UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-1914

Caption [use short title]: In re Petrobras Securities Litigation

Motion for: Leave to file brief of amicus curiae EuropeanIssuers ivzw-aisbl in support of defendants-appellants.

Set forth below precise, complete statement of relief sought:

Leave, pursuant to Fed. R. App. P. 29(b), to file an amicus curiae brief in support of defendants-appellants.

MOVING PARTY: EuropeanIssuers ivzw-aisbl

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Plaintiffs-Appellees

MOVING ATTORNEY: Jason Gottlieb, Esq.

OPPOSING ATTORNEY: Jeremy A. Lieberman, Esq.

[name of attorney, with firm, address, phone number and e-mail]

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Pomerantz LLP
600 Third Avenue, 20th Fl., NY, NY 10016
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Court-Judge/Agency appealed from: U.S. District Court for the S.D.N.Y. (Hon. Jed S. Rakoff)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Jason Gottlieb **Date:** 7/28/2016

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

16-1914

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNIVERSITIES SUPERANNUATION SCHEME LIMITED,
EMPLOYEES RETIREMENT SYSTEM OF THE STATE OF HAWAII,
NORTH CAROLINA DEPARTMENT OF STATE TREASURER,

Plaintiffs-Appellees,

PETER KALTMAN, individually and on behalf of all others similarly situated, DIMENSIONAL EMERGING MARKETS VALUE FUND, DFA INVESTMENT DIMENSIONS GROUP INC., on behalf of its series EMERGING MARKETS CORE EQUITY PORTFOLIO, EMERGING MARKETS SOCIAL CORE EQUITY PORTFOLIO and T.A. WORLD EX U.S. CORE EQUITY PORTFOLIO, DFA INVESTMENT TRUST COMPANY, on behalf of its series THE EMERGING MARKETS SERIES, DFA

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF EUROPEANISSUERS AISBL AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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Attorneys for Amicus Curiae EuropeanIssuers aisbl

AUSTRIA LIMITED, solely in its capacity as responsible entity for the DIMENSIONAL EMERGING MARKETS TRUST, DFA INTERNATIONAL CORE EQUITY FUND, and DFA INTERNATIONAL VECTOR EQUITY FUND by DIMENSIONAL FUND ADVISORS CANADA ULC solely in its capacity as Trustee, DIMENSIONAL FUNDS PLC, on behalf of its subfund EMERGING MARKETS VALUE FUND, DIMENSIONAL FUNDS ICVC, on behalf of its sub-fund EMERGING MARKETS CORE EQUITY FUND, SKAGEN AS, DANSKE INVEST MANAGEMENT A/S, DANSKE INVEST MANAGEMENT COMPANY, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, NEW YORK CITY POLICE PENSION FUND, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY DEFERRED COMPENSATION PLAN, FORSTA AP-FONDEN, TRANSAMERICA INCOME SHARES, INC., TRANSAMERICA FUNDS, TRANSAMERICA SERIES TRUST, TRANSAMERICA PARTNERS PORTFOLIOS, JOHN HANCOCK VARIABLE INSURANCE TRUST, JOHN HANCOCK FUNDS II, JOHN HANCOCK SOVEREIGN BOND FUND, JOHN HANCOCK BOND TRUST, JOHN HANCOCK STRATEGIC SERIES, JOHN HANCOCK INVESTMENT TRUST, JHF INCOME SECURITIES TRUST, JHF INVESTORS TRUST, JHF HEDGED EQUITY & INCOME FUND, ABERDEEN EMERGING MARKETS FUND, ABERDEEN GLOBAL EQUITY FUND, ABERDEEN GLOBAL NATURAL RESOURCES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, each a series of ABERDEEN FUNDS, ABERDEEN CANADA EMERGING MARKETS FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE GLOBAL FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE INTERNATIONAL FUND, ABERDEEN CANADA FUNDS EAFE PLUS EQUITY FUND and ABERDEEN CANADA FUNDS GLOBAL EQUITY FUND, each a series of ABERDEEN CANADA FUNDS, ABERDEEN EAFE PLUS ETHICAL FUND, ABERDEEN EAFE PLUS FUND, ABERDEEN EAFE PLUS SRI FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN FULLY HEDGED INTERNATIONAL EQUITIES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, ABERDEEN GLOBAL EMERGING MARKETS EQUITY FUND, ABERDEEN GLOBAL ETHICAL WORLD EQUITY FUND, ABERDEEN GLOBAL RESPONSIBLE WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD EQUITY DIVIDEND FUND, ABERDEEN GLOBAL WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD RESOURCES EQUITY FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN ETHICAL WORLD EQUITY FUND, ABERDEEN MULTI-ASSET FUND, ABERDEEN WORLD EQUITY FUND, ABERDEEN LATIN AMERICA EQUITY FUND, INC., AAAID EQUITY PORTFOLIO, ALBERTA TEACHERS RETIREMENT FUND, AON HEWITT INVESTMENT CONSULTING, INC., AURION INTERNATIONAL DAILY EQUITY FUND, BELL ALIANT REGIONAL COMMUNICATIONS INC., BMO GLOBAL EQUITY CLASS, CITY OF ALBANY PENSION PLAN, DESJARDINS DIVIDEND INCOME FUND, DESJARDINS EMERGING MARKETS FUND, DESJARDINS GLOBAL ALL CAPITAL EQUITY FUND, DESJARDINS OVERSEAS EQUITY VALUE FUND, DEVON COUNTY COUNCIL GLOBAL EMERGING MARKET FUND, DEVON COUNTY COUNCIL GLOBAL EQUITY FUND, DGIA EMERGING MARKETS EQUITY FUND L.P., ERIE INSURANCE EXCHANGE, FIRST TRUST / ABERDEEN EMERGING OPPORTUNITY FUND, GE UK PENSION COMMON INVESTMENT FUND, HAPSHIRE COUNTY COUNCIL GLOBAL EQUITY PORTFOLIO, LONDON BOROUGH OF

