAY: That's absolutely right. The
5 reading -- my friend's reading of section 30 would
6 render section 10(b) -- I mean the reading of section
7 10(b) would render section 30 superfluous. And there
8 are other provisions of -- that are in the Exchange Act
9 where Congress has made clear statements to show that it
10 can make clear statements. Section 30A which
11 immediately follows section 30, is the Foreign Corrupt
12 Practices Act.

13 So Congress -- if Congress -- if there is a
14 loophole, and that's what this Court said in Microsoft
15 v. AT&T; if there is some kind of loophole that presents
16 some kind of a problem, that Congress needs to fix,
17 Congress can do it. Congress can do it with a clear
18 statement.

19 In sum, Your Honors, countries -- nations of
20 the world do things differently. They -- they -- they
21 have different rules of liability. We see in the amicus
22 briefs different rules of materiality, different rules
23 of disclosure. And some rely on -- on public
24 enforcement more than others.

25 The French rely on l'action publique, as

1 they say; and some nations approach ours in their
2 generosity to plaintiffs. Australia allows opt-out
3 class actions; so does Canada. Canada allows opt-out
4 class actions; it dispenses with, for example, the proof
5 of reliance, it dispenses with scienter in some cases.
6 Yet it -- it does all that, but it restricts liability
7 to \$1 million or 5 percent of a -- of a company's --

8 JUSTICE BREYER: How does it hurt the other
9 countries if what we would say on their reading of this
10 is, Congress has said, "Look, if some terribly bad
11 conduct happens in the United States; they lie through
12 their teeth; and you, whoever you are in the world, who
13 buys some shares and as a result you are hurt, we will
14 give you a remedy. Come to us" -- now, how does that
15 hurt Australia?

16 MR. CONWAY: Well, it hurts Australia --

17 JUSTICE BREYER: Or France or England or any
18 of these others?

19 MR. CONWAY: Exactly the same way this Court
20 said it hurts in Empagran. In Empagran this Court noted
21 that -- that a reading of the rule that would allow -- a
22 reading of the FTAIA that would have allowed foreign
23 plaintiffs to come and sue for -- for foreign vitamins
24 transaction in a foreign country would essentially allow
25 plaintiffs to avoid the -- the narrower rules of the

1 liability and the narrower remedies that other nations
2 provide. And that is exactly true here, where, you
3 know, for example, Australia does not permit
4 fraud-on-the-market class actions. It doesn't allow --
5 it doesn't recognize the fraud-on-the-market
6 presumption.

7 And as I said, for example, Canada restricts
8 these actions, it has generous liability rules and
9 allows opt-out class actions, but it says -- it caps
10 damages at 5 percent of an issuer's market
11 capitalization or \$1 million, whichever is greater.

12 And so that's the -- that is the problem.
13 It's not just substance but it's remedy. Other nations
14 want to do things in different ways; they should be
15 allowed to. What is going on here is essentially a --
16 Brandeising -- experiment a global scale. And that's a
17 good thing.

18 It's a good thing because it enables
19 countries to judge for themselves what kind of rules
20 they want to have for people who buy shares on their own
21 exchanges. And to apply section 10(b) it cases like
22 this would cut that experiment short. It would amount
23 to exactly the sort of legal imperialism that this Court
24 rejected, rightly, in *Empagran*. The Court should reject
25 it here as well and it should affirm the judgment of the

1 court of appeals.

2 I thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Conway.

5 Mr. Roberts.

6 ORAL ARGUMENT OF MATTHEW D. ROBERTS,
7 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIE,
8 SUPPORTING THE RESPONDENTS

9 MR. ROBERTS: Mr. Chief Justice, and may it
10 please the Court:

11 This case presents two distinct questions:
12 First whether the fraud alleged by Petitioners violated
13 Section 10b; and second, whether Petitioners may bring a
14 private action.

15 In our view, the alleged fraud violated
16 Section 10b, because significant conduct material to the
17 fraud's success occurred in the United States.

18 CHIEF JUSTICE ROBERTS: There are -- there
19 are a lot of moving parts in that test. You know,
20 significant conduct, material, you require it to have a
21 direct causal relationship. Doesn't the complication of
22 that kind of defeat the whole purpose?

