No.

In the Supreme Court of the United States

CHARLES D. SCOVILLE,
PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), the Court held that the extraterritorial reach of Section 10(b) of the Securities Exchange Act of 1934 was a question of the substantive scope of that statute. 561 U.S. at 254. In so holding, the Court expressly rejected the notion that extraterritorial application of a statute is a question of a federal court's subject-matter jurisdiction. *Ibid.* Soon thereafter, Section 929P(b) of the Dodd-Frank Act amended the provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 that govern the subject-matter jurisdiction of the district courts to provide that the "district courts of the United States * * * shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States * * * involving" certain domestic "conduct" or "effect[s]." Section 929P(b) did not amend or alter the extraterritorial reach of the substantive regulatory provisions of the securities laws, including Section 10(b) of the Exchange Act and Section 17(a) of the Securities Act. The question presented is:

Whether Section 929P(b)'s jurisdictional amendments conferred substantive extraterritorial reach upon Sections 10(b) and 17(a) in SEC enforcement actions and in federal criminal prosecutions.

PARTIES TO THE PROCEEDING

Petitioner is Charles D. Scoville.[*] Respondent is the Securities and Exchange Commission.

[*] On the notice of appeal filed in the district court, Traffic Monsoon, LLC, was listed as an appellant, along with petitioner. Because the district court had placed the company in receivership and the receiver had not authorized counsel to file appeal on behalf of the company, the court of appeals concluded that Traffic Monsoon was "not a proper party to this appeal." App., *infra*, 11a.

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In the Supreme Court of the United States

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CHARLES D. SCOVILLE,
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SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles D. Scoville respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-39a) is reported at 913 F.3d 1204. The opinion of the district court (App., *infra*, 40a-91a) is reported at 245 F. Supp. 3d 1275. The order of the district court entering a preliminary injunction (App., *infra*, 92a-95a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2019. By orders entered April 16, 2019, and May 9, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to June 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 77q(a) of Title 15 of the United States Code provides in relevant part:

> **(a) Use of interstate commerce for purpose of fraud or deceit.** It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section 78c(a) (78) of this title) by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—
>
> > (1) to employ any device, scheme, or artifice to defraud, or
> >
> > * * *
> >
> > (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 77v of Title 15 of the United States Code provides in relevant part:

> **(a) Federal and State courts; venue; service of process; review; removal; costs.** The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and

regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. * * *

(c) Extraterritorial jurisdiction. The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of section 77q(a) of this title involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or

(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

Section 78j of Title 15 of the United States Code provides in relevant part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of

such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 78aa of Title 15 of the United States Code provides in relevant part:

> **(a) In general.** The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. * * *
>
> **(b) Extraterritorial jurisdiction.** The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the viola-

> tion, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

STATEMENT

This case presents an opportunity to correct a plain error by the court of appeals in applying a recent decision of this Court, *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010). In that case, every member of the Court agreed that the extraterritorial reach of the securities laws was a question that turned on the substantive antifraud provisions of those statutes and *not* the jurisdictional provisions. Yet the court of appeals here ruled that an amendment to those jurisdictional provisions somehow also effected a change in the language of the substantive antifraud provisions to reach extraterritorial conduct—language that the Court in *Morrison* had already held does not reach extraterritorially.

1. a. Building on prior decisions such as *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), this Court in *Morrison* held that the territorial reach of Section 10(b) of the Securities Exchange Act of 1934 raised a "merits question," *not* "a question of subject-matter jurisdiction." 561 U.S. at 253-254. The Court observed that subject-matter jurisdiction is "an issue quite separate" from the substantive reach of the statute, and thus whether the statute reaches extraterritorial conduct. *Id.* at 254. Indeed, the Court went on to observe that the district court in *Morrison* "had jurisdiction * * * to adjudicate the question whether § 10(b) applies" under Section 27 (now 27(a)) of the Exchange Act. *Ibid.*

On the merits, the Court applied "the presumption against extraterritoriality" and held that, because "there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, * * * it does not." *Id.* at 262, 265. The Court also abrogated the so-called "conduct" and "effects" tests previously applied by the lower courts. See *id.* at 255-261.

b. The Court issued its decision in *Morrison* on June 24, 2010. Almost a month later, on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223 (2010), was signed into law.

Among the Dodd-Frank Act's provisions was Section 929P(b), entitled "Extraterritorial Jurisdiction of the Antifraud Provisions of the Federal Securities Laws." 124 Stat. 1864. As relevant here, Section 929P(b)(2) added to Section 27 of the Exchange Act—the jurisdictional provision discussed in *Morrison*—a new Section 27(b), entitled "Extraterritorial Jurisdiction," which provides that "[t]he district courts of the United States * * * shall have jurisdiction of an action or proceeding brought * * * by the [Securities and Exchange] Commission or the United States alleging a violation of the antifraud provisions of this [Act] involving" either

> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.