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Plaintiffs,

—against—

PETROLEO BRASILEIRO S.A. PETROBRAS, BB SECURITIES LTD., MERRIL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, BANK OF CHINA (HONG KONG) LIMITED, BANCA IMI, S.P.A., SCOTIA CAPITAL (USA) INC., THEODORE MARSHALL HELMS, PETROBRAS GLOBAL FINANCE B.V., PETROBRAS AMERICA INC., CITIGROUP GLOBAL MARKETS INC., ITAU BBA USA SECURITIES, INC., J.P.MORGAN SECURITIES LLC, MORGAN STANLEY & CO. LLC, MITSUBISHI UFJ SECURITIES (USA), INC., HSBC SECURITIES (USA) INC., STANDARD CHARTERED BANK, BANCO BRADESCO BBI S.A.,

Defendants-Appellants,

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Defendants.

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, counsel for prospective *amicus curiae* EuropeanIssuers aisbl ("EuropeanIssuers") respectfully moves for leave to file the attached brief (the "Proposed Brief") as *amicus curiae* in support of defendants-appellants. EuropeanIssuers files this motion and the attached Proposed Brief within seven days after the date that defendants-appellants filed their principal briefs, as set forth in Fed. R. App. P. 29(e).

EuropeanIssuers contacted the parties to obtain consent to file the Proposed Brief, and defendants-appellants consented. Plaintiffs-appellees did not consent, making this motion necessary.

I.

EuropeanIssuers' Interest As *Amicus*

EuropeanIssuers has a strong interest in the outcome of this appeal. EuropeanIssuers is a non-profit pan-European industry and trade organisation representing the interests of (as of December 31, 2014) some 8,000 publicly quoted companies in 14 European countries and fifteen different national associations, as well as other corporate members, regarding legislation concerning European companies quoted on both the main regulated markets and the alternative exchange-regulated markets. EuropeanIssuers' members cover markets worth

approximately €7.2 trillion in market capitalization. Its mission is to ensure an environment in which European companies can raise capital through the public markets and deliver growth over the long-term. As the only pan-European organization of its kind, EuropeanIssuers is uniquely situated to voice the concerns of European industry.

EuropeanIssuers is offering its view because this case involves important issues for the standards of class certification in private securities litigation, as well as the extraterritorial effect of U.S. securities laws. These concerns are directly relevant to the mission of EuropeanIssuers and the markets it covers. For the reasons set forth in the Proposed Brief, the members represented by EuropeanIssuers will be severely adversely affected should the District Court's class certification be affirmed.

II.

EuropeanIssuers' *Amicus* Brief is Desirable and the Matters Asserted are Relevant to the Disposition of the Case

This appeal involves an important issue concerning the intersection of the standard for class certification in private securities actions and the extraterritoriality of the U.S. securities laws. Petrobras is a foreign issuer whose equities trade on foreign exchanges and whose debt does not trade on any exchange, but rather in the global "over-the-counter" ("OTC") market. In the

instant litigation, the District Court's class certification deviated from the rule set forth in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010). In *Morrison*, the Supreme Court held that the extraterritorial limits of the federal securities laws should be assessed on a transactional basis, and non-domestic claims should be dismissed as outside the reach of U.S. securities laws. However, the District Court certified an investor class seeking billions of dollars in damages in connection with purchases, spanning years, of a foreign issuer's non-exchange traded, globally-offered notes. *In re Petrobras Sec. Litig.*, 14:cv-9662-JSR (Dkt # 428) (the "District Court Cert Decision"). A-5982 – A-6030. This class will likely include many claims that would not survive *Morrison* scrutiny, but forces the class action defendants to defend them nevertheless.

The Proposed Brief is desirable because it will assist the Court in its consideration of defendants-appellants' appeal. EuropeanIssuers is well-positioned to submit an *amicus* brief on this issue because it and its members have deep experience in and understanding of global debt markets, particularly from a transnational perspective. The Proposed Brief provides context on the unique issues that the District Court's class certification presents for foreign securities issuers. EuropeanIssuers is also uniquely suited to call the Court's attention to the consequential impact that the District Court's class certification will have on the

issuance costs and risk protocols of foreign issuers. This information should be taken into account in evaluating the issues raised on appeal.

The matters asserted in the Proposed Brief are also relevant to the disposition of the case. In the District Court Cert Decision, the District Court's acknowledgement of the *Morrison* rule extended only to including the phrase "domestic transactions" in the class definition. The District Court's use of that phrase is cold comfort for foreign issuers, such as those represented by EuropeanIssuers, because the class definition leaves foreign issuers at a loss as to which transactions are going to be part of the class in the end, and which should have been excluded under *Morrison* from the start. Rather, it subjects all transactions in over-the-counter securities, and all issuers of those securities, to the full U.S. class action litigation process, leaving to some future unspecified time a determination of whether some, many, or virtually all of those transactions should not have been subject to U.S. litigation in the first place. Accordingly, the District Court's class definition does not satisfy Rule 23's requirements of ascertainability or predominance, and in circumventing these requirements, the class certification results in many harms that *Morrison* sought to prevent.

