IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT MORRISON, ET AL., :

Petitioners :

v. : No. 08-1191

NATIONAL AUSTRALIA BANK :

LTD., ET AL. :

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Washington, D.C.

Monday, March 29, 2010

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

APPEARANCES:

THOMAS A. DUBBS, ESQ., New York, New York; on behalf of Petitioners.

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

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

C O N T E N T S

P R O C E E D I N G S

(11:07 a.m.)

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

Mr. Dubbs.

ORAL ARGUMENT OF THOMAS A. DUBBS

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

deference.

JUSTICE SCALIA: Right.

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

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

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

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

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

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

MR. DUBBS: Sorry?

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

MR. DUBBS: They --

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

MR. DUBBS: Your Honor --

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

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

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

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

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

MR. DUBBS: No --

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

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

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

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

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

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

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

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

So what -- what did you mean when you were

referring to Sinochem and forum non conveniens?

MR. DUBBS: We meant two things, Your Honor. The first thing we meant was that, in addition to the other tests that are proposed, putting Sinochem at the beginning of the train would sort out some of these questions in general. That's in general.

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

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

about Australia.

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

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

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

MR. DUBBS: There --

JUSTICE ALITO: -- that should override that?

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

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

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

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

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

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

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

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

an interest in that.

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

JUSTICE ALITO: Which of your standards --

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

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

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

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

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

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

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

runs -- raises a substantial risk of interstate conflict.

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

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

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

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

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

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

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

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

But let me address the direct question. He

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

JUSTICE SCALIA: Not to these plaintiffs.

MR. DUBBS: Sir --

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

MR. DUBBS: We have joined --

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

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

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

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

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

MR. DUBBS: They --

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

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

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

other.

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

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

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

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

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

MR. DUBBS: Well, they are only --

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

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

JUSTICE GINSBURG: I thought Morrison --

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

JUSTICE GINSBURG: Mr. Dubbs, Morrison, the

first-named plaintiff, was a derivative holder.

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

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

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

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

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

consisted of.

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

MR. DUBBS: No, Your Honor.

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

MR. DUBBS: Yes.

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

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

specifically.

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

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

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

screened out of the system.

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

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

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

And pursuant to the Private Securities

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Dubbs.

Mr. Conway.

ORAL ARGUMENT OF GEORGE T. CONWAY, III,

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CONWAY: Yes.

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

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

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

JUSTICE BREYER: Sign the paper here in New York.

MR. CONWAY: Yes.

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

MR. CONWAY: Yes, sir.

(Laughter.)

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: What about the --

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

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

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

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

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

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

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

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

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

MR. CONWAY: It should only be applied --

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

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

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

JUSTICE GINSBURG: Purchased -- purchased or sold?

MR. CONWAY: Purposed or sold, Your Honor.

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

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

CHIEF JUSTICE ROBERTS: Under these same

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

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

CHIEF JUSTICE ROBERTS: Right.

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

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

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

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

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

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

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

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

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

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

MR. CONWAY: That --

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

MR. CONWAY: Well, my --

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

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

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

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

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

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

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

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

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

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

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

MR. CONWAY: That's --

JUSTICE SCALIA: -- were read as broadly.

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

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

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

The French rely on l'action publique, as

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

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

MR. CONWAY: Well, it hurts Australia --

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

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

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

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

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

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

court of appeals.

I thank you.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Conway.

Mr. Roberts.

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

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

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

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

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

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

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

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

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

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

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

investors.

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

MR. ROBERTS: Schmidt is in Germany?

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

MR. ROBERTS: The defrauder is in Germany?

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

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

JUSTICE BREYER: No.

(Laughter.)

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

room.

MR. ROBERTS: Okay.

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

MR. ROBERTS: Okay.

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

(Laughter.)

MR. ROBERTS: I'm sorry.

JUSTICE BREYER: I'm looking --

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

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

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

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

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

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

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

JUSTICE BREYER: Correct.

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

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

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

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

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

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

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

JUSTICE GINSBURG: Mr. Roberts --

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Well, okay.

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

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

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

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

do we?

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

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

MR. ROBERTS: Yes.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Roberts.

Mr. Dubbs, you have three minutes remaining.

REBUTTAL ARGUMENT OF THOMAS A. DUBBS
ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

**D**