124 Stat. 1865; 15 U.S.C. 78aa(b).

Section 929P(b)(1) added a parallel provision, Section 22(c), to the jurisdictional section of the Securities Act of 1933. 124 Stat. 1864. The new Section 22(c) provides that

"the district courts of the United States * * * shall have jurisdiction of an action or proceeding" brought under Section 17(a) of the Securities Act by the SEC or the United States involving the same kind of domestic conduct or effects. 124 Stat. 1864; 15 U.S.C. 77v(c); see p. 6, *supra*.[2]

Nothing in Section 929P(b), and—for that matter—nothing anywhere in the Dodd-Frank Act, amended the substantive antifraud provisions of the Securities Act or the Exchange Act to provide for extraterritorial reach. In particular, Section 10(b) of the Exchange Act and Section 17(a) of the Securities Act remained unchanged.

2. This case is an SEC enforcement action in which, as the court of appeals put it, "[t]he parties have very different versions of [petitioner's] business model." App., *infra*, 3a. Petitioner is a Utah resident who is the sole member and manager of Traffic Monsoon LLC, an internet traffic exchange, which he established in September 2014. Internet traffic exchanges offer internet advertising services; they are designed to deliver "clicks" or "visits" to the websites of the customers or members of the traffic exchange. *Id.* at 3a-4a.

One of Traffic Monsoon's products was the "AdPack," which a member could purchase for $50. An AdPack entitled the member to 1,000 visits to the member's website, and 20 clicks on the member's banner ad. App., *infra*, 4a. An AdPack also permitted its purchaser to share in the available revenues of Traffic Monsoon by receiving credits to the member's account up to a maximum amount of $55 per AdPack. *Id.* at 4a. Members could also obtain

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[2] Section 929P(b)(3) contains a third parallel provision, amending the jurisdictional provisions of the Investment Advisers Act of 1940. *See* 124 Stat. 1865; 15 U.S.C. 80b-14(b). That provision is not at issue in this case.

commissions by recruiting others to purchase AdPacks and other products.

As the court of appeals noted, "[n]inety percent of Adpacks were purchased by people who live outside the United States." App., *infra*, 8a.

3. In July 2016, the SEC brought this civil enforcement action against petitioner and Traffic Monsoon in the United States District Court for the District of Utah, alleging violations of Sections 17(a)(1) and (3) of the Securities Act, and Section 10(b) of the Exchange Act and SEC Rule 10b-5 promulgated thereunder. The SEC claimed that AdPacks were securities, and that their sales amounted to a Ponzi scheme. The agency sought and obtained *ex parte* orders from the district court freezing petitioner's and Traffic Monsoon's assets, appointing a receiver, and temporarily restraining petitioner and Traffic Monsoon from operating their business. App., *infra*, 11a. The SEC moved for a preliminary injunction, and petitioner and Traffic Monsoon moved to set aside the receivership.

Following a hearing, the district court issued an opinion granting the SEC's motion, and denying petitioner's and Traffic Monsoon's. App., *infra*, 40a-91a. In its opinion, the district court rejected petitioner's argument that, under *Morrison* v. *National Australia Bank*, Sections 10(b) and 17(a) did not apply to AdPack purchases that took place outside the United States. In particular, the court rejected petitioner's argument that, because Section 929P(b) of the Dodd-Frank Act amended only the provisions of the 1933 and 1934 Acts addressing subject matter jurisdiction, *Morrison* still governed. *Id.* at 60a-70a.

In reaching this conclusion, the district court relied heavily upon, and quoted extensively from, the legislative history of the Dodd-Frank Act, and in particular from

Rep. Paul Kanjorski's statement in the Congressional Record that Section 929P(b)'s purpose "is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act[] [and] the Exchange Act * * * may have extraterritorial application." App., *infra*, 66a-67a (quoting 156 Cong. Rec. H5235, H5237 (daily ed. June 30, 2010)). The district court also pointed to the title of the entirety of Section 929P (not just subsection 929P(b))—"STRENGTHENING ENFORCEMENT BY THE COMMISSION"—as "suggest[ing] an intent to expand the SEC's authority." *Id.* at 68a.

The district court also provided an "alternative reason" for its injunction, which was that it concluded that all AdPack sales were domestic for purposes of *Morrison*'s test as that test has been further developed by some of the courts of appeals. App., *infra*, 71a-74a.

The district court accordingly issued an injunction that contained *no* territorial limitations, and that, by its terms, applied across the globe. App., *infra*, 92a-95a. It nowhere limited itself to any subset of Traffic Monsoon's business or transactions. To the contrary, the court's injunctive order prohibited petitioner and Traffic Monsoon "from soliciting, accepting, or depositing any moneys"—anywhere in the world—"obtained from actual or prospective investors, individuals, customers, and/or entities"—again, anywhere in the world. *Id.* at 92a. The district court also made the extraterritorial reach of its injunction explicit, ordering petitioner, Traffic Monsoon, and their agents to "take such steps as are necessary to repatriate and deposit into the registry of this Court * * * any and all funds or assets of Traffic Monsoon LLC * * * that presently may be located outside of the United States." *Id.* at 93a. The district court also took "exclusive * * * possession of the assets, of whatever

kind and wherever situated, of Traffic Monsoon, LLC," and "froze[]" "Defendants' Assets"—again, without geographic limitation—"until further order of this Court." *Id.* at 93a.