The Proposed Brief explains how the District Court Cert Decision places "hydraulic pressure" on a foreign issuer defendant to settle, likely at an inflated amount. As foreign issuers would be unable to assess what actual

damages might be until after claims administration – if at all – they would be forced to negotiate settlements in the dark. In such a case, the foreign issuer could face a class action claim potentially worth billions of dollars, but actually worth some considerable amount less, once non-domestic transactions are excluded. The failure to exclude non-domestic purchasers before judgment would risk producing an "astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants," in violation of the Due Process Clause and the Rules Enabling Act. *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

Finally, the Proposed Brief describes the direct and collateral costs imposed on foreign issuers by the District Court Cert Decision. The District Court's class certification would foist the ill effects of incompatibility of U.S. securities laws with foreign laws onto foreign issuers. Additionally, if the District Court's class certification is upheld, foreign issuers will have to take on board all of the costs of avoiding the risks set forth above, undermining their competitiveness in a manner that *Morrison* sought to avoid. These extra costs to foreign issuers will disincentivize issuing securities in U.S. markets, unduly restricting U.S. markets and harming U.S. investors.

CONCLUSION

For all of the reasons set forth above, EuropeanIssuers' motion for leave to file the Proposed Brief as *amicus curiae* in support of defendants-appellants should be granted.

Dated: July 28, 2016

Respectfully submitted,

MORRISON COHEN LLP

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(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* EUROPEANISSUERS AISBL IN SUPPORT OF DEFENDANTS-APPELLANTS

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AUSTRIA LIMITED, solely in its capacity as responsible entity for the DIMENSIONAL EMERGING MARKETS TRUST, DFA INTERNATIONAL CORE EQUITY FUND, and DFA INTERNATIONAL VECTOR EQUITY FUND by DIMENSIONAL FUND ADVISORS CANADA ULC solely in its capacity as Trustee, DIMENSIONAL FUNDS PLC, on behalf of its subfund EMERGING MARKETS VALUE FUND, DIMENSIONAL FUNDS ICVC, on behalf of its sub-fund EMERGING MARKETS CORE EQUITY FUND, SKAGEN AS, DANSKE INVEST MANAGEMENT A/S, DANSKE INVEST MANAGEMENT COMPANY, NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM, NEW YORK CITY POLICE PENSION FUND, BOARD OF EDUCATION RETIREMENT SYSTEM OF THE CITY OF NEW YORK, TEACHERS' RETIREMENT SYSTEM OF THE CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT PENSION FUND, NEW YORK CITY DEFERRED COMPENSATION PLAN, FORSTA AP-FONDEN, TRANSAMERICA INCOME SHARES, INC., TRANSAMERICA FUNDS, TRANSAMERICA SERIES TRUST, TRANSAMERICA PARTNERS PORTFOLIOS, JOHN HANCOCK VARIABLE INSURANCE TRUST, JOHN HANCOCK FUNDS II, JOHN HANCOCK SOVEREIGN BOND FUND, JOHN HANCOCK BOND TRUST, JOHN HANCOCK STRATEGIC SERIES, JOHN HANCOCK INVESTMENT TRUST, JHF INCOME SECURITIES TRUST, JHF INVESTORS TRUST, JHF HEDGED EQUITY & INCOME FUND, ABERDEEN EMERGING MARKETS FUND, ABERDEEN GLOBAL EQUITY FUND, ABERDEEN GLOBAL NATURAL RESOURCES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, each a series of ABERDEEN FUNDS, ABERDEEN CANADA EMERGING MARKETS FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE GLOBAL FUND, ABERDEEN CANADA SOCIALLY RESPONSIBLE INTERNATIONAL FUND, ABERDEEN CANADA FUNDS EAFE PLUS EQUITY FUND and ABERDEEN CANADA FUNDS GLOBAL EQUITY FUND, each a series of ABERDEEN CANADA FUNDS, ABERDEEN EAFE PLUS ETHICAL FUND, ABERDEEN EAFE PLUS FUND, ABERDEEN EAFE PLUS SRI FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN FULLY HEDGED INTERNATIONAL EQUITIES FUND, ABERDEEN INTERNATIONAL EQUITY FUND, ABERDEEN GLOBAL EMERGING MARKETS EQUITY FUND, ABERDEEN GLOBAL ETHICAL WORLD EQUITY FUND, ABERDEEN GLOBAL RESPONSIBLE WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD EQUITY DIVIDEND FUND, ABERDEEN GLOBAL WORLD EQUITY FUND, ABERDEEN GLOBAL WORLD RESOURCES EQUITY FUND, ABERDEEN EMERGING MARKETS EQUITY FUND, ABERDEEN ETHICAL WORLD EQUITY FUND, ABERDEEN MULTI-ASSET FUND, ABERDEEN WORLD EQUITY FUND, ABERDEEN LATIN AMERICA EQUITY FUND, INC., AAAID EQUITY PORTFOLIO, ALBERTA TEACHERS RETIREMENT FUND, AON HEWITT INVESTMENT CONSULTING, INC., AURION INTERNATIONAL DAILY EQUITY FUND, BELL ALIANT REGIONAL COMMUNICATIONS INC., BMO GLOBAL EQUITY CLASS, CITY OF ALBANY PENSION PLAN, DESJARDINS DIVIDEND INCOME FUND, DESJARDINS EMERGING MARKETS FUND, DESJARDINS GLOBAL ALL CAPITAL EQUITY FUND, DESJARDINS OVERSEAS EQUITY VALUE FUND, DEVON COUNTY COUNCIL GLOBAL EMERGING MARKET FUND, DEVON COUNTY COUNCIL GLOBAL EQUITY FUND, DGIA EMERGING MARKETS EQUITY FUND L.P., ERIE INSURANCE EXCHANGE, FIRST TRUST / ABERDEEN EMERGING OPPORTUNITY FUND, GE UK PENSION COMMON INVESTMENT FUND, HAPSHIRE COUNTY COUNCIL GLOBAL EQUITY PORTFOLIO, LONDON BOROUGH OF

