No. 18-1566

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the entry of preliminary relief against petitioner, based on evidence that he had violated the antifraud provisions of the federal securities laws by operating a Ponzi scheme to defraud investors in the United States and abroad.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Utah):

SEC v. *Traffic Monsoon, LLC*, No. 16-cv-832 (Mar. 28, 2017)

United States Court of Appeals (10th Cir.):

SEC v. *Scoville*, No. 17-4059 (Jan. 24, 2019) (decision below)

SEC v. *Traffic Monsoon*, No. 18-4038 (related appeal abated by the court of appeals pending resolution of this case)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

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OPINIONS BELOW

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

JURISDICTION

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

STATEMENT

Through his Utah-based company, petitioner operated an "unlawful online Ponzi scheme involving the fraudulent sale of securities." Pet. App. 2a. The Securities and Exchange Commission (SEC or Commission) brought a civil enforcement action against him for violating the antifraud provisions of the federal securities laws. *Ibid.* The district court entered preliminary relief, including freezing petitioner's assets, appointing a receiver, and preliminarily enjoining the operation of his business. *Ibid.*; see *id.* at 40a-91a. The court of appeals affirmed. *Id.* at 1a-36a.

A. Legal Background

1. Section 17(a) of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78j(b)—along with SEC Rule 10b-5, 17 C.F.R. 240.10b-5—broadly prohibit fraud in connection with securities transactions. See, *e.g.*, *Lorenzo* v. *SEC*, 139 S. Ct. 1094, 1100-1103 (2019). Those antifraud provisions make it unlawful to "employ any device, scheme, or artifice to defraud," or to "engage in any transaction, practice, or course of business which operates or would operate as a fraud," in connection with a securities transaction. 15 U.S.C. 77q(a)(1) and (3); 17 C.F.R. 240.10b-5(a) and (c) (implementing 15 U.S.C. 78j(b)).

In, *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court addressed the question whether the antifraud provisions apply extraterritorially or only within the United States. *Id.* at 255-261. Beginning in the late 1960s, many federal courts of appeals—led by the Second Circuit—held that the antifraud provisions could have extraterritorial application in two

scenarios: (1) if "wrongful conduct [abroad] had a substantial effect in the United States or upon United States citizens," or (2) if "wrongful conduct * * * in the United States" affected investors abroad. *Id.* at 257 (quoting *SEC* v. *Berger*, 322 F.3d 187, 192 (2d Cir. 2003)); see *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206-209 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969); see also *In re CP Ships Ltd. Sec. Litig.*, 578 F.3d 1306, 1313-1314 (11th Cir. 2009); *Kauthar SDN BHD* v. *Sternberg*, 149 F.3d 659, 664-667 (7th Cir. 1998), cert. denied, 525 U.S. 1114 (1999); *Grunenthal GmbH* v. *Hotz*, 712 F.2d 421, 424-425 (9th Cir. 1983); *Continental Grain (Austl.) Pty. Ltd.* v. *Pacific Oilseeds, Inc.*, 592 F.2d 409, 421-422 (8th Cir. 1979); *SEC* v. *Kasser*, 548 F.2d 109, 112-115 (3d Cir.), cert. denied, 431 U.S. 938 (1977). That approach became known as the "conduct-and-effects test." See *Morrison*, 561 U.S. at 258-259.

Before this Court's 2010 decision in *Morrison*, the Second Circuit and other courts had treated the extraterritorial scope of the antifraud provisions as "a question of subject-matter jurisdiction." 561 U.S. at 253; see *CP Ships*, 578 F.3d at 1313; *Continental Grain*, 592 F.2d at 421; *Schoenbaum*, 405 F.2d at 208. Under that approach, the determination whether sufficient conduct or effects had occurred in the United States was made by the judge at the outset of the case, even if the issue turned on contested facts. See generally *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006) (describing the features of subject-matter jurisdiction).

2. In *Morrison*, this Court rejected the lower courts' view that Section 10(b) of the Exchange Act applied extraterritorially under the conduct-and-effects test. The Court also held that questions concerning Section 10(b)'s

application to extraterritorial conduct went to the merits of a plaintiff's claims rather than to a court's subject-matter jurisdiction. 561 U.S. at 253-265.