In short, through a geographically unlimited injunction premised upon its interpretation of Section 929P(b), the district court applied Sections 10(b) and 17(a) to the entire planet.

4. a. The Tenth Circuit affirmed this global injunction. App., *infra*, 1a-39a. The court of appeals acknowledged that Section 929P(b) had "amended only the jurisdictional sections of the securities laws" and "did not make any explicit revisions to the substantive antifraud provisions themselves." *Id.* at 21a. The court further conceded that "'the plain language of * * * Section 929P(b) seems purely jurisdictional—particularly in light of its placement in the jurisdictional section of the Exchange Act * * * .'" *Id.* at 21a (quoting *SEC* v. *Chicago Convention Ctr., LLC*, 961 F. Supp. 2d 905, 910 (N.D. Ill. 2013)).

The Tenth Circuit nonetheless agreed with the district court that Section 929P(b) had substantively extended the territorial reach of Sections 10(b) and Section 17(a), because "the Congressional intent behind [Section 929P(b)] supports the conclusion that the provision is substantive." App., *infra*, 21a (quoting *Chicago Convention Ctr.*, 961 F. Supp. 2d at 910). The court reasoned that, "[n]otwithstanding the placement of the Dodd-Frank amendments in the jurisdictional provisions of the securities acts, * * * it is clear to us that Congress undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied." *Id.* at 21a.

The court emphasized that, until this Court's decision in *Morrison*, "[t]he courts of appeals treated application

of the conduct-and-effects test to decide when the federal securities acts applied extraterritorially as a matter of subject-matter jurisdiction." App., *infra*, 17a. It minimized the import of this Court's decision in *Arbaugh* as having involved "a Title VII employment case," and thus "a completely different context." *Id.* at 17a. As for the Court's holding on the jurisdictional-merits distinction in *Morrison*, the court of appeals, quoting the district court, argued that Congress could be excused for failing to take it into account because of "the close proximity between the date when *Morrison* was issued and the date when the language of Dodd-Frank was finalized." *Id.* at 21a (quoting *id.* at 65a-66a). The court instead offered the "assumption * * * that *Morrison* was issued too late in the legislative process to reasonably permit Congress to react to it." *Id.* at 22a (quoting *id.* at 66a).

In reaching its conclusion that Section 929P(b) had bestowed extraterritorial reach upon Sections 10(b) and 17(a) without changing a word of them, the court of appeals pointed to the title of the entirety of Section 929P, as had the district court. App., *infra*, 22a. The court of appeals, again like the district court, also emphasized legislative history, noting that "several members of Congress, including § 929P's drafter, Representative Paul Kanjorski, stated that the purpose of that provision was to make clear that the antifraud provisions apply extraterritorially in enforcement actions." *Id.* at 22a.

The court of appeals concluded that, accordingly, "Congress has 'affirmatively and unmistakably' indicated that the antifraud provisions of the federal securities acts apply extraterritorially when the statutory conduct-and-effects test is met." App., *infra*, 22a-23a. As a result, the court of appeals concluded that Sections 17(a) and 10(b) "reach[ed] Traffic Monsoon's sales to customers outside the United States." *Id.* at 2a.

b. Judge Briscoe concurred in the judgment. App., *infra*, 36a-39a. Her concurrence was silent as to the merits of the majority's reasoning. Instead, Judge Briscoe was "not persuaded * * * that the AdPack sales at issue were foreign sales outside of the United States." *Id.* at 36a. Agreeing with the alternative holding of the district court, she concluded that the foreign transactions satisfied the test first articulated in *Morrison*, and further refined by certain of the courts of appeals. *Id.* at 36a-39a. The majority opinion did not address Judge Briscoe's concurrence, just as it did not address the district court's alternative grounds.

REASONS FOR GRANTING THE PETITION

In *Morrison* v. *National Australia Bank*, 561 U.S. 247, this Court held that, although the Exchange Act provided jurisdiction over disputes regarding extraterritorial conduct, Section 10(b) of that statute—the chief antifraud provision in the Act—did not reach extraterritorial conduct. The decision below holds that Congress, by passing the Dodd-Frank Act, legislatively overturned *Morrison* with respect to SEC enforcement proceedings. That holding is simply erroneous: Dodd-Frank amended only the jurisdictional provision of the Exchange Act (as well as analogous jurisdictional provision of the Securities Act)—provisions that, under *Morrison*, posed no obstacle to adjudication of extraterritorial conduct. Dodd-Frank did not amend the relevant antifraud provisions—provisions that, under *Morrison*, are the obstacle to any claim based on extraterritorial conduct.