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Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, EuropeanIssuers aisbl hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% of its stock.

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INTEREST OF AMICUS CURIAE

EuropeanIssuers aisbl[1] is a non-profit pan-European industry and trade organisation representing the interests of (as of December 31, 2014) some 8,000 publicly quoted companies in 14 European countries[2] and fifteen different national associations, as well as other corporate members, regarding legislation concerning European companies quoted on both the main regulated markets and the alternative exchange-regulated markets. EuropeanIssuers' members cover markets worth approximately €7.2 trillion in market capitalization. Its mission is to ensure an environment in which European companies can raise capital through the public markets and deliver growth over the long-term. As the only pan-European organization of its kind, EuropeanIssuers is uniquely situated to voice the concerns of European industry.

EuropeanIssuers is offering its view because this case involves important issues for the standards of class certification in private securities

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[1] Pursuant to Fed. R. App. P. 29(c)(5), EuropeanIssuers states that no party's counsel authored this brief in whole or in part and that no party or party's counsel, or any other person, other than *amici* or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

[2] Austria, Belgium, Cyprus, Finland, France, Germany, Greece, Italy, Netherlands, Poland, Portugal, Spain, Switzerland, and the United Kingdom.

litigation, as well as the extraterritorial effect of U.S. securities laws; concerns that are directly relevant to the mission of EuropeanIssuers and the markets it covers.

BACKGROUND AND SUMMARY OF ARGUMENT

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the Supreme Court held that the extraterritorial limits of the federal securities laws should be assessed on a transactional basis. If a European company issues securities to a European party in a transaction taking place in Europe, that company should not be subject to the United States securities laws, which were not designed to reach such extraterritorial transactions. *Morrison* also held that if the U.S. securities laws applied to foreign transactions, the risks of inconsistent or even incompatible laws and regulations would sharpen dramatically.

In the instant litigation, the District Court's class certification deviated from the rule set forth in *Morrison* by certifying an investor class seeking billions of dollars in damages in connection with purchases, spanning years, of a foreign issuer's non-exchange traded, globally-offered notes. A-5982 – A-6030. The District Court's acknowledgement of the *Morrison* rule extended only to including the phrase "domestic transactions" in the class definition.

The District Court's use of that phrase is cold comfort, however, because the class definition leaves foreign issuers at a loss as to which transactions are going to be part of the class in the end, and which should have been excluded

under *Morrison* from the start. It subjects all transactions in over-the-counter securities, and all issuers of those securities, to the full U.S. class action litigation process, leaving to some future unspecified time a determination of whether some, many, or virtually all of those transactions should not have been subject to U.S. litigation in the first place.

Critically, a foreign issuer would not have any idea how many transactions in its securities were "domestic" transactions that would be included in a class like the District Court's class, versus how many would be non-domestic and thus excluded under *Morrison.* The test for a "domestic transaction" is one where "irrevocable liability was incurred or title was transferred within the United States." *Absolute Activist Value Master Fund Ltd. v. Ficeto,* 677 F.3d 60, 68 (2d Cir. 2012). But there is no way for an issuer to know whether any "domestic transactions" in its debt securities occurred in the over-the-counter ("OTC") market after their initial issuance. Accordingly, the District Court's class definition does not satisfy Rule 23's requirements of ascertainability or predominance, and in circumventing these requirements, the class certification contravenes one of the principles of *Morrison*: early dismissal of claims regarding non-domestic transactions.

The District Court's caveat – that *Morrison* could be applied after trial, when an "administratively feasible" claims administration process could

weed out foreign claims – does not mitigate the burdens envisioned and avoided by *Morrison*. By the time of claims administration, the foreign issuer will already have suffered significant prejudice and costs.

Foreign issuers facing a class of unknown size would be unable to assess what their actual damages might be at the end of the day. As a result, they would be forced to negotiate settlements in the dark, while facing a "hydraulic pressure" to settle to avoid even a small risk of tremendous liability. If it turns out that most of the claims in the class would not have survived under *Morrison*, then a tremendous cost will have been inflicted on foreign issuers in contravention of the principles that *Morrison* sets forth.

Further, the failure to exclude non-domestic claims before judgment increases the cost of litigation, in particular the costs of discovery, which will be proportional to the amount in dispute under the Federal Rules of Civil Procedure, and which can be especially heightened for cross-jurisdictional litigation. Delaying exclusion of non-domestic transactions increases the costs of insurance coverage to cover these litigation costs (if such insurance is even available), and will cause foreign issuers to require larger accounting reserves, held for longer than would have been necessary had *Morrison* been applied at the outset of the case – even setting aside the increased cost of insurance or reserve requirements that the specter of a larger judgment would trigger.