23 MR. ROBERTS: No, Your Honor, we don't think
24 so. In terms of the -- of the direct cause part, which
25 it will be -- the significant limit on private actions,

1 as this case illustrates, the district courts even
2 accepting the allegations in the plaintiff's complaint
3 will often be able to dismiss the suit on the pleading
4 for its failure to satisfy that test. It's not a
5 difficult test --

6 CHIEF JUSTICE ROBERTS: That's only for the
7 private companies?

8 MR. ROBERTS: That's right. And in terms of
9 the other test, again, I don't think it's that
10 complicated. The -- the significance part of it is
11 essentially trying to assess the amount of the conduct
12 of --

13 CHIEF JUSTICE ROBERTS: Well, what if --
14 what if significant elements of the fraud occur in four
15 different countries?

16 MR. ROBERTS: If -- if -- the critical
17 question is whether there's significant conduct here
18 that's material to the broad success. And the reason
19 for that is if Section 10b didn't cover that kind of
20 conduct, then that would risk allowing the United States
21 to become a base for orchestrating securities frauds for
22 export. It would allow thing like masterminds in the
23 United States engineering international boiler room
24 schemes in which they direct agents in foreign countries
25 to make fraudulent representations that victimize

1 investors.

2 JUSTICE BREYER: So it's not as easy to
3 apply this, you think? Now, on your theory, I guess
4 Schmidt is in Germany and we have our Brooklyn Bridge.
5 Okay, now wait. What happens is he calls Schmidt on the
6 telephone, Jones, and he says I own the Brooklyn Bridge.
7 Actual, right, direct? Under your test, correct?

8 MR. ROBERTS: Schmidt is in Germany?

9 JUSTICE BREYER: Schmidt is in Germany. He
10 calls him up.

11 MR. ROBERTS: The defrauder is in Germany?

12 JUSTICE BREYER: All -- everything -- you
13 have to assume he's going to buy the thing on the
14 exchange in Germany but the fraud is in Brooklyn. He is
15 lying about -- he doesn't really own the Brooklyn
16 Bridge. So he calls Schmidt. I am interested in -- he
17 calls Schmidt. Causation, that's what your last pages
18 of your brief, focus on that. He calls him and he lies
19 to him. Actual. In your theory --

20 MR. ROBERTS: I'm sorry, Your Honor, can I
21 ask you if everybody is in Germany?

22 JUSTICE BREYER: No.

23 (Laughter.)

24 JUSTICE BREYER: Go back to my Brooklyn
25 Bridge example. Everything is hatched in your boiler

1 room.

2 MR. ROBERTS: Okay.

3 JUSTICE BREYER: And they communicate the
4 lie by calling Schmidt in Berlin on the telephone,
5 directly.

6 MR. ROBERTS: Okay.

7 JUSTICE SCALIA: Schmidt is the German.
8 He's in Germany.

9 (Laughter.)

10 MR. ROBERTS: I'm sorry.

11 JUSTICE BREYER: I'm looking --

12 MR. ROBERTS: The question is, is there
13 significant conduct in the United States --

14 JUSTICE BREYER: No, I'm focusing on the
15 last pages of your brief. Where you turn this whole
16 thing on the directness of the causation.

17 MR. ROBERTS: That's right. And the SEC
18 would be able to take action if there is significant
19 conduct in the United States --

20 JUSTICE BREYER: I'm accepting that for the
21 moment. What's bothering me, taking off from what the
22 Chief Justice said, is the feasibility of your test.
23 Your test, it seems to me on causation, would say that
24 when you phone Schmidt and lie to him, he can sue. But
25 when you phone your parent company, knowing that they

1 will put it in the prospectus and Schmidt will read it,
2 you can't sue.

3 And then what occurs to me is suppose you
4 phoned a reporter, or suppose you phoned your parent
5 company and you knew they would tell a reporter. I'm
6 focusing on the practicality of your causation test.

7 MR. ROBERTS: If the conduct is directed or
8 controlled from the United States --

9 JUSTICE BREYER: Correct.

10 MR. ROBERTS: -- then it would -- then the
11 direct causation test would be -- would be met. The
12 critical question is, is the conduct in the United
13 States have a close enough --

14 JUSTICE BREYER: You think that's the
15 question here? You think the question is whether this
16 really took place in Florida? I didn't think that was
17 the question.

