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

REPLY BRIEF FOR PETITIONER

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As respondent the Securities and Exchange Commission (SEC) explains, this Court and Congress were simultaneously considering the extraterritorial reach of the antifraud provisions of the securities laws. Opp. 4-6. In *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court undertook to decide whether the antifraud provisions as written already had extraterritorial effect in what would become the Dodd-Frank Wall Street Reform and Consumer Protection Act. Congress considered whether to amend those laws to give them extraterritorial effect. The SEC was involved in both inquiries: It signed the government's briefs in *Morrison*, in which the

government asserted that the extraterritorial reach of the antifraud provisions was a question of those provisions' substantive reach, and not of the jurisdictional provisions in the securities statutes. And some of the SEC lawyers working on *Morrison* also advised Congress on the extraterritoriality issues that case presented. Amicus Br. 13-14; Pet. 16.

Soon thereafter, this Court in *Morrison* confirmed the government's understanding on the substance-versus-jurisdiction issue, holding that the securities laws provided for jurisdiction over extraterritorial conduct, while also holding that Section 10(b) did not have extraterritorial application in light of the presumption against extraterritoriality. 561 U.S. at 253-254, 262-265. A month later, Congress amended the jurisdiction provisions of the Securities Exchange Act of 1934 and the Securities Act of 1933 through Section 929P(b) of Dodd-Frank—but left untouched the antifraud provisions relevant here, Section 10(b) of the Exchange Act and Section 17(a) of the Securities Act.

The SEC now contends that those untouched antifraud provisions were nevertheless, somehow, substantively amended by Section 929P(b)'s amendments to the jurisdictional provisions. According to the SEC, the newly-added "context" those amendments provide has changed the meaning of Sections 10(b) and 17(a)—long-ago-enacted provisions the text of which Dodd-Frank did not alter—and, not only that, this late-arriving "context" is clear enough to subject individuals to civil penalties, equitable remedies, and even jail time. Opp. 18-20. Not surprisingly, that argument cannot be reconciled with either this Court's precedents or underlying principles of statutory interpretation. The petition for a writ of certiorari should be granted.

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

Respondent acknowledges *Morrison*'s holding that "Section 10(b) does not apply extraterritorially," Opp. 5, and does not contend that the presumption against extraterritoriality applies differently to the text of Section 17. Respondent further agrees that the Court in *Morrison* both adhered to its longstanding view that jurisdiction refers to a court's "power to hear a case," and held that the Exchange Act's jurisdictional provision, Section 27, was satisfied despite the conduct in question occurring overseas. Opp. 4-5 (quoting *Morrison*, 561 U.S. at 254).

Instead, respondent asserts, the decision below can be squared with *Morrison* because the Court in that case recognized that "context can be consulted" in determining the extraterritorial effect of a statute. 561 U.S. at 265; see Opp. 18. To be sure, this Court has long acknowledged that context is relevant to determining whether there exists a "clear indication of extraterritorial effect" necessary to overcome the presumption against extraterritoriality. *E.g.*, *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2102 (2016). But it is a "rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality." *Id.* at 2103. The Court has never suggested that Congress could create such context where it did not exist before by amending *another* part of the same statutory scheme, as the SEC suggests Congress did through the jurisdictional amendments in Section 929P(b). Nor has the Court held that the requisite "clear indication" can come from separate provisions that provide, at best, ambiguous support for giving extraterritorial effect to substantive provisions of a statute.