The question in *Morrison* was whether, in a private securities-fraud action, Section 10(b) applied to alleged misstatements that were made by the Florida subsidiary of an Australian bank and that were reflected in the bank's financial statements, which were issued in Australia and relied on by Australian investors who purchased the bank's shares on the Australian Stock Exchange. See 561 U.S. at 251-253. The district court dismissed the suit for lack of jurisdiction, concluding that, under the conduct-and-effects test, the plaintiffs sought an impermissible extraterritorial application of Section 10(b). *Id.* at 253. The Second Circuit affirmed. *Ibid.* The court of appeals explained that Congress "'determine[s] a lower federal court's subject-matter jurisdiction,'" but that the Exchange Act had "omitted" any such discussion as to "transactions taking place outside of the United States," which had led the court to develop the conduct-and-effects test. *Morrison* v. *National Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (citation omitted), aff'd, 561 U.S. 247 (2010). The court "respectfully urge[d] that this significant omission receive the appropriate attention of Congress." *Id.* at 170 n.4.

While Congress was considering a potential statutory amendment to address the concern that the Second Circuit had identified, this Court granted a petition for a writ of certiorari in *Morrison* and affirmed the court of appeals' judgment on alternative grounds. See 561 U.S. at 253-265. The Court first rejected the position of the Second Circuit and other courts of appeals that the alleged extraterritorial scope of Section 10(b) presents "a question of subject-matter jurisdiction." *Id.* at 253. The

Court explained that subject-matter jurisdiction "refers to a tribunal's power to hear a case," not to "whether the allegations the plaintiff makes entitle him to relief." *Id.* at 254 (citations and internal quotation marks omitted). The Court concluded that the determination whether Section 10(b) applies extraterritorially concerned "what conduct § 10(b) prohibits, which is a merits question" rather than an issue of subject-matter jurisdiction. *Ibid.* The Court further observed (*ibid.*) that federal courts had subject-matter jurisdiction under Section 27 of the Exchange Act, 15 U.S.C. 78aa (2006), which provided district courts with "exclusive jurisdiction of violations of" that law.

The Court then concluded that Section 10(b) does not apply extraterritorially. *Morrison*, 561 U.S. at 255-265. The Court began with the "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." *Id.* at 255 (citations and internal quotation marks omitted). The Court explained that this "presumption against extraterritoriality" can be rebutted by an "affirmative indication" that a statute "applies extraterritorially." *Id.* at 265. The Court emphasized that, in analyzing whether Congress has given such an indication, there is no "requirement that a statute say 'this law applies abroad.'" *Ibid.* (citation omitted). The presumption against extraterritoriality thus does not impose a "'clear statement rule,'" and "context can be consulted" in determining whether a given law has a particular extraterritorial effect. *Ibid.* (citation omitted). After analyzing the text of Section 10(b), other provisions of the Exchange Act, and other relevant "sources of statutory meaning," the

Court found "no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially." *Ibid.*

Finally, the Court held that applying the Exchange Act to the fraud that was alleged in *Morrison* would constitute an impermissible extraterritorial application even though the relevant misstatements had been made by a Florida company. 561 U.S. at 266-270, 273. The Court explained that "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." *Id.* at 266. The Court concluded that, because the securities transactions at issue had occurred in Australia, the statute did not cover the fraud that the plaintiffs had alleged. *Id.* at 273. The Court accordingly affirmed the dismissal of the complaint. *Ibid.*

3. While *Morrison* was pending before this Court, Congress was considering legislation to amend the securities laws. That legislation ultimately became the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, which was signed into law in July 2010—one month after the *Morrison* decision.

Of central relevance here, Section 929P(b) of the Dodd-Frank Act addressed the extraterritorial application of the Securities Act and the Exchange Act—the issue that the Second Circuit in *Morrison* had urged Congress to resolve. 124 Stat. 1864-1865; see *Morrison*, 547 F.3d at 170 n.4. Section 929P(b) originated in October 2009, while the petition for a writ of certiorari in *Morrison* was pending before this Court. H.R. 3817 § 216, 111th Cong., 2d Sess. The provision codified for government enforcement actions the longstanding court-of-appeals precedent holding that district courts have subject-matter jurisdiction over extraterritorial securities frauds that

satisfy the conduct-and-effects test. *Ibid.*; see H.R. Rep. No. 687, 111th Cong., 2d Sess. Pt. 1, at 80 (2010) ("This section addresses the authority of the SEC and the United States to bring civil and criminal law enforcement proceedings involving transnational securities frauds" by "codify[ing] * * * both the conduct and the effects tests.").

