No. 17-664

In the Supreme Court of the United States

PETRÓLEO BRASILEIRO S.A.—PETROBRAS, ET AL.,
Petitioners,
v.

UNIVERSITIES SUPERANNUATION SCHEME LIMITED, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF EUROPEANISSUERS AISBL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

EuropeanIssuers aisbl is a non-profit pan-European cross-sectorial industry organization representing the interests of some 8,000 publicly quoted companies in 14 European countries and through its fifteen different national associations, as well as direct 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 €7.6 trillion in market capitalization. Its mission is to ensure a favorable regulatory environment in which European companies can raise capital through the public markets and deliver growth over the long-term.

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; concerns that are directly relevant to the mission of EuropeanIssuers and the markets it covers.

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[1] This brief is filed with the written consent of all parties. No counsel for either party authored this brief in whole or in part, nor did any party or other person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the brief's preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of amici to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises a recurring issue of exceptional importance under federal securities laws and the law governing class actions, on which the Courts of Appeals are deeply divided. Simply put, to certify a class for a class action under Rule 23 of the Federal Rules of Civil Procedure, will there be a uniform requirement in the United States that class membership must be ascertainable at the time of class certification through administratively feasible means?[2]

In its decision below, the Second Circuit joined the Sixth, Seventh, and Ninth Circuits in interpreting the ascertainability requirement to permit a court to certify a class in the absence of any evidence that class members can readily ascertain their membership. In contrast, the Third, Fourth, and Eleventh Circuits require plaintiffs to establish a reliable and ready method for identifying class members at the time of class certification.

The Second Circuit's decision deepens a circuit split, raising serious concerns for European and other foreign securities issuers. The conflicting Court of Appeals rulings—if left unaddressed by this Court—will likely

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[2] EuropeanIssuers submits this amicus brief in support of the second Question Presented by the November 1, 2017 Petition for a Writ of Certiorari (the "Cert Petition"), regarding Rule 23 ascertainability requirements. EuropeanIssuers supports certiorari on the first Question Presented as well, regarding the standard for a presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), for the reasons set forth in the Cert Petition, which will not be addressed herein.

have a significant impact on the ability of European and other foreign issuers to use and participate in U.S. financial markets, and have a negative impact on those markets as a whole.

The fundamentally problematic circuit split means that European and other foreign issuers of securities are faced with deep uncertainty over the standards under which they can be pulled into a U.S. class action alleging fraud relating to those securities, which currently depends heavily on what federal circuit plaintiffs choose as the forum for their suit.

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

The circuit split deepened by the Second Circuit's holding regarding ascertainability re-injects the potentially paralyzing uncertainty for foreign issuers that *Morrison* had relieved. Foreign issuers are left at a loss as to which transactions will be part of a certified class at the end of the litigation, and which should have been excluded under *Morrison* from the start.

The uncertainty 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.

A foreign issuer does not have any idea whether there were any "domestic transactions" in its securities in the over-the-counter ("OTC") secondary market after their initial issuance. Thus, there is no way for a foreign issuer to know how many such transactions would be included in a class, versus how many would be non-domestic and thus excluded under *Morrison*. Foreign issuers are in the dark as to how big a class could possibly be, severely disadvantaging them in any litigation or settlement negotiations.

In February 2016, the District Court granted class certification, presuming that it was "highly likely" that documentation demonstrating whether a transaction is domestic would be easily accessible to the court and putative class members, such that the resolution of *Morrison* issues would require only a post-verdict "bureaucratic" determination. App. 86a. The District Court therefore concluded that the proposed classes were "ascertainable and administratively manageable." App. 86a.

On appeal, the Second Circuit viewed Rule 23 ascertainability as a "modest threshold requirement," and that the "*practicality* of making the domesticity determination for each putative class member" is irrelevant, as long as such determinations are "objectively *possible*." App. 43a. The Second Circuit

acknowledged the direct split among circuit courts on the question of whether the process of ascertaining class membership must be administratively feasible. App. 32a.

The Second Circuit's holding contravenes the core principle of *Morrison*—early dismissal of claims regarding non-domestic transactions. The Second Circuit's ruling also splits from the Third, Fourth, and Eleventh Circuits, which each require plaintiffs to establish a reliable and ready method for identifying class members prior to class certification.