The decision below accordingly contradicts this Court's decision in *Morrison*. And, to do so, it flouts foundational principles of statutory interpretation providing that a statute should be interpreted according to its plain terms. The Court should grant the petition for a writ of

certiorari both to prevent the misapplication of its decision in *Morrison* and to defend those principles of statutory interpretation, which are necessary circumscriptions of the judicial function.

A. The Decision Under Review Conflicts With Decisions Of This Court

1. The principal holding of *Morrison*, 561 U.S. 247, is that Section 10(b) of the Exchange Act does not apply extraterritorially. As the Court concluded, "there is no affirmative indication [that] § 10(b) applies extraterritorially." *Id.* at 265. In fact, Section 10(b) itself "contains nothing to suggest it applies abroad." *Id.* at 262. Accordingly, applying the "presumption against extraterritoriality," the Court held that Section 10(b) "does not" "appl[y] extraterritorially." *Id.* at 265. And, because the statutory section did not apply extraterritorially, neither did Rule 10b-5. *Id.* at 262 ("[I]f § 10(b) is not extraterritorial, neither is Rule 10b-5.").

The reasoning of *Morrison* applies with full force to Section 17(a) of the Securities Act. Nothing in the language of Section 17(a) suggests that it applies to overseas conduct. Rather, the statute bears obvious textual parallelism to Rule 10b-5, which has no extraterritorial reach. Compare 15 C.F.R. 240.10b-5 with 15 U.S.C. 77q(a); see *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 767 (1975) (Blackmun, J., dissenting). Moreover, "[t]he same focus on domestic transactions [in the Exchange Act] is evident in the Securities Act of 1933, enacted by the same Congress as the Exchange Act, and forming part of the same comprehensive regulation of securities trading." *Morrison*, 561 U.S. at 268. Under *Morrison* and the presumption against extraterritoriality, Section 10(b) and

Section 17(a), taken alone by their plain terms, do not apply to foreign transactions—as neither the Tenth Circuit nor the SEC disputed below.

The court below had no quarrel with *Morrison*'s principal holding that Section 10(b) did not apply extraterritorially, or the application of that holding to Section 17(a). To the contrary, the Tenth Circuit recounted the reasoning of *Morrison* without objection. See App., *infra*, 19a-20a. The court nevertheless refused to apply *Morrison*—even though "[n]inety percent of Adpacks were purchased by people who live outside the United States"—in contravention of *Morrison*'s extraterritoriality holding. *Id.* at 8a.

2. To do so, the Tenth Circuit contravened a threshold, albeit secondary, holding in *Morrison* regarding the distinction between subject-matter jurisdiction and the scope of a statute that itself springs from numerous earlier decisions of this Court.

a. Specifically, the *Morrison* Court held that the court below in that case had committed an "error" when it "considered the extraterritorial reach of § 10(b) to raise a question of subject-matter jurisdiction." 561 U.S. at 253-254. The federal courts' jurisdiction under the Exchange Act is set out by statute. See 15 U.S.C. 78aa. It was that provision, the Court reasoned, that sets out "a tribunal's 'power to hear a case.'" *Id.* at 254 (quoting *Union Pac. R.R. Co.* v. *Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 81 (2009)). That provision "presents an issue quite separate from" the extraterritoriality question, which asks "what conduct § 10(b) reaches"—*i.e.*, "a merits question." *Morrison*, 561 U.S. at 254. The federal courts, the Supreme Court held, "had jurisdiction under 15 U.S.C. § 78aa to adjudicate the question whether § 10(b) applies to [the subject] conduct." *Ibid.*

In so concluding, the *Morrison* court drew on a line of cases extending at least as far back as *Bell* v. *Hood*, 327 U.S. 678 (1946), where the Court explained that federal courts "must assume jurisdiction to decide whether * * * allegations state a cause of action," and that "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Id.* at 682. The distinction is "firmly established" between a party's having "a valid (as opposed to arguable) cause of action" and a court's having "subject-matter jurisdiction, *i.e.*, [the] statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998).

Especially since *Steel*, the Court has redoubled its efforts to emphasize this distinction between the jurisdiction of the courts and the merits of a dispute in an effort "to bring some discipline to the use of the term 'jurisdiction.'" *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (quoting *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 435 (2011)) (internal quotation marks omitted). At the center of that effort has been the Court's acknowledgement and enforcement of a "readily administrable bright line" rule, one that looks to statutory text: "If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh*, 546 U.S. at 515-516 (footnote omitted). Conversely, a statutory requirement or element goes to the merits if it "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Ibid.* (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)); see also, *e.g.*, *Hamer* v. *Neighborhood Hous. Servs.*, 138 S. Ct. 13, 20 n.9 (2017); *Musacchio* v. *United States*, 136 S. Ct. 709, 717 (2016); *United States* v. *Kwai Fun Wong*, 135 S.