Finally, the District Court's class certification creates a high probability of inconsistency with foreign laws, including laws that specifically preclude class actions of the type known in the U.S., for what will be an extended duration before the foreign claims can be weeded out. Addressing these conflicts adds further costs and uncertainty.

All of these increased costs to foreign issuers increase foreign issuers' incentives to avoid U.S. markets to the extent possible. Thus, the District Court's class certification risks harming U.S. markets and U.S. investors.

We respectfully request that this Court reverse the District Court's class certification decision.

ARGUMENT

I. THE SUPREME COURT'S RULE IN *MORRISON* IS SENSIBLE AND BENEFICIAL TO INTERNATIONAL CAPITAL MARKETS

Before *Morrison*, U.S. private class actions alleging transnational securities fraud were on the rise, and private securities class actions against foreign issuers had increased as a percentage of total securities class actions, from around 6% and 3% in 1996 and 1997, to 12% in 2009.[3] Worse, U.S. securities laws were

[3] *See* Brief of *Amici Curiae* the Securities Industry and Financial Markets Association, the Association for Financial Markets in Europe, the Chamber of Commerce of the United States of America, the United States Council for International Business, the Association Française des Entreprises Privées, and GC100 in Support of Respondents at 10 n.2, *Morrison*, 567 U.S. 247 (No. 08–1191) (citing *Cornwell v. Credit Suisse Group*, No. 08 Civ. 3758 (VM), 2009 WL

being applied unpredictably and inconsistently to transnational cases. *Morrison*, 561 U.S. at 260.[4]

For these reasons, several European nations and major European industry organizations submitted *amicus* briefs in *Morrison*, each generally advocating for a rule limiting the reach of U.S. securities laws to domestic transactions, and leaving jurisdiction over foreign transactions to the relevant foreign jurisdiction. As the Supreme Court noted in *Morrison*:

> Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters. See, e.g., Brief for United Kingdom of Great Britain and Northern Ireland as Amicus Curiae 16–21. The Commonwealth of Australia, the

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3241404 (S.D.N.Y. Oct. 5, 2009); *In re Optimal Strategic U.S. Equity Fund Sec. Litig.*, 648 F. Supp. 2d 1388 (J.P.M.L. 2009); Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 Colum. J. Transnat'l L. 14, 40-41 n.120 (2007); Cornerstone Research, *Securities Class Action Filings—2009: A Year In Review* 11 (2010), *available at* http://securities.cornerstone.com/pdfs/Cornerstone_Research_Filings_2009_YIR.pdf).

[4] Citing Stephen J. Choi & Linda J. Silberman, Transnational Litigation and Global Securities Class-Action Lawsuits, 2009 Wis. L. Rev. 465, 467–468; Kun Young Chang, Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction, 9 Fordham J. Corp. & Fin. L. 89, 106–108, 115–116 (2004); Donald Langevoort, Schoenbaum Revisited: Limiting the Scope of Antifraud Protection in an Internationalized Securities Marketplace, 55 Law & Contemp. Probs. 241, 244–248 (1992).

> United Kingdom of Great Britain and Northern Ireland, and the Republic of France have filed amicus briefs in this case.
>
> So have (separately or jointly) such international and foreign organizations as the International Chamber of Commerce, the Swiss Bankers Association, the Federation of German Industries, the French Business Confederation, the Institute of International Bankers, the European Banking Federation, the Australian Bankers' Association, and the Association Française des Entreprises Privées. They all complain of the interference with foreign securities regulation that application of §10(b) abroad would produce, and urge the adoption of a clear test that will avoid that consequence.

Morrison, 561 U.S. at 269.

The Supreme Court was persuaded by these (among other) reasons, and held that Section 10(b) of the 1934 Act does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges. *Morrison*, 561 U.S. at 269-70 ("The transactional test we have adopted—whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange—meets that requirement.").

Accordingly, absent clearly expressed congressional intent to the contrary, federal laws are construed to have only domestic application. It is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 561 U.S. at 248 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("Aramco") and *Foley Bros., Inc. v.*

Filardo, 336 U.S. 281, 285 (1949)). This principle "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Morrison*, 561 U.S. at 225 (quoting *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)). And, more specifically, "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Morrison*, 561 U.S. at 248.

The Supreme Court has recently reinforced this rule, confirming that the Securities Exchange Act of 1934 "does not apply to frauds in connection with foreign securities transactions, even if those frauds involve domestic misrepresentations." *RJR Nabisco, Inc., v. European Cmty.*, __ U.S. ___, 195 L. Ed. 2d 476, 492, 2016 U.S. LEXIS 3925, at *20 (2016).

This Court, too, has recognized and applied *Morrison*, reaffirming specifically that an issuer who sells debt in the international markets is liable in the U.S. only to those who purchase domestically, and is not liable to a person who does not buy on a domestic exchange or in a domestic transaction. *See Absolute Activist Value Master Fund*, 677 F.3d at 62.

II. THE DISTRICT COURT'S DECISION WAS IN ERROR BECAUSE THE PROPOSED CLASS IS NOT ASCERTAINABLE

Class action litigation did not escape the Supreme Court's notice in *Morrison*: "While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some

fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets." *Morrison* at 270.[5] *Morrison* quelled many of these justifiable fears. The District Court's ruling would resurrect them.