That provision was included in the bill that was passed by the House of Representatives, see H.R. 4173 § 7216, 111th Cong., 1st Sess. (2009), but it was not part of the counterpart bill passed by the Senate, see Pet. App. 64a. The provision was included in the final bill produced by the conference committee, which held its last meeting on June 24, 2010, the day this Court decided *Morrison*. See *ibid.*; H.R. Conf. Rep. No. 517, 111th Cong., 2d Sess. 498-499 (2010); 156 Cong. Rec. 12,068, 12,199 (2010). The provision stated as follows:

> EXTRATERRITORIAL JURISDICTION OF THE ANTIFRAUD PROVISIONS OF THE FEDERAL SECURITIES LAWS. * * *
>
> (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 * * * 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.

Dodd-Frank Act § 929P(b), 124 Stat. 1864-1865; see 15 U.S.C. 78aa(b).

In the debate over the conference bill, the House Member who had introduced Section 929P(b), Representative Paul Kanjorski, directly addressed this Court's decision in *Morrison*. Pet. App. 66a. He explained that the Court in *Morrison* had "appl[ied] a presumption against extraterritoriality," and that Section 929P(b) was intended to "rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department." 156 Cong. Rec. at 12,432. He added:

> [T]he purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States.

Ibid. Senator Jack Reed likewise explained that Section 929P(b) contained "extraterritoriality language that clarifies that in actions brought by the SEC or the Department of Justice," the antifraud provisions of the securities laws "apply if the conduct within the United States is significant, or the external U.S. conduct has a foreseeable substantial effect within our country." 156 Cong. Rec. at 13,182.

Both houses of Congress passed the conference report, and President Obama signed the Dodd-Frank Act into law on July 21, 2010. See Pet. App. 64a.

B. Proceedings Below

1. Petitioner, who resides in Utah, operated a company called Traffic Monsoon, LLC. Pet. App. 2a-3a. Petitioner represented that Traffic Monsoon was "a legitimate internet traffic exchange" business. *Id.* at 3a. Such a business sells "visits to a purchaser's website in order to make that website look more popular than it really is" on search engines like Google, which "rank more frequently visited websites higher than less frequently visited websites." *Ibid.*

Petitioner "operated Traffic Monsoon through a website * * * housed on servers physically located in the United States." Pet. App. 4a. A potential customer "wanting to do business with Traffic Monsoon first had to become a member by going to the website and creating an account." *Ibid.* "The member could then purchase through the website several different advertising services." *Ibid.* "For example, for $5, a member could purchase twenty clicks on the member's online advertisement, and for $5.95 a member could purchase 1,000 visits to his website." *Ibid.* Alternatively, "a member could purchase an Adpack for $50." *Ibid.* An Adpack "entitled a member to receive 1,000 visits to his website and twenty clicks on his internet ad (a $10.95 value), plus the opportunity to share in Traffic Monsoon's revenue up to a maximum amount of $55." *Ibid.*

To participate in that purported revenue sharing, Traffic Monsoon members were required to click on a specified number of internet ads for other Traffic Monsoon members' websites each day. Pet. App. 4a. "Typ-

ically an Adpack purchaser would earn $1 in shared revenue for each day that he made the requisite number of qualifying clicks." *Id.* at 5a. "That meant that in approximately fifty-five days an Adpack purchaser could reach the maximum $55 return, recouping the $50 the member originally paid for the Adpack plus earning an additional $5 (a 10% return over the fifty-five days)." *Ibid.* "When an Adpack purchaser reached the maximum $55 limit in revenue sharing, that member could either use that money to purchase another $50 Adpack, or he could withdraw some or all of his money." *Ibid.*

Adpacks became Traffic Monsoon's most popular product. See Pet. App. 7a. "Between October 2014 and July 2016, * * * members paid Traffic Monsoon $173 million in new money to purchase 3.4 million Adpacks and purchased approximately 14 million additional Adpacks—for $700 million—by rolling over money earned from earlier Adpacks." *Ibid.* "Ninety percent of Adpacks were purchased by people who live outside the United States." *Id.* at 8a. "Adpacks were especially popular in poorer countries, including Bangladesh, Venezuela, and Morocco." *Ibid.*