Ct. 1625, 1632 (2015); *Gonzalez* v. *Thaler*, 565 U.S. 134, 141-142 (2012); *Henderson*, 562 U.S. at 435-436; *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 161-162 (2010); *Union Pac. R.R.*, 558 U.S. at 83 n.8.

Accordingly, when *Morrison* applied this standard, it did not pave new ground. To the contrary, the parties in *Morrison* agreed that the Exchange Act's jurisdiction provision had been satisfied. *See* 561 U.S. at 254. Notably, the government did too, and argued that the jurisdiction provision of the Exchange Act contained no extraterritorial limitation. Filing a brief in response to an order from the Court inviting it to do so at the certiorari stage, the government addressed the jurisdictional provision of the Exchange Act, Section 78aa, stating that, "under the plain terms of [that section], the geography of an alleged fraudulent scheme—*i.e.*, whether it was conceived and executed in whole or in part outside the United States—is irrelevant to the district court's subject matter jurisdiction." U.S. Br., *Morrison*, 2009 WL 3460235, at *9 (Oct. 27, 2009).[3] At the merits stage, the government took the same position, arguing that, "neither 28 U.S.C. 1331, 15 U.S.C. 78aa, nor any other provision of the Exchange Act restricts the federal courts' subject-matter jurisdiction over a Section 10(b) claim based on whether the alleged violation occurred in the United States." U.S. Br., *Morrison*, 2010 WL 719337, at *11 (Feb. 26, 2010).[4]

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[3] The government acknowledged in a footnote that Congress was considering legislation that "would address the transnational reach of the antifraud provisions" of the Securities Act and Exchange Act, offering that the possibility of Congressional action was "an additional reason" for the Court to deny the petition. *Id.* at *6 n.1.

[4] The General Counsel, Deputy General Counsel, and Solicitor of the SEC signed both of the government's briefs in *Morrison*.

Accordingly, *Morrison* resolved that the question of the extraterritorial reach of the antifraud provisions of the securities laws was not found in those statutes' jurisdictional provisions. The Court expressly held that the jurisdictional provision of the Exchange Act had been satisfied and provided subject-matter jurisdiction over an extraterritorial claim. *Morrison*, 561 U.S. at 254. But, the Court went on to hold, the satisfaction of that statutory provision did not mean that the substantive statute—*i.e.*, Section 10(b)—had extraterritorial effect.

It necessarily follows from that holding that an amendment to the jurisdictional provision of the Exchange Act (or the equivalent provision of the Securities Act) does not modify the extraterritorial reach of the substantive provisions of those acts. Indeed, that conclusion is implicit in the essential division between jurisdictional issues and merits issues that this Court has instilled over the past two decades.

b. But the decision under review placed little value on the actual reasoning of *Morrison*. It suggested that no one could have anticipated *Morrison*'s holding that extraterritoriality was not a question of jurisdiction because *Arbaugh* had arisen the "completely different context" of a "Title VII employment case," App., *infra*, 17a, and *Morrison*'s holding was "contrary to forty years of circuit-level law," *id.* at 20a. The majority did not acknowledge that the petitioner, the respondent, and *the government* in *Morrison* had all agreed that the Exchange Act's jurisdiction provision presented no obstacle to extraterritorial application. *Morrison*, 561 U.S. at 254; p. 16, *supra.* Most disturbingly, the majority even elided that *Morrison* addressed the Exchange Act's jurisdictional provision—titled "Jurisdiction of offenses and suits"—and concluded that it presented no obstacle to extraterritorial application. The panel opinion referred to 15 U.S.C. 78aa as just

one "other provision[ ] of the securities acts." App., *infra*, 20a.

Instead, the majority reasoned, it could disregard *Morrison* because of "the context and historical background surrounding Congress's enactment" of the Dodd-Frank Act. App., *infra*, 21a. Given that Dodd-Frank "did not make any explicit revisions to the substantive antifraud provisions themselves," and "amended only the jurisdictional sections of the securities laws," *id.* at 21a, the court of appeals' holding is impossible to square with *Morrison*. The Court in *Morrison* had already held that the jurisdiction sections of the securities laws allowed for extraterritorial application of those laws. 561 U.S. at 254 & n.3. It was the substantive antifraud provisions themselves that gave no indication that extraterritorial application was intended. *Morrison*, 561 U.S. at 262-265. And those are unchanged.

The decision of the court of appeals accordingly is inconsistent with this Court's decision in *Morrison*.

B. The Decision Under Review Is Erroneous

To be sure, the statutory provisions of the Securities Act and Exchange Act created by Section 929P(b) of Dodd-Frank provide jurisdiction to the federal courts to adjudicate claims brought by the SEC or Department of Justice regarding certain types of extraterritorial violations of the securities laws. But ordinary principles of statutory construction, especially as applied to consideration of the extraterritorial reach of statutes, compel the conclusion that those amendments did not transmogrify Sections 10(b) and 17(a) into having extraterritorial reach.