A prerequisite to class certification is that the proposed class satisfies the "implied requirement of ascertainability." *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015). A plaintiff must prove that the proposed class is "defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case." *Id.* at 24-25.

The District Court recognized that *Morrison* required putative class members to be able to show that they purchased Petrobras securities on an American exchange or in a domestic transaction. A-6004. The District Court also found that ascertaining those transactions would be manageable, because

[5] Citing Brief for Infineon Technologies AG as *Amicus Curiae* 1–2, 22–25; Brief for European Aeronautic Defence & Space Co. N. V. et al. as *Amici Curiae* 2–4; Brief for Securities Industry and Financial Markets Association et al. as *Amici Curiae* 10–16; John C. Coffee, Jr., Securities Policeman to the World? The Cost of Global Class Actions, N.Y.L.J. 5 (2008); Stuart M. Grant & Diane Zilka, The Current Role of Foreign Investors in Federal Securities Class Actions, PLI Corporate Law and Practice Handbook Series, PLI Order No. 11072, pp. 15–16 (Sept.-Oct. 2007); Hannah L. Buxbaum, Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict, 46 Colum. J. Transnat'l L. 14, 38–41 (2007).

"documentation of 'the placement of purchase orders' is the sort of discrete, objective record routinely produced by the modern financial system that a court, a putative class member, or a claims administrator can use to determine whether a claim satisfies *Morrison*." *Id.*

However, the District Court's conclusion misunderstands international OTC markets. Bonds originally issued in one market can be traded globally, without any participation or involvement of the issuer. Obviously, a foreign issuer understands and can document where it initially issued its debt securities. But that foreign issuer often does not know whether, or to what extent, those debt securities are traded in any particular secondary market transactions afterwards, or whether those transactions were inside or outside the U.S. Foreign issuers would not have access to those secondary market trading records, which often would be in the hands of unknown third parties, such as various non-party financial institutions and other securities investors and intermediaries worldwide. Thus, it may be impossible for a foreign issuer to ascertain whether any particular putative class member will have a claim that survives *Morrison*, or whether "domestic transactions" will predominate over foreign claims that will be excluded.

Indeed, the record in this case reflects that nobody knows what proportion of the over $40 billion in face value of Petrobras's notes changed hands in the U.S. Plaintiffs themselves admit the class members "are not identifiable at

this stage" and argue that the discovery necessary to obtain the identities would be "impracticable and unrealistic." A-6045-46, A-6048.

In *Brecher*, this Court reversed an order certifying a class of all beneficial owners of a bond because the active secondary market for those bonds made it difficult to establish "a particular interest's provenance in the particular circumstances of this case," which in turn make the class not sufficiently "definite to allow ready identification of the … persons who will be bound by the judgment." 806 F.3d at 25.

The instant case is analogous. Many, and perhaps most, potential class members and third-party asset managers will not know the identity or location of the counterparty to their securities transactions, the location of their broker, or the location where title was transferred, and will have no documentation that could answer these questions.

If the class cannot be successfully ascertained, it should not be certified. And if it is not possible to ascertain how many claims will be dismissed because they are disallowed under *Morrison*, including because of the need for numerous individual determinations of whether a claim even is foreign or domestic, then it cannot be said that the allowable claims "predominate" over claims that should be dismissed from the outset. *See In re Initial Pub. Offerings Sec. Litig*, 471 F.3d 24, 45 (2d Cir. 2006). After all, whether a purchaser has a

federal securities claim is a threshold merits question to be resolved before judgment is entered. *See McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

III. DEFERRING THE MORRISON ISSUE UNTIL AFTER CLASS CERTIFICATION GREATLY HARMS FOREIGN ISSUERS AND ADVERSELY AFFECTS U.S. DEBT MARKETS

The impact of the District Court's class certification error is that by the time non-domestic claims could be established and weeded out of the class, the foreign issuer will already have faced the enormous costs of discovery, trial, and claims administration, despite the fact that the foreign issuer's exposure may, in fact, be minimal.

Foreign issuers who were relieved by the Supreme Court's sensible rule in *Morrison* are thus now plunged back into worry: under the District Court's reasoning, any foreign issuer can be haled into a U.S. court to face a class action, and its attendant costs, on the basis of a single trade in that issuer's security that occurs in the U.S. As this Court has expressed, the securities laws should not be given an interpretation that would "apply the statute to wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction." *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings*, 763 F.3d 198, 215 (2d Cir. 2014).

A. The District Court's Rule Would Exacerbate U.S. Litigation Risks and Costs for Foreign Issuers

The District Court's ruling is an invitation to plaintiff's lawyers to file in the Southern District of New York broad class actions on behalf of over-the counter purchasers worldwide, with only the minimal requirement to identify a single domestic purchaser, in order to create a shadow of a much larger class. While such class actions may be a boon to the plaintiffs' bar, they will cause undue harms to European and other foreign issuers.

Under the District Court's rule, a foreign issuer could face a class action claim potentially worth billions of dollars, but actually worth a considerable amount less, once non-domestic transactions are excluded. The failure to exclude non-domestic purchasers before judgment would risk producing an "astronomical damages figure that does not accurately reflect the number of plaintiffs actually injured by defendants and that bears little or no relationship to the amount of economic harm actually caused by defendants," in violation of the Due Process Clause and the Rules Enabling Act. *McLaughlin*, 522 F.3d at 231.