EuropeanIssuers urges this Court to resolve the circuit split, and hold that in order to certify a Rule 23 class, class membership should be ascertainable at the time of class certification through administratively feasible means. Otherwise, foreign issuers will be subject to class actions of completely unknown exposure levels. That uncertainty will lead to additional costs for foreign issuances, and a concomitant negative impact on the U.S. securities markets.

ARGUMENT

I. THE SUPREME COURT'S RULE IN *MORRISON* IS SENSIBLE AND BENEFICIAL TO U.S. AND 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 being applied unpredictably and inconsistently to transnational cases. *Morrison*, 561 U.S. at 260.

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. *See Morrison*, 561 U.S. at 269.

This Court was persuaded by these (among other) reasons, and held that Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), does not provide a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in

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[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 3241404 (S.D.N.Y. Oct. 5, 2009).

connection with securities traded on foreign exchanges or in other foreign transactions. *See Morrison*, 561 U.S. at 269-70.

Accordingly, absent clearly expressed congressional intent to the contrary, federal laws are construed to have only domestic application. *Morrison*, 561 U.S. at 248. 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 Court recently reinforced this rule, confirming that the Exchange Act "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). To be sure, the Court's rule excluding foreign transactions from the reach of U.S. securities laws (and leaving jurisdiction over such foreign transactions to the relevant foreign jurisdiction) has created predictability and certainty for international issuers, encouraging participation in the global capital markets.

II. THE SECOND CIRCUIT'S DECISION DEFERS THE *MORRISON* ISSUE UNTIL AFTER CLASS CERTIFICATION, WHICH GREATLY HARMS FOREIGN ISSUERS AND ADVERSELY AFFECTS U.S. SECURITIES MARKETS

The Second Circuit concluded that Rule 23 does not include an "independent administrative feasibility requirement," but rather requires only that a class be definite and defined by objective criteria. It concluded that ascertainability is a "modest threshold requirement," and that the "practicality of making the domesticity determination for each putative class member" is irrelevant, as long as such determinations are "objectively possible." App. 41a, 43a.

The Second Circuit's conclusion errs because without a threshold Rule 23 requirement that class membership be ascertainable through administratively feasible means, by the time non-domestic claims could be established (if at all) and weeded out of the class under *Morrison*, the foreign issuer will already have faced the enormous costs of discovery and trial, despite the fact that the foreign issuer's exposure may, in fact, be minimal or even zero.

Foreign issuers who were relieved by the Supreme Court's sensible rule in *Morrison* are thus now plunged back into worry: under the Court of Appeals' 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 United States.

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

The Second Circuit's holding invites plaintiffs' lawyers to file 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—and to pick carefully the circuit in which they file such actions. Such class actions will cause severe and undue harms to European and other foreign issuers.

Under the Second Circuit's rule, a foreign issuer could face a class action claim potentially worth billions of dollars, but actually worth a considerable amount less—perhaps only trivial amounts—once non-domestic transactions are excluded. The absence of an administratively feasible way to ascertain domestic purchasers at the time of class certification 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." *McLaughlin v. Am. Tobacco Co.,* 522 F.3d 215, 231 (2d Cir. 2008). And, such an inflated damages estimate will in turn place a "hydraulic pressure on defendants to settle," so as to allow them to avoid "the risk, however small, of potentially ruinous liability.'" *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2014); *quoting Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001).

1. The Second Circuit'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 how many secondary market transactions in its securities may have occurred in the United States; even for initial offerings for debt, the location of the transaction may be unclear when the underwriters are banks that have operations, affiliates, and customers all over the globe. 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.

In the class action case *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this 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.

As this Court has long held, 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." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975); *see also Twombly*; 550 U.S. at 557-58 (same); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (same); *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 Second Circuit's Rule Would Increase the Costs 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 overstated. 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 under *Morrison*.

3. The Second Circuit's Rule Would Raise Insurance and Reserve Costs for Foreign Issuers

The uncertainty generated by the Second Circuit'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 Second Circuit's rule, the potential liability (and attendant litigation costs, which should be proportional) may not be known at the time of class certification. 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 Second Circuit'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, in addition to 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 should be ascertained at a far earlier stage, and an appropriate level of reserves for any remaining domestic claims could be assessed. But under the Second Circuit'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 use more productively in the meantime—money that could be 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 would encourage plaintiffs' lawyers to pursue this end-run around *Morrison*, severely disadvantaging foreign issuers and their shareholders, employees, creditors, and owners.