18 MR. ROBERTS: In terms of a private
19 plaintiff suing, in our view, the question is whether
20 the United States' conduct has a close enough connection
21 to their -- to -- to their injury --

22 JUSTICE BREYER: Let's skip -- skip my
23 question because other people may ask.

24 JUSTICE ALITO: If the plaintiffs in this
25 case had clearly alleged in their complaint that nobody

1 in Australia reviewed the numbers that were sent from
2 Florida to any degree, they just directly copied them,
3 some low-level clerk directly copied them, would the
4 direct cause test be met?

5 MR. ROBERTS: Yes, if the action was just
6 ministerial over overseas, it would -- it would be met.
7 Again, the critical question, in our view, under the
8 direct cause test is, was there culpable conduct in the
9 United States that is directly responsible for the
10 plaintiff's injury?

11 JUSTICE GINSBURG: Mr. Roberts --

12 JUSTICE KENNEDY: Well, then you give no
13 weight to the fact that it was on the Australian
14 exchange?

15 MR. ROBERTS: The -- the fact that the
16 transaction happens on the Australian exchange is not
17 dispositive, because if -- if somebody in the United
18 States is directly -- is -- is executing the fraud -- if
19 it turned on just a transaction on the Australian
20 exchange, then a domestic investor could be injured by a
21 fraud that is hatched entirely here that is executed
22 entirely here, and he is tricked into executing a
23 transaction on an overseas exchange.

24 JUSTICE GINSBURG: Mr. Roberts, because your
25 time is running out, there is a basic question here.

1 You are asking us to make a distinction between what the
2 SEC can sue for and what a private party can sue for.
3 Congress did that with respect to aiders and abettors.

4 Is there any other instance in which we have
5 made a distinction, yes, the SEC has a claim but the
6 private litigant doesn't?

7 MR. ROBERTS: Yes, the -- the -- the private
8 litigants are -- have numerous elements that they have
9 to show that the SEC doesn't have to show: Reliance,
10 loss, loss causation. All of those go to the causal
11 link between the injury and -- and the fraud. And we
12 think that the direct injury requirement is an
13 appropriate application of those more general causation
14 requirements in the context of transnational fraud.

15 JUSTICE SCALIA: I am frankly less concerned
16 with your -- your test for the private cause of action,
17 the direct cause test -- I -- I guess I could work with
18 that -- than I am with your test for -- for the
19 jurisdiction of the -- of the SEC, which is sort of a
20 totality of the circumstances test. It doesn't seem to
21 me that's an appropriate test for a jurisdictional
22 question. You don't want to spend time litigating the
23 totality of the circumstances.

24 MR. ROBERTS: We don't think it's a -- a
25 jurisdictional question in the sense of the subject

1 matter jurisdiction, Your Honor. It's a -- a test about
2 the scope of the statutory coverage.

3 JUSTICE SCALIA: Well, okay.

4 MR. ROBERTS: And it's true that bright line
5 rules -- it's true that bright line rules are easier to
6 administer, but the -- there is a danger in bright line
7 rules for fraud prohibitions because they can provide a
8 road map for evasion of the statute.

9 CHIEF JUSTICE ROBERTS: Do you have any
10 indication that our friends around the world are
11 comfortable with your test?

12 MR. ROBERTS: Well, the briefs that have
13 been filed by Australia and United Kingdom and France
14 are limited to the private right of action. They base
15 their -- what they want to do is to limit the private
16 rights. And I think the United Kingdom brief
17 specifically says that -- it thinks that SEC action
18 could be appropriate here, and that's a reason why, if
19 the Court adopts the -- a limit on the private actions,
20 that it need not -- it need not be concerned about the
21 possibility that -- that fraud would be launched in the
22 United States or directed in the United States and it
23 couldn't be addressed.

24 JUSTICE SCALIA: I guess we don't have to
25 say anything about -- about what the government can do,

1 do we?

2 MR. ROBERTS: No, Your Honor. And we would
3 certainly prefer that you decided the case solely on the
4 private right of action if the alternative for a holding
5 substantive prohibitions didn't apply here.

6 CHIEF JUSTICE ROBERTS: Mr. Roberts, you
7 urge deference to the SEC's interpretation in
8 administrative adjudications?