Traffic Monsoon's Adpacks sales were in substance a Ponzi scheme. Pet. App. 31a-33a. The company sold ever-increasing numbers of Adpacks to new and existing purchasers in order to pay returns on prior Adpacks that it had sold. See *id.* at 32a-33a. Although Traffic Monsoon "misrepresented to its Adpack purchasers that the revenue it was sharing came from sales of" the company's other advertising services, "there was essentially no other business activity generating the revenue Traffic Monsoon was sharing with qualifying Adpack purchasers." *Ibid.*

2. In July 2016, the SEC filed this enforcement action against petitioner and Traffic Monsoon, alleging violations of Section 17(a)(1) and (3) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5(a) and (c). Pet. App. 9a. The Commission requested (1) a temporary restraining order (TRO) prohibiting petitioner and Traffic Monsoon from further violations of the antifraud provisions and freezing their assets, and (2) an order appointing a receiver. *Id.* at 11a. The district court issued the TRO and imposed a receivership. *Id.* at 41a.

The SEC then sought a preliminary injunction that would continue the temporary emergency relief throughout the pendency of the litigation. Pet. App. 40a. Petitioner opposed that interim relief and moved to have the receivership set aside. *Id.* at 40a-41a. Among other things, petitioner contended that Traffic Monsoon's sales of Adpacks to overseas purchasers were beyond the territorial scope of the antifraud provisions; that Adpacks did not constitute "securities" under the antifraud provisions; that his business was not a fraudulent Ponzi scheme; and that he lacked scienter. *Id.* at 13a-14a.

The district court granted the Commission's request for a preliminary injunction and denied petitioner's request to set aside the receivership. Pet. App. 40a-91a. The court first rejected petitioner's contention that his conduct was beyond the territorial reach of the securities laws. *Id.* at 55a-74a. The court acknowledged that, because Section 929P(b) of the Dodd-Frank Act is phrased as an extension of subject-matter jurisdiction over extraterritorial frauds that satisfy the conduct-and-effects test, the provision does not "explicitly overturn the core holding of *Morrison*" that the substantive provisions of the securities laws do not reach such frauds.

Id. at 61a. The court emphasized, however, that *Morrison* had rejected the premise that the presumption against extraterritoriality can be rebutted only through a "clear statement." *Id.* at 62a. Rather, the court explained, "the judicial presumption against the extraterritorial application of a statute may be rebutted by referring to 'all available evidence about the meaning' of a statute—including the context provided by related statutes, history of amendments, underlying purpose, and legislative history." *Ibid.* (quoting *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993)).

After reviewing the text and history of Section 929P(b)—including its formulation against the backdrop of pre-*Morrison* court of appeals precedents that had treated the extraterritorial application of U.S. securities laws as a question of subject-matter jurisdiction, and the provision's enactment in close proximity to this Court's decision in *Morrison*—the district court concluded that Congress had indicated its "intent to apply" the antifraud provisions in a government enforcement action "to extraterritorial transactions if the conduct and effects test can be satisfied." Pet. App. 68a. Among other textual and contextual evidence, the court explained that "the operative language of Section 929P(b) strongly indicates Congress's intent" that the antifraud provisions apply to extraterritorial transactions in enforcement actions because it would be "pointless to clarify that district courts had jurisdiction to hear Section 10(b) and 17(a) claims based on certain extraterritorial transactions unless Congress also intended that these statutes be applied extraterritorially." *Id.* at 68a-69a. Indeed, the court explained, "a contrary interpretation of the legislative intent animating Section 929P(b) would require the court to assume that Congress intended the

amendment be a nullity." *Id.* at 69a. The court concluded that the numerous "clear indications that Congress intended Sections 10(b) and 17(a) to be applied to foreign transactions are sufficient to overcome the presumption against extraterritorial application." *Id.* at 70a.

In the alternative, the district court held that, "[e]ven if the court has erred in concluding that Section 929P(b) reinstated the conduct and effects test, all of the AdPack sales challenged by the SEC are domestic transactions under the *Morrison* transactional test." Pet. App. 71a. Applying the "irrevocable liability" test that the Second Circuit had developed after *Morrison* to determine whether a securities transaction that does not occur on a U.S. securities exchange is domestic, *Absolute Activist Value Master Fund Ltd.* v. *Ficeto*, 677 F.3d 60, 67 (2012), the district court explained that Traffic Monsoon had "incurred irrevocable liability in the United States" for all of the transactions in question, thereby making them domestic transactions, Pet. App. 73a. The court further held that Section 17(a) applies for the additional reason that it covers domestic "offer[s]" as well as consummated domestic transactions, and Traffic Monsoon had offered to sell the Adpacks while in the United States. *Id.* at 73a-74a.