1. The District Court's Rule Would Force Foreign Issuers into Settlement Discussions With Less Information, Forcing Unduly High Settlements

As detailed above, at the class certification phase, a foreign issuer will likely have no idea – absolutely no way to know – how many secondary market transactions in its securities may have occurred in the U.S. A foreign issuer would

bear the risk of underestimating the quantity of "domestic transactions" at its peril. A prudent issuer would be forced to assume the worst, leading to a much higher settlement figure than might eventually be justified, in a blindman's bluff of a settlement negotiation.

For these reasons, the foreign issuer will face a "class certification [that] places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2014) (citations and internal quotation marks omitted).

In the landmark class action case *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court expressed concern that a "claim just shy of a plausible entitlement to relief" could lead to undue pressure to settle: "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." 550 U.S. at 559. In such a case, "a plaintiff with a largely groundless claim [would] be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.* at 557-58 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U. S. 336, 347 (2005) and *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (internal quotation marks omitted); see also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (any order certifying a large plaintiff class "may so increase the defendant's potential damages liability and litigation costs that he may

find it economically prudent to settle and to abandon a meritorious defense"); *In re Rhone-poulenc Rorer Inc.*, 51 F.3d 1293, 1297-98 (7th Cir. 1995) (Posner, J.) (when defendants are faced with a class action worth billions in potential liability and bankruptcy, "They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.").

Incentivizing settlement at a disproportionately high value is a boon to class action plaintiffs' lawyers, but it comes at a severe cost to foreign issuers, their local shareholders (who have no rights of participation in the class or recovery from any award), and the foreign labor, vendors, and other groups dependent on the foreign issuer. Such class actions "disruptively expos[e] foreign corporations to a litigation environment in which plaintiffs arguably have undue leverage," and "the United States' foreign neighbors must fear that a global class action in a U.S. court may threaten the solvency of even their largest companies and could have an adverse impact on the interests of local constituencies, including labor, creditors and local communities." John C. Coffee, Jr., *Global Class Actions*, Nat'l Law J., June 11, 2007, at 12.

2. The District Court's Rule Would Increase the Cost of Litigation for Foreign Issuers

The potential liability at the outset of the case affects the entirety of the case, and its importance cannot be understated. For example, the amount of discovery appropriate under Fed. R. Civ. P. 26(b)(1) is to be "proportional" to the

"amount in controversy." *See also* Fed. R. Civ. P. 26 Advisory Committee Notes on Rules – 2015 Amendment ("Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case."). A class claim of billions of dollars may easily inflict tens of millions of dollars in discovery costs on a foreign issuer, even if only a small handful of claims would survive *Morrison* in the end – a fact that, had it been clear from the outset, would have justified far lower discovery costs.

Moreover, litigation involving entities and activities outside of the U.S. raises significant discovery issues that often make litigation more complicated and expensive: various foreign secrecy laws, blocking statutes, and data protection regulations; requirements to invoke the Hague Convention and employ letters rogatory; increased costs of collecting documents, trading data, and other evidence around the world; and of course, dealing with any translation issues. The extent to which all of these factors will add to the cost of the litigation depends on the amount at stake in the case. A multi-billion dollar class action may well justify high discovery expenses. But if only a few claims in the class would survive once the *Morrison* standards are applied, the amount of discovery that would be proportional to the claim would be radically reduced. It is unfair to inflict millions of dollars in discovery costs for claims that, had they been properly plead in a non-class-action, would not have survived a motion to dismiss.

3. The District Court's Rule Would Raise Insurance and Reserve Costs for Foreign Issuers

The uncertainty generated by the District Court's class certification rule will increase other costs for European issuers as well. Like many American companies, European companies frequently seek to insure against business and legal risk. But third-party insurance against the cost of a judgment, or even the litigation costs of a protracted lawsuit, may not be available to European issuers. And even if such insurance were available, it may come with steep premiums, because under the District Court's rule, the potential liability (and attendant litigation costs, which should be proportional) may not be known until after any post-judgment *Morrison* claims administration. That uncertainty – even as to the order of magnitude – will trigger a relatively higher premium, raising costs to the issuer who chooses to insure against such risks.

Further, companies are generally required under the applicable accounting rules of their jurisdiction to take reserves for potential liability or costs of litigation as a contingent liability. The District Court's rule generates uncertainty that will raise the level of such reserves. A company may be forced to set aside immense amounts of money for litigation costs alone, much less for the cost of any potential judgment, all for a case that may end up being worth far less, or even nothing, once the non-domestic claims are removed. Under *Morrison*, non-domestic claims would be dismissed at a far earlier stage, and an appropriate

level of reserves for any remaining domestic claims could be assessed. But under the District Court's rule, a company might well have to take a higher reserve than would ultimately be justified.

These increased costs are, economically speaking, a deadweight loss. The money that is tied up for the duration of the litigation is capital that a foreign company cannot be using more productively in the meantime – money that could have been used to hire workers, build factories, expand investments, pay dividends to shareholders, or deliver other kinds of growth and economic benefit.

Thus, allowing class plaintiffs to postpone the *Morrison* inquiry until after trial would encourage plaintiff's lawyers to pursue this end-run around *Morrison*, severely disadvantaging foreign issuers and their shareholders, employees, creditors, and owners.