1. a. First, an ordinary textual analysis of the amendments to the jurisdiction provisions of the Securities Act and Exchange Act demonstrates that they do not

change the extraterritorial reach of the substantive provisions. "As in all cases involving statutory construction, '[the] starting point must be the language employed by Congress.'" *Am. Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter* v. *Sonotone*, 442 U.S. 330, 337 (1979)). For as this Court has "'stated time and again,'" judges must presume "'that a legislature says in a statute what it means and means what it says there.'" *Carr* v. *United States*, 560 U.S. 438, 458 (2010) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006)).

That is the "one, cardinal canon" that "a court should always turn [to] first," "before all others." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-176 (2009) (quoting *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)); accord, *e.g.*, *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985).

"When the words of a statute are unambiguous, this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank*, 503 U.S. at 254 (citation omitted). That is so even if arguably "legislative history points to a different result." *Ibid.* "When the statutory language is plain, the *sole* function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Carr*, 560 U.S. at 458 (emphasis added) (quoting *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 296); accord, *e.g.*, *Hardt* v. *Reliance Std. Life Ins. Co.*, 560 U.S. 242, 251 (2010); *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009); see *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). And "'[u]nless otherwise

defined, statutory terms are generally interpreted in accordance with their ordinary meaning.'" *Sebelius* v. *Cloer*, 569 U.S. 369, 376 (2013) (alteration in original) (quoting *BP Am. Prod. Co.* v. *Burton*, 549 U.S. 84, 91 (2006)).

Here, interpreting the provisions created by Section 929P(b) "begins with the language of the statute itself, and that is also where the inquiry should end, for the statute's language is plain." *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks omitted). The critical language in those provisions is "[t]he district courts of the United States * * * shall have jurisdiction * * * ." Pub. L. No. 111–203, §§ 929P(b)(1), (2), 124 Stat. 1376, 1864, 1865; 15 U.S.C. 77v(c); 15 U.S.C. 78aa(b). By its plain terms, that language expressly refers to the adjudicatory power of United States district courts, and cannot be construed as setting forth any substantive rule regulating anyone's conduct or providing for a substantive rule of decision.

This reasoning was apparent in *Morrison* as to one of the very provisions that Section 929P(b) amended: Section 27 of the Exchange Act, which then provided (and now still provides in Section 27(a)) that "[t]he district courts of the United States * * * shall have exclusive jurisdiction of violations of [the Exchange Act] or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder." *Morrison*, 561 U.S. 254 n.3 (quoting 15 U.S.C. 78aa (2006)). This provision, the Court held, gave the district court in *Morrison* all the jurisdiction it needed to decide the extraterritoriality "merits question" in that case. *Id.* at 254.

In short, the language of Section 929P(b) is clear: It addresses subject-matter jurisdiction only, and not the merits.

b. To be sure, the statutory provisions that Section 929P(b) amended already addressed jurisdiction. But any canon against superfluity does not support the court of appeals' transformation of Dodd-Frank's jurisdictional amendments into substantive amendments of the anti-fraud provisions. Perhaps that is why, although the district court included such an argument in its reasoning, the court of appeals did not invoke such a canon. Compare App., *infra*, 69a-70a (district court opinion), with *id.* at 21a-23a (court of appeals opinion).

This Court has repeatedly made clear that its "preference for avoiding surplusage constructions is not absolute." *Lamie* v. *U.S. Tr.*, 540 U.S. 526, 536 (2004); accord, *e.g.*, *King* v. *Burwell*, 135 S. Ct. 2480, 2492 (2015); *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013). "[I]nstances of surplusage are not unknown." *Marx*, 568 U.S. at 385 (quoting *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 299 n.1). To the contrary, "[r]edundancies across statutes are not unusual events in drafting." *Ibid.* (quoting *Conn. Nat'l Bank*, 503 U.S. at 253).

Accordingly, the canon against superfluity simply lends weight to a choice between two textually supportable readings of a statute. See *Lamie*, 540 U.S. at 536. If, however, there is only one meaning that comports with the plain text, that meaning governs. Courts must always "prefer the plain meaning since that approach respects the words of Congress," even if that means accepting some surplusage. *Ibid.* Here, there is no textual anchor for the court of appeals' holding that a jurisdictional amendment effectuated a substantive rewrite of the securities statutes.