On the merits, the district court considered petitioner's contentions that Traffic Monsoon's "sale of AdPacks does not constitute a Ponzi scheme that would violate" the securities laws; that "the AdPacks are not securities and are therefore not subject to the" antifraud provisions; and that "the SEC likely cannot prove the scienter requirements of Rule 10b-5 or Section 17(a)." Pet. App. 77a; see *id.* at 77a-87a. The court concluded that petitioner was not likely to succeed on any of those arguments, and it accordingly entered the preliminary

relief the Commission had sought. *Id.* at 89a, 92a-95a. The court rejected petitioner's objections to the receivership order on similar grounds. *Id.* at 89a-90a. The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 90a.

3. The court of appeals affirmed. Pet. App. 1a-36a. The court held that "Congress has 'affirmatively and unmistakably' indicated that the antifraud provisions of the federal securities acts apply extraterritorially" in a government enforcement action "when the statutory conduct-and-effects test is met." *Id.* at 22a-23a. Based on the *Morrison* Court's recognition that "'context can be consulted'" in an extraterritoriality inquiry, and on "the specific context in which Congress enacted the 2010 jurisdictional amendments as part of the Dodd-Frank Act," the court held that Congress had rebutted the presumption against extraterritoriality for suits like this one. *Id.* at 17a (quoting *Morrison*, 561 U.S. at 265).

Like the district court, the court of appeals emphasized that Section 929P(b) of the Dodd-Frank Act was drafted at a time when courts "treated application of the conduct-and-effects test to decide when the federal securities acts applied extraterritorially as a matter of subject-matter jurisdiction." Pet. App. 17a. The court of appeals observed that the *Morrison* Court had rejected that approach on "the final day that the joint committee considered the proposed Dodd-Frank Act." *Id.* at 20a. The court of appeals agreed with the district court that it "strains credulity to assume that legislators read *Morrison* on the last day that they met to negotiate the final version of a massive 850-page omnibus bill designed to overhaul large swaths of the United States financial regulations and consciously chose to en-

act Section 929P(b) against the background of the fundamental shift in securities law brought about by *Morrison*." *Id.* at 21a-22a (citation omitted).

The court of appeals identified several other aspects of the Dodd-Frank Act that "bolstered" its conclusion, Pet. App. 22a, including the title of Section 929P ("Strengthening Enforcement by the Commission"), 124 Stat. 1862 (capitalization altered), and Section 929Y of the Act, 124 Stat. 1871, which directed the SEC to "solicit public comment and thereafter conduct a study to determine the extent to which *private* rights of action under the antifraud provisions" of the Exchange Act "should be extended" extraterritorially, *ibid.* (emphasis added). The court viewed those features of the statute as suggesting that, in enacting Section 929P(b), "Congress believed it 'had extended the SEC's authority to bring an [antifraud] enforcement action'" under the conduct-and-effects test. Pet. App. 22a (citation omitted; brackets in original).

The court of appeals accordingly concluded that, "[n]otwithstanding the placement of the Dodd-Frank amendments in the jurisdictional provisions of the securities acts," the "context and historical background surrounding Congress's enactment of those amendments" made clear that Congress had "undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied" in a government enforcement action. Pet. App. 21a.

The court of appeals affirmed the district court's conclusion that the Commission was likely to prevail on the merits. Pet. App. 24a-34a. The court of appeals also rejected petitioner's challenge to the scope of the asset freeze. *Id.* at 35a. The court accordingly affirmed "in

all respects the district court's challenged preliminary decisions." *Ibid.*

Judge Briscoe concurred in the judgment based on the district court's alternative holding. Pet. App. 36a-39a. She found "no need to address in this case whether the antifraud provisions" apply extraterritorially because, in her view, "the SEC sufficiently established that [petitioner and Traffic Monsoon] sold securities in the United States in violation of the securities acts and their accompanying regulations." *Id.* at 36a, 39a. She emphasized that "Traffic Monsoon was based in the United States and operated out of the United States when selling its securities," including by making "its sales through computer servers based solely in the United States." *Id.* at 38a-39a. "Under any common sense reading of *Morrison* and § 10(b)," Judge Briscoe concluded, Traffic Monsoon had made securities sales in the United States and was accordingly subject to the antifraud provisions. *Id.* at 39a.