B. The District Court's Rule Would Exacerbate Regulatory Costs and Risk Conflicting Legal Regimes

The Supreme Court recently reaffirmed that there are "several reasons" for the presumption against extraterritoriality. "Most notably, it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco*, 195 L. Ed. 2d at 492 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ___, 133 S. Ct. 1659 (2013); *Aramco*, 499 U.S. at 248; *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

The Supreme Court noted that it received "similar warnings" in the *Morrison* case, where the Republic of France (an *amicus curiae* in *Morrison*, and a respondent in *RJR Nabisco*) stated that "most foreign countries proscribe securities fraud" but "have made very different choices with respect to the best way to implement that proscription," such as "prefer[ring] 'state actions, not private ones' for the enforcement of law." *RJR Nabisco*, 195 L. Ed. 2d at 500 (citing Brief for Republic of France as *Amicus Curiae* in *Morrison* ("France Amicus Brief") at 20, 23, 567 U.S. 247 (2010) (No. 08–1191) ("Even when foreign countries permit private rights of action for securities fraud, they often have different schemes" for litigating them and "may approve of different measures of damages.")).

For example, although "most foreign countries proscribe securities fraud … the U.S. approach to policing securities fraud – by privately initiated class actions instituted by plaintiffs' attorneys working on a contingency-fee basis – is not one that has commended itself to most foreign nations." France Amicus Brief at 20. Indeed, "only a few other countries have adopted class-action mechanisms for securities violations." Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 Wis. L. Rev. 465, 484 (2009).

Thus, the Supreme Court concluded in *Morrison*, "The probability of incompatibility with the applicable laws of other countries is so obvious that if

Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'" *Morrison*, 561 U.S. at 269 (quoting *Aramco*, 499 U.S. at 256).

The District Court's class certification would foist the ill effects of this "probable" incompatibility with foreign laws onto foreign issuers. The fact that the incompatibility may one day be resolved, after discovery, trial, judgment, and a class administration procedure, is cold comfort to the foreign issuer who is forced to deal with the conflicts in the meantime.

C. The District Court's Rule Harms the U.S. and International Capital Markets

If the District Court's class certification is upheld, foreign issuers will have to take on board all of the costs of avoiding the risks set forth above, undermining their competitiveness in a manner that *Morrison* sought to avoid. Such a ruling would trigger the outsized compliance costs of obeying U.S. laws even for debt securities that are not issued in the U.S., on the chances that those securities may one day be traded in the U.S., whether the issuer even knows it or not. A foreign issuer would have to assume the risks, and absorb the costs, of being haled into court to defend against a class action litigation featuring a pre-judgment class of some unknown, but possibly terrifyingly large, size. Foreign issuers would also incur the costs of navigating any conflicts of laws between U.S. laws and their own country's laws.

These extra costs to foreign issuers will disrupt the balance of incentives between issuing securities in international and U.S. markets, unduly restricting both markets and the U.S. financial sector. The District Court's ruling will deter European issuers from issuing debt securities that might later be traded in U.S. markets. Instead, it will incentivize European issuers to issue bonds in transactions that do not use U.S. jurisdictional means at all, or issue securities with prophylactic measures to reduce the risk of those bonds touching U.S. investors on the secondary market.

It is far from clear that prophylactic measures would even be possible or enforceable. If an issuer issues bonds entirely outside the U.S., and one of the bonds subsequently trades in a U.S. domestic transaction, a class action plaintiff could – and will – argue that the issuer is subject to a U.S. class action under the District Court's rule.

But even were such measures possible, they would carry a significant cost to the issuer, in terms of liquidity and cost of financing. Issuing securities to a smaller pool of investors with greater restrictions on the alienability of those securities will decrease the liquidity of the security, and (in the case of debt securities) increase the issuer's cost of borrowing. The result of this heavy thumb on the incentives scale would be to increase the cost of raising capital, hindering

growth, making U.S. markets less attractive to European issuers, and concomitantly, reducing investment opportunities for U.S. investors.

Amici in *Morrison* observed that the attendant costs of U.S. securities class actions made the United States less attractive as a market for securities. As described in the Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents in *Morrison* at 26 n.53:

> The Schumer-Bloomberg Report found that meritless securities class action lawsuits and settlements in the United States with their attendant costs and possibility of director and officer liability have made London and other European capitals more attractive venues for listing and investment for some businesses than the United States. [Citation omitted.] This Court recognized similar concerns in [*Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008)].

567 U.S. 247 (2010) (No. 08–1191). The Supreme Court took note of the many *amici* from foreign issuers in formulating its decision in *Morrison*. We respectfully suggest this Court take the same approach.

Reducing the incentive to issue debt securities available to U.S. investors would affect foreign issuers' business choices, affecting the market for debt securities in the United States. As one *amicus* in *Morrison* put it, the "costs associated with defending global class actions by foreign investors who have no connection with the United States often vastly exceeds the value of such listings, and, if left unabated by this Court, will discourage foreign participation in the

United States capital markets." Brief of Infineon Technologies AG as *Amicus Curiae* at 27, 567 U.S. 247 (2010) (No. 08–1191).

Fewer debt securities from foreign issuers available in the U.S. would lead to a less liquid, competitive, and robust U.S. debt market, which is, put simply, bad for European issuers, bad for U.S. business, and bad for U.S. investors.

CONCLUSION

The District Court's class certification should be overturned.

Dated: July 28, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for *Amicus Curiae* EuropeanIssuers aisbl hereby certifies that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(i), the typeface requirements set forth in Fed. R. App. P. 32(a)(5), and the type style requirements set forth in Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font and contains 5,362 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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