B. The Second Circuit's Rule Would Exacerbate Regulatory Costs and Risk Conflicting Legal Regimes and Outcomes

This 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); *EEOC v. Arabian American Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

This Court also 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.")).

These concerns are compounded here. 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*, "[t]he 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 Second Circuit's rule 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 and trial is cold comfort to the foreign issuer who is forced to deal with the conflicts and attendant costs in the meantime. Similarly, beyond the discord of differing procedural and substantive laws across jurisdictions, the Second Circuit's rule invites the possibility of incompatible *outcomes*; here, for instance, Brazilian authorities and courts concluded Petrobras to be the victim of a criminal scheme, yet the company continues to be sued in United States court in relation to the same issues. App. 13a-14a.

C. The Second Circuit's Rule Harms the U.S. and International Capital Markets

If the Second Circuit's class certification rule is upheld, foreign issuers will have to take on board all of the costs of avoiding the risks set forth above, undermining the competitiveness of the United States capital markets 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 United States, on the chances that those securities may one day be purchased there, 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 Second Circuit's ruling will deter European issuers from issuing 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 unclear 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 Second Circuit'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). This Court took note of the many *amici* from foreign issuers in formulating its decision in *Morrison*.

Reducing the incentive to issue securities available to U.S. investors would affect foreign issuers' business choices, affecting the market for 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 securities from foreign issuers available in the U.S. would lead to a less liquid, competitive, and robust U.S. securities market, which is, put simply, bad for European issuers, bad for U.S. business, and bad for

U.S. investors. We respectfully request that this Court grant certiorari so that it can re-affirm *Morrison*'s limitations and prevent this result.

III. EUROPEAN AND OTHER FOREIGN ISSUERS HAVE A DEEP INTEREST IN RESOLVING THE ACKNOWLEDGED CIRCUIT SPLIT ON WHETHER RULE 23 REQUIRES ADMINISTRATIVE FEASIBILITY

Foreign securities issuers are anxious to resolve this circuit split in order to be assured that they will be treated in a uniform manner regardless of where in the United States a plaintiff chooses to bring a class action case.

A. The Circuits Are Sharply Divided on the Administrative Feasibility Requirement

Three circuits require plaintiffs to establish a reliable method for identifying class members prior to certification: the Third Circuit, *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013) (ascertainability requires that "the class must be defined with reference to objective criteria" and "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition"); *Marcus v. BMW of N. Am., LLC,* 687 F.3d 583, 593 (3d Cir. 2012) (same); the Fourth Circuit, *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) ("[i]f class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials,' then a class action is inappropriate.") (citing 7A Charles Alan Wright et al., Federal Practice & Procedure § 1760 (3d ed. 2005); and the Eleventh Circuit, *Karhu v. Vital Pharm., Inc.*, 621

F. App'x 945, 946-50 (11th Cir. 2015) ("A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible.").

In contrast, the Sixth, Seventh, and Ninth Circuits have allowed class actions to proceed even if the plaintiffs cannot propose a reliable means of identifying class members. *See Briseño v. ConAgra Foods, Inc*., 844 F.3d 1121, 1123 (9th Cir. 2017), cert denied *sub nom Conagra Brands, Inc. v. Briseño*, No. 16-1221, __ S. Ct. __, 2017 WL 1365592 (Oct. 10, 2017); *Rikos v. Procter & Gamble Co*., 799 F.3d 497, 524-25 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 662 (7th Cir. 2015).

B. This Case Is An Excellent Vehicle For The Court To Consider Ascertainability

Under *Morrison*, whether an investor has a claim under the federal securities law with respect to securities not traded on a domestic exchange is determined on a transaction-by-transaction basis that considers whether irrevocable liability was incurred or title was passed in the United States. *See, e.g.*, *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 67 (2d Cir. 2012). In order for such a person to avail himself of the federal securities laws, he must make an individualized showing that may depend, among other things, on "facts concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money." *Id.* at 67-68.

However, there is no administratively feasible means for an investor in many European-issued notes, the court, or defendants to ascertain whether the notes were purchased in "domestic transactions." In the modern securities markets, transactions occur in markets worldwide. Neither investors nor issuers may know all the facts relevant to determining whether a particular transaction is "domestic."