ARGUMENT

The courts below correctly held that the Commission may pursue an enforcement action against petitioner for operating a Ponzi scheme that defrauded domestic and foreign investors in violation of the federal securities laws. In *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court held that the federal securities-fraud provisions in their then-current form applied only to frauds that related to transactions or offers occurring in the United States. The Court's holding was based not on explicit statutory language limiting the provisions' coverage to frauds involving domestic sales, but on the presumption against extraterritoriality, a venerable tool for inferring Congress's likely intent. Congress can rebut that presumption either

through an explicit directive as to a statute's extraterritorial scope, or through other contextual indications that make its intent clear. By vesting the district courts with jurisdiction over government enforcement suits that are premised on the conduct-and-effects test, the Dodd-Frank Act clearly manifests Congress's intent that SEC suits like this one can proceed. Petitioner's contrary argument would deprive that amendment of any practical effect.

In any event, petitioner does not suggest that the decision below conflicts with any decision of another court of appeals, or that the question presented recurs with any frequency. To the contrary, the only decisions addressing the question presented in the decade since the Dodd-Frank Act's enactment are the two decisions below. In addition, this case is in an interlocutory posture; petitioner continues to challenge the merits of the enforcement action on multiple grounds, and he could prevail on any of them. And as Judge Briscoe's concurrence and the district court explained, the SEC might ultimately prevail even if the antifraud provisions were not given extraterritorial effect. The petition for a writ of certiorari should be denied.

1. Under established interpretive principles, courts presume that a federal statute applies only domestically unless there is an "affirmative indication" that the statute "applies extraterritorially." *Morrison*, 561 U.S. at 265; see, *e.g.*, *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016); *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013). The presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters." *Morrison*, 561 U.S. at 255; see *EEOC* v. *Arabian Am.*

Oil Co., 499 U.S. 244, 248 (1991) ("This canon of construction is a valid approach whereby unexpressed congressional intent may be ascertained.") (citation, ellipsis, and internal quotation marks omitted). The "affirmative indication" required to rebut the presumption, however, need not come in the form of a "'clear statement.'" *Morrison*, 561 U.S. at 265. That is, there is no "requirement that a statute say 'this law applies abroad.'" *Ibid.* (citation omitted); see *RJR Nabisco*, 136 S. Ct. at 2102 ("[A]n express statement of extraterritoriality is not essential."). Instead, the "affirmative indication" required to rebut the presumption against extraterritoriality can come through inferences from "context" or other "sources of statutory meaning." *Morrison*, 561 U.S. at 265; see *RJR Nabisco*, 136 S. Ct. at 2102-2103 (finding the presumption rebutted by contextual indications).

As in *RJR Nabisco*, "[c]ontext is dispositive here." 136 S. Ct. at 2102. Section 929P(b) of the Dodd-Frank Act states that federal courts "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 the federal securities laws, based on (as relevant here) "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*." 15 U.S.C. 78aa(b)(1) (emphasis added). There is no real dispute that Congress enacted Section 929P(b) to codify—albeit solely with respect to government enforcement actions—the pre-*Morrison* precedents that had prevailed in the courts of appeals, under which the antifraud provisions applied extraterritorially as a matter of subject-matter jurisdiction if the conduct-and-effects test was satisfied. See pp. 2-9, *supra*. The only

plausible inference is that Congress intended to authorize the government to bring enforcement actions for extraterritorial frauds that satisfy the conduct-and-effects test. See Pet. App. 18a-23a, 55a-74a. That inference supersedes the rule announced in *Morrison* to the extent that the two conflict.

Applying that interpretive approach does not elevate unenacted evidence of Congress's intent above fidelity to literal statutory text. The plain text of the relevant federal securities laws, read in isolation and without reference to other indicia of likely congressional intent, unambiguously *encompasses* petitioner's alleged fraud. See 15 U.S.C. 77q(a)(1) and (3) (making it unlawful to "employ any device, scheme, or artifice to defraud," or to "engage in any transaction, practice, or course of business which operates or would operate as a fraud," without any geographic limitation on those prohibitions); 17 C.F.R. 240.10b-5(a) and (c) (adopting the same prohibitions in implementing 15 U.S.C. 78j(b)). In holding the securities laws inapplicable to frauds committed in connection with foreign transactions, the *Morrison* Court did not suggest that any language in the relevant statutes explicitly imposed that limitation. See 561 U.S. at 255 (recognizing that "the Exchange Act is silent as to the extraterritorial application of § 10(b)"). The Court instead relied on a venerable interpretive canon—the presumption against extraterritoriality—that has long been used to infer geographic limitations that do not appear in federal statutory text. See *ibid.* In the present case, the courts below simply held that, in determining whether and to what extent current law imposes liability for securities fraud in connection with foreign transactions, Section 929P(b) provides a more reliable and

specific indication of congressional intent than does the presumption against extraterritoriality.