2. The court of appeals eschewed any textual anchor for its conclusion, relying instead on legislative history and other extratextual content to discard the text of Section 929P(b). In doing so, it violated accepted principles

of statutory interpretation. Worse still, it went about interpreting legislative history incorrectly.

a. "[G]iven the straightforward statutory command, there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). This Court has consistently made clear "that appeals to statutory history are well taken only to resolve 'statutory ambiguity.'" *Barnhill* v. *Johnson*, 503 U.S. 393, 401 (1992) (internal quotation marks and citation omitted); accord *Ratzlaf* v. *United States*, 510 U.S. 135, 148 n.18 (1994). The reason for this rule is simple: "Congress's 'authoritative statement is the statutory text, not the legislative history.'" *Chamber of Comm.* v. *Whiting*, 563 U.S. 582, 599 (2011) (quoting *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005)). So the "best evidence" of what Congress intended "is the statutory text adopted by both Houses of Congress and submitted to the President." *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). This has been the "recognized rule" for over a century; "when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source." *Caminetti*, 242 U.S. at 490.

Accordingly, this Court "do[es] not resort to legislative history to cloud a statutory text that is clear." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119 (2001) (quoting *Ratzlaf*, 510 U.S. at 147-148). That is, even if legislative history can "clear up ambiguity," it may not be cited to *create* ambiguity. *Milner* v. *Dep't of Navy*, 562 U.S. 562, 574 (2011); accord, *e.g.*, *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 458 (2012).

That, however, is what the court below did. The Court in *Morrison* held that Section 27 of the Exchange Act

clearly allows for *jurisdiction* over extraterritorial conduct, but that Section 10(b) just as clearly "contains nothing to suggest it applies abroad" and thus *on the merits* does not extend to extraterritorial conduct. 561 U.S. at 254 & n.3, 262. Whatever legislative history indicates about Congress's intent in passing Section 929P(b), it cannot be allowed to undermine the clear and unchanged statutory text of Section 10(b).

b. Even if legislative history should have been consulted, however, the court of appeals' analysis of legislative history was fundamentally flawed. As the court below acknowledged, Dodd-Frank "did not make any explicit revisions to the substantive antifraud provisions themselves." App., *infra*, 21a. The panel, however, did not look to the intent of the Congress that enacted Section 17(a) of the Securities Act in 1933 or Section 10(b) of the Exchange Act in 1934. Instead, it relied on indications of the intent of the Congress that enacted Dodd-Frank in 2010.

That approach squarely conflicts with this Court's common-sense observation that when Congressional intent is relevant, courts should look only "to determine the intent of the Congress that originally enacted the provision in question" because "[i]t is the intent of the Congress that enacted [the section] * * * that controls." *Mackey* v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) (quoting *Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977)) (second and third alterations in original) (internal quotation marks omitted); see also *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."). That is, "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the

enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil*, 545 U.S. at 568.

The Court recently applied this principle in the context of determining the extraterritorial reach of a statute in *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016). In that decision, the dissent suggested that the intent of a later Congress in amending a different provision of the Racketeer Influenced and Corrupt Organizations Act was relevant to evaluating the territorial scope of that statute's private right of action. See *id.* at 2114 n.3 (Ginsburg, J., dissenting). Notably, however, the opinion of the Court did not consider the after-the-fact amendment, thus implicitly rejecting such consideration. See *id.* at 2099-2111.

The same reasoning should apply here. The legislative history surrounding the passage of Dodd-Frank in 2010 does not speak to the reach Congress intended Section 17(a) and Section 10(b) to have when it passed those provisions in 1933 and 1934, respectively.

3. There is one last reason why the lower court's reimagining of Section 17(a) and Section 10(b) violates ordinary principles of statutory interpretation: the historic rule of lenity. Sections 17(a) and 10(b) serve not merely as the predicates for civil sanctions; people can and do go to jail for violating those provisions. Section 24 of the Securities Act, and Section 32(a) of the Exchange Act, impose criminal penalties against anyone "who willfully violates" these respective statutes. 15 U.S.C. 77x; 15 U.S.C. 78ff(a). Accordingly, Sections 17(a) and Section 10(b) are effectively criminal as well as civil prohibitions. And any provisions purporting to extend those statutes' territorial reach in "an action or proceeding brought or instituted by the * * * United States"—like the provisions created by Section 929P(b) of Dodd Frank—should be treated as

criminal provisions as well. 15 U.S.C. 77v(c); 15 U.S.C. 78aa(b).

This Court has not only made clear that "it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of [a criminal] statute's coverage," *Crandon* v. *United States*, 494 U.S. 152, 158 (1990), it has also made clear that the rule of lenity takes precedence over legislative history that arguably "tip[s] in the Government's favor," see *United States* v. *Bass*, 404 U.S. 336, 347 (1971). "In various ways over the years, we have stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Id.* at 347-348 (quoting *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)). "This principle is founded on two policies that have long been part of our tradition": the need to give "fair warning" of what has been criminalized, and the principle that "legislatures and not courts should define criminal activity." *Id.* at 348 (internal quotation marks omitted).

The rule of lenity thus "'demand[s] resolution of ambiguities in criminal statutes in favor of the defendant.'" *Ratzlaf*, 510 U.S. at 148 (quoting *Hughey* v. *United States*, 495 U.S. 411, 422 (1990)). As a result, "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Ibid.* (quoting *Crandon*, 494 U.S. at 160). Here, the rule of lenity forecloses the court below's use of legislative history to create a criminal statute that Congress did not draft.