9 MR. ROBERTS: Yes.

10 CHIEF JUSTICE ROBERTS: Do you have anything
11 other than those two proceedings over the last 35 years?

12 MR. ROBERTS: Those are the two
13 administrative adjudications. The SEC's administrative
14 adjudicatory authority is limited to people involved in
15 the securities industry, and a lot of these frauds that
16 happen are -- don't involve people that are registered
17 broker/dealers and the like. There are numerous Civil
18 Actions that the SEC has brought where it has taken the
19 same approach. The SEC v. Berger case that we cite in
20 our brief is one of them.

21 I can name some others. There is
22 SEC v. Wolfson, which is a case that's in the district
23 court in Utah, and SEC v. Shay in -- in the southern
24 district of New York. SEC v. Banger in the northern
25 district of Illinois. Those involve international

1 boiler-room schemes of the kind I was alluding to
2 before, where masterminds in the United States basically
3 direct agents that they have got in countries like
4 Thailand or Spain to -- to make false statements and
5 engage in high-pressure selling to target investors in
6 other countries. Sometimes they induce them to engage
7 in transactions in still other countries. So --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 Mr. Roberts.

10 Mr. Dubbs, you have three minutes remaining.

11 REBUTTAL ARGUMENT OF THOMAS A. DUBBS

12 ON BEHALF OF THE PETITIONERS

13 MR. DUBBS: Thank you, Your Honor. Let me
14 begin with Justice Alito's question, and I promise to
15 get back to Judge Friendly and the Brooklyn Bridge.

16 As to -- we have alleged that in -- that
17 effectively, ministerial activities did occur here. The
18 Second Circuit held, interpreting our complaint, that
19 the numbers were mechanically incorporated. That's as
20 close to ministerial as you get.

21 We used, in the complaint, the were
22 "adopted." We said that they were asleep at the wheel.
23 The meaning is the same, but the -- there were no
24 checkpoints. The checkpoints are illusory. If there
25 was a checkpoint, the guard was asleep at the

1 checkpoint, and the MSR number went right through the
2 checkpoint. Those are the allegations, and we should be
3 able to stick with the allegations.

4 Now, turning to the statute, my colleague
5 indicated that the language with respect to foreign and
6 interstate commerce and so on, based on the Aramco
7 decision, was boilerplate. That's wrong. In this
8 statute, those specific statutory approaches towards
9 stopping fraud are in the substance of the statute.
10 They are not in the jurisdictional statute. That's
11 important. That's why that's different.

12 As to the Leasco example and Bersch example,
13 what Leasco shows is a long chain of causation, because
14 Leasco involved an American, not a foreigner, which was
15 very important under Judge Friendly's typology. And in
16 Leasco, you have this extended line of causation
17 beginning with representations in the United States
18 about a friendly, tender offer. Then there was a phone
19 call, maybe in London, maybe in the United States, and
20 then there was a command by Saul Steinberg to his
21 investment bankers: Go into the London Stock Exchange
22 and start to buy.

23 That extended line of causation would not
24 pass muster under the direct cause test. The direct
25 cause test as this Court is using it in the RICO area

1 under cases like Hemi, that would not pass muster. What
2 that shows, and Judge Friendly said that if you have a
3 foreign Plaintiff, the direct cause is appropriate, that
4 shows that the direct cause test is narrower, it's a
5 screening device, and it limits the possibilities when
6 you have a foreign Plaintiff.

7 Now, that is a proper way to cabin the
8 private cause of action. Taking an eraser to the
9 statute and saying: The only words that count are on an
10 exchange, doesn't do it if you are going to keep a
11 linkage between the private cause of action and the
12 expressed words of the statute. If that can't do it,
13 what are the other tools? And the other tools are the
14 direct cause test, and this Court has been very ably
15 working through some of these difficult fact patterns in
16 the RICO area.

17 Now, in this case, there is not the problem
18 that there is in Hemi; there is not the intervening
19 cause. You have a related party, NAB, that may or may
20 not be involved that allegedly is broken -- breaking the
21 chain of causation. It is -- has to be, under that
22 doctrine, a totally third party, as it was in Hemi,
23 where you have the State of New York, the City of New
24 York and had all these bouncing balls going back and
25 forth. This is a straight shot between that MSR being

1 fabricated in Florida and going on to the financial
2 statements. There is no intervening cause.

3 And even if we assume that in some senses,
4 it was normal to look at those financial statements,
5 that in and of -- of itself has failed.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 12:06 p.m., the case in the
9 above-entitled matter was submitted.)

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