The Second Circuit's decision on ascertainability exacerbates the problems that this Court sought to avert in *Morrison*. The Second Circuit upheld the certification of a *worldwide* class of investors who purchased in "domestic transactions" *and* held that the plaintiffs need not show that it was feasible to ascertain whether class members actually purchased domestically. The Second Circuit's ruling thus invites any plaintiffs' lawyer to identify a single off-exchange domestic purchaser and file in U.S. federal court on behalf of a broad purported class.

Given the frequency with which this issue arises, the ongoing confusion in the lower courts, the conflict among federal courts of appeals, and the incentive for plaintiffs' lawyers to engage in forum-shopping, this case presents "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c); *see Wright v. North Carolina*, 415 U.S. 936, 938 (1974) (Douglas, J., dissenting) ("the prime consideration in the exercise of discretionary jurisdiction was 'whether the case is of such a character that the last word, the ultimate guiding rule, should be announced by the Supreme Court, so that there may be uniformity of decision in the several circuit courts of appeals . . . .'"); *see also Basic Inc. v. Levinson*, 485 U.S.

224, 230 (1988) (granting certiorari "to resolve the split among the Courts of Appeals . . . .").

The purpose of the Federal Rules of Civil Procedure is to provide a uniform and orderly process of adjudicating cases in the federal system, but only this Court can now provide a single, uniform standard for the application of Rule 23.

C. European and Other Foreign Securities Issuers Have an Abiding Interest in Uniformity of Application of Federal Securities Laws and Class Action Procedures

On behalf of its members, EuropeanIssuers has a strong interest in the uniform application of standards for United States class action procedure. Unlike domestic companies, European securities issuers are not domiciled in any particular state of the United States. There is no "natural" United States jurisdiction in which European companies reside, and thus European companies may risk being haled into court in various federal circuits.

The circuit split on this issue has created a situation in which European securities issuers are doubly blind. First, they cannot know whether they will face a certified class action based on securities they issued solely to Europeans in Europe. Second, and worse, the answer may well depend on where plaintiffs choose to file suit: one rule applies in Philadelphia, Richmond, and Atlanta, and a different rule applies in Chicago, Detroit, Los Angeles, and New York City. That uncertainty makes the U.S. a riskier legal environment for securities issuers, and incentivizes European

issuers to incur significant additional costs to avoid it, as set forth *supra*.

Further, the lack of a "natural" home circuit, combined with the current circuit split, creates an incentive for plaintiffs' class action firms to engage in forum shopping, in an attempt to find an easier jurisdiction in which to certify their class in cases that involve foreign issuers.

This Court has repeatedly decried "forum shopping" in many different contexts. *See, e.g.*, *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1672 (2015) (rejecting a state judge recusal rule "that would enable transparent forum shopping"); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) ("The federal limitations period governing copyright suits serves . . . to prevent the forum shopping invited by disparate state limitations periods . . . ."); *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 583 (2013) (federal change-of-venue statute "should not create or multiply opportunities for forum shopping" where parties have agreed to a contractual forum-selection clause) (internal quotation marks omitted); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 415 (2010) ("We must acknowledge the reality that keeping the federal court-door open to class actions that cannot proceed in state court will produce forum shopping."); *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) ("The interpretation given to the Arbitration Act by the California Supreme Court would . . . encourage and reward forum shopping."); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (the "outcome-determination" test for application of state law in federal diversity cases "cannot be read without reference to the twin aims of

the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."); *see also* Note, Forum Shopping Reconsidered, 103 Harv. L. Rev. 1677, 1681 (1990) ("The Supreme Court has relied on the 'danger of forum shopping' in reaching many decisions.").

As a result of the circuit split, plaintiffs' counsel will seek the most favorable circuit when suing foreign securities issuers, leading to a disproportionate number of such class actions being brought where the "hydraulic pressures" for foreign issuers to settle at high costs are at their strongest. It is fundamentally unfair to foreign issuers—those most affected by the Second Circuit's rejection of the administrative feasibility rule—that their rights and potential settlement pressures should be so heavily influenced by whether the litigation proceeds in one circuit rather than another.

The Federal Rules of Civil Procedure and the federal securities laws are complex enough, particularly for non-U.S. issuers. They should not differ from circuit to circuit, from city to city. Only this Court can impose a uniform rule, and prevent a severe disadvantage to foreign issuers, by resolving this circuit split in favor of the reasoning of the Third, Fourth, and Eleventh Circuits.

CONCLUSION

For the reasons set forth above and in the petition for certiorari, EuropeanIssuers urges that this Court grant the writ.

Respectfully submitted,

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