* * * * *

In short, the Tenth Circuit's reading of Dodd-Frank's amendments to the jurisdictional provisions of the Securities Act and Exchange Act amounted to wholesale redrafting of the substantive antifraud provisions of Section 17(a) and Section 10(b). Section 929P(b) afforded no basis for the court of appeals not to apply this Court's decision in *Morrison*.

C. The Question Presented Is An Important One And This Case Is An Ideal Vehicle To Address It

1. The question presented in this case goes to the heart of the judicial function. This Court has repeatedly noted that "[w]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)). That narrow role arises from "deference to the supremacy of the Legislature." *United States* v. *Locke*, 471 U.S. 84, 95 (1985).

Accordingly, when some legislators' presumed intent conflicts with the text Congress enacted, there is no question what courts should do—follow the text. "It is beyond [this Court's] province to rescue Congress from its drafting errors, and to provide for what [the Court] might think * * * is the preferred result." *Lamie*, 540 U.S. at 542 (third alteration in original) (quoting *United States* v. *Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring in judgment)). That circumscription of the role of the courts is, if anything, more critical in situations like this one, where legislative history and historical context seems to point to an outcome at odds with the text.

It is then that courts should recall that it is "the language of a bill" that members of Congress vote on. *Locke*,

471 U.S. at 95. That language, even if it creates "apparently odd contours[,] may reflect unknowable compromises or legislators' behind-the-scenes strategic maneuvers." John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2395 (2003). "[J]udges can rarely, if ever, tell if a law's specific wording is unintentionally imprecise or was instead crafted to navigate the complex legislative process." *Ibid.*; see, *e.g.*, *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 460-461 (2002) (accepting as the product of Congressional compromise plain-text statutory reading that produced awkward-seeming result).

In short, "legislative history is not the law." *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019). "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. * * * This allows both * * * branches to adhere to [their] respected, and respective, constitutional roles." *Lamie*, 540 U.S. at 542. What the court of appeals did amounted to legislative revision—a role entirely improper for the judiciary.

2. This case is an ideal vehicle for the Court to consider whether the Dodd-Frank amendments to the securities laws' jurisdictional provisions worked an amendment to the substantive anti-fraud provisions. That question was pressed and passed upon at length by both the court of appeals and the district court. App., *infra*, 14a-23a (court of appeals opinion), 60a-70a (district court opinion). And, critically, although Judge Briscoe and the district court both reached an alternative ground for ruling in favor of the SEC—that Traffic Monsoon's sales to foreign purchasers were, in fact, domestic securities transactions, 36a-39a (court of appeals opinion) (Briscoe, J., concurring); 71a-74a (district court opinion)—the panel majority below implicitly rejected that holding by never discussing it, 14a-24a (court of appeals opinion). The opinion

of the court of appeals thus stands *only* for the proposition that *Morrison* no longer applies to federal securities-fraud enforcement actions.

Although the decision under review is an appeal from the entry of a preliminary injunction, the court of appeals' conclusion on the above legal question was neither preliminary nor subject to additional factual development. The court of appeals concluded that "[t]he antifraud provisions reach Traffic Monsoon's sales of, or offers to sell, Adpacks to purchasers located outside the United States." App., *infra*, 14a (heading). That was not a tentative conclusion. Unlike other aspects of its decision, where it concluded only that it was "likely" that the SEC would prevail, *id.* at 31a (heading), the court of appeals reached a clear conclusion on the question presented here.

That conclusion also allowed the SEC to enjoin conduct that constituted "90% of Traffic Monsoon's Adpack sales," which otherwise would have fallen outside the SEC's ambit. App., *infra*, 14a. Not only was the legal question essential to the scope of the injunction entered, it has "produced immediate consequences" for the petitioner. See *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam). Traffic Monsoon is in receivership, meaning petitioner can no longer operate his business, and Traffic Monsoon's assets as well as petitioner's own have been frozen. A judgment by this Court reversing the Tenth Circuit would grant Mr. Scoville meaningful relief, as the district court's injunction would need to be modified to exclude Traffic Monsoon's revenue earned abroad and could well result in lifting the receivership. See *Netsphere, Inc.* v. *Baron*, 703 F.3d 296, 310 (5th Cir. 2012), cert. denied *sub nom. Vogel* v. *Baron*, 135 S. Ct. 437 (2014) (mem.).

* * * * *

The decision under review flatly contradicts two holdings that this Court already reached in its *Morrison* decision. And it does so in contravention of established principles of statutory interpretation, and even considerations of legislative history. Indeed, the errors in the decision below are so clear that the Court may wish to summarily reverse.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider the possibility of summary reversal; in the alternative, the Court should grant plenary review and set the case for briefing and argument.

Respectfully submitted.

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