2. Petitioner does not seriously dispute that the court of appeals' decision reflects a correct understanding of Congress's intent in enacting Section 929P(b). He instead contends (Pet. 13-26) that Section 929P(b) cannot supersede this Court's holding in *Morrison* because that decision addressed "what conduct § 10(b) prohibits, which is a merits question," 561 U.S. at 254, and Section 929P(b) addresses the jurisdiction of the district courts. That argument lacks merit. Despite its framing as a jurisdictional provision, Section 929P(b) provides a sufficiently clear indication of congressional intent to overcome the presumption against extraterritoriality.

"Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad." *Kiobel*, 569 U.S. at 117. That is what Congress did in enacting Section 929P(b). As explained above, the sequence of events that led to Section 929P(b)'s enactment makes clear that Congress intended to authorize government enforcement actions premised on the conduct-and-effects test that had long prevailed in the courts of appeals. See pp. 2-9, *supra*. And, as further explained above, the Tenth Circuit did not treat Section 929P(b) as superseding any geographic limitations imposed by the text of the relevant federal statutes. See pp. 19-20, *supra*. It simply treated Section 929P(b) as rebutting the inference about unexpressed congressional intent that the presumption against extraterritoriality would otherwise have mandated.

The text and structure of Section 929P reinforce that understanding. The title of Section 929P, "Strengthening Enforcement by the Commission," indicates that Congress intended to define the substantive scope of *the*

Commission's enforcement powers, not merely the jurisdiction of courts. 124 Stat. 1862 (capitalization altered); see, *e.g.*, *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (relying on a title in interpreting a statute). Similarly, the title of Section 929P(b) refers to the "extraterritorial jurisdiction of *the antifraud provisions of the federal securities laws*," not merely the jurisdiction of the courts. 124 Stat. 1864 (emphasis added; capitalization omitted). In addition, Section 929Y(a) of the Dodd-Frank Act requires the SEC to "conduct a study to determine the extent to which *private* rights of action under the antifraud provisions * * * should be extended" extraterritorially using the same conduct-and-effects test that is codified for government enforcement actions. 124 Stat. 1871 (emphasis added). Section 929Y(a)'s exclusive focus on private suits reflects the understanding that Congress had *already* "extended" the antifraud provisions in government enforcement actions through Section 929P(b). See Pet. App. 22a; cf. *Morrison*, 561 U.S. at 262-265 (looking to multiple related provisions of the Exchange Act in addressing extraterritoriality question).

Finally, petitioner's reading of Section 929P(b) would render it a practical nullity. Indeed, petitioner's reading would render the provision superfluous in two distinct respects. First, as explained above, the Court in *Morrison* held that district courts already had subject-matter jurisdiction under 15 U.S.C. 78aa (2006) "to adjudicate the question whether § 10(b) applies to" particular extraterritorial conduct. 561 U.S. at 254. On petitioner's theory of the case, Section 929P(b) added nothing to the jurisdiction that federal courts already possessed.

Second, Section 929P(b)(1) of the Dodd-Frank Act vested the district courts with jurisdiction over government enforcement actions premised on "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*." 15 U.S.C. 78aa(b)(1) (emphasis added). But the conduct described by the italicized language is the very conduct that the *Morrison* Court held did not violate the securities laws. Confirming the district courts' jurisdiction over a class of suits that is defined by their lack of merit would serve no useful purpose. See Pet. App. 68a-69a ("It would be pointless to clarify that district courts had jurisdiction to hear Section 10(b) and 17(a) claims based on certain extraterritorial transactions unless Congress also intended that these statutes be applied extraterritorially.").

Petitioner observes that this Court's "preference for avoiding surplusage constructions is not absolute." Pet. 21 (quoting *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004)). It is true that the "rule against surplusage" can give way to "other indications" of statutory meaning. *Lamie*, 540 U.S. at 536. But here, as explained above, those "other indications" point toward the reading that the district court and court of appeals unanimously adopted. The Court in *Lamie*, moreover, was willing to tolerate a single superfluous word ("attorney"). *Ibid.* Here, petitioner's reading of Section 929P(b) would deprive three separate statutory provisions that Congress added to the securities laws (in apparent response to a suggestion from the Second Circuit) of any practical effect.[1]

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[1] Petitioner makes the related contention (Pet. 23) that the Court should ignore Section 929P(b) of the Dodd-Frank Act and focus only

In sum, the text, context, structure, and history of Section 929P(b) "clearly evidence[] extraterritorial effect despite lacking an express statement of extraterritoriality" in the substantive provisions of the securities laws. *RJR Nabisco*, 136 S. Ct. at 2103. Indeed, "[s]hort of an explicit declaration" in the laws' substantive provisions, "it is hard to imagine how Congress could have more clearly indicated that it intended" to authorize the Commission to bring enforcement actions against extraterritorial frauds that satisfy the conduct-and-effects test. *Id.* at 2102-2103; see *Morrison*, 561 U.S. at 265.[2]

3. This Court's review is not warranted for several additional reasons.

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on "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." But there is no authority for categorically ignoring the text or context of a relevant statutory provision. To the contrary, the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *United States* v. *Fausto*, 484 U.S. 439, 453 (1988).

[2] Petitioner suggests (Pet. 24-25) that the rule of lenity undermines the decisions of the courts below. Because petitioner did not invoke the rule of lenity in the lower courts, that argument cannot provide a basis for reversal. In any event, the rule of lenity does not apply here because there is no ambiguity remaining after applying all the relevant tools of statutory interpretation. See *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010). And petitioner cannot reasonably contend that he lacked fair notice because, before the violations at issue here began, the SEC adopted (through notice-and-comment rulemaking) a regulation clearly stating the Commission's view that it was authorized to undertake enforcement actions against extraterritorial frauds that satisfy the conduct-and-effects test. See 79 Fed. Reg. 47,278, 47,360-47,361 (Aug. 12, 2014).

First, petitioner does not assert that the decision below conflicts with any decision of another court of appeals. Indeed, the only two courts that have ruled on the interpretive issue presented here in the decade since Section 929P(b)'s enactment are the district court and court of appeals in this case. And because Section 929P(b) applies only in government enforcement actions, there is no reason to expect that the question presented here will arise frequently in future cases.

Second, the extraterritoriality issue may not ultimately be dispositive in this case. The court of appeals decided the case in an "interlocutory" posture and affirmed only preliminary relief. Pet. App. 2a, 35a. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (*VMI*) (Scalia, J., respecting the denial of the petition for writ of certiorari), and that course is particularly appropriate here. Petitioner is contesting numerous merits issues, including whether Adpacks are "securities" under the antifraud provisions, whether his business was in fact a Ponzi scheme, and whether he acted with the requisite scienter. Pet. App. 13a-14a. If petitioner prevails on remand on any of those issues, resolving the extraterritoriality question would be unnecessary. And if the Commission ultimately prevails on the merits, petitioner remains free to "rais[e] the same issues" that he presents here "in a later petition, after final judgment has been rendered." *VMI*, 508 U.S. at 946.

Even if Section 929P(b) did not allow the Commission to pursue an enforcement action based on extraterritorial frauds that satisfy the conduct-and-effects test, petitioner would still be liable under the antifraud provisions because the transactions at issue were domestic

transactions. Cf. *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2136-2137 (2018) (declining to resolve extraterritoriality question because the relevant transactions were domestic transactions). As Judge Briscoe's concurrence and the district court explained, because petitioner conducted the fraudulent sales through a company in the United States using a United States-based server, the transactions were domestic for purposes of the antifraud provisions despite the foreign location of most purchasers. See Pet. App. 38a-39a, 72a-73a.

Finally, the Commission's Section 17(a) claim would survive, and the preliminary injunctive relief (including the asset freeze) and receivership would remain in place, even if petitioner prevailed on the extraterritoriality issue and the sales to overseas persons were found to be foreign transactions. As the district court explained, "the language of Section 17(a) expands the domestic conduct that is regulated to include both completed transactions and *offers* to sell securities." Pet. App. 74a n.13 (emphasis added). The district court found that the sales to persons overseas all involved domestic offers, *id.* at 74a, and petitioner did not dispute that finding in his court of appeals briefing. That alternative ground for allowing the SEC's enforcement action to go forward provides a further reason for this Court to deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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