1. To start with, Section 929P(b)'s amendments to the jurisdictional provisions of the Securities Act and Ex-

change Act are unusual places to locate "context" for determining the extraterritorial reach of those statute's antifraud provisions. The principle that statutes do not ordinarily apply extraterritorially is "a presumption about a statute's meaning." *Morrison*, 561 U.S. at 255. Context is therefore considered to determine whether there is an "'affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect." *Ibid.* (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). As with any inquiry into statutory interpretation, the relevant intention is that belonging to the Congress that passed the statute at issue. See Pet. 23-24. Accordingly, in *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the Court considered the context provided by "the historical background against which the [Alien Tort Statute] was enacted," *id.* at 119-124, because that background is what could provide the relevant context for understanding that statute's extraterritorial effect. The Section 929P(b) amendments cannot provide that context, because they postdate the relevant statutory enactments *by more than seventy-five years*. Indeed, the Court has already considered the relevant context surrounding Section 10(b), and held that it does not provide extraterritorial effect. *Morrison*, 561 U.S. at 262-265.

Respondent claims that this ordinary way of interpreting a statute "categorically ignor[es] the text or context of a relevant statutory provision." Opp. 22-23 n.1. But that assumes the conclusion: The question is to what extent Section 929P(b)'s amendments are "relevant." Later amendments to other sections of a statutory regime do not shed light on the "intention" of the statutory provision under consideration.

To be sure, the Court has observed that "the implications of a statute may be altered by the implications of a later statute." Opp. 23 n.1 (quoting *United States* v.

Fausto, 484 U.S. 439, 453 (1988)). But that does not mean that Congress can or should legislate by "implication." To the contrary, "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change." *Fausto*, 484 U.S. at 453.[1] Here, respondent emphasizes, Congress was expressly considering how to address the extraterritorial effect of the securities laws against a background understanding that the question it was addressing was not a matter of jurisdiction. Amicus Br. 13-14; Pet. 16. Whatever Congress then accomplished through its amendments to the jurisdiction provisions, it did not *sub silentio* amend the antifraud provisions by providing "context" in other parts of the securities laws. *Cf. Lamie* v. *U.S. Tr.*, 540 U.S. 526, 542 (2004) (the Court's avoidance of trying to "rescue" Congress from perceived drafting errors "allows both * * * branches to adhere to [their] respected, and respective, constitutional roles"). The ultimate goal of *Morrison*'s "context" inquiry is to arrive at "'the most faithful reading' of the text." 561 U.S. at 265 (quoting *id.* at 280 (Stevens, J., concurring in the judgment)). When the text of a provision has not changed, it follows that the meaning of the provision has not changed either.

2. In any event, Section 929P(b)'s revisions to the jurisdictional provisions of the Exchange Act and Securities Act are a particularly poor way to have impliedly amended Section 10(b) and Section 17(a). To be sure, "[i]t is true

[1] In *Fausto*, the question was whether the Civil Service Reform Act of 1978, which had "comprehensively overhauled the civil service system," had impliedly changed an interpretation by regulators and the Court of Claims that the latter was an "appropriate authority" under 5 U.S.C. 5596(b)(1) to adjudicate a civil servant's claim for backpay. 484 U.S. at 443, 454. That situation bears no resemblance to the circumstance presented by this case.

that 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. But a jurisdictional provision, like any other, still must "evince a clear indication of extraterritoriality." *Id.* at 118 (internal quotation marks and citation omitted).

Here, the amendments to the jurisdictional provisions state only that federal district courts "shall have jurisdiction" over SEC enforcement proceedings in which the SEC brings claims under, *inter alia*, Section 17(a) and Section 10(b) based on certain extraterritorial conduct or transactions. 15 U.S.C. 77v(c) (Pet. 3); 15 U.S.C. 78aa(b) (Pet. 4-5). Respondent does not contest that, applying a plain meaning of the word "jurisdiction," these two provisions do nothing more than provide the federal courts with the power to hear such cases. See Pet. 18-20; see generally *Kiobel*, 569 U.S. at 116 (noting a jurisdictional provision "does not directly regulate conduct or afford relief").

a. Instead, respondent claims that there "is no real dispute" but that Congress meant something other than what it said, and intended to change the reach of the antifraud provisions through these amendments. Opp. 18. But there is such a dispute, because that argument runs against ordinary principles of statutory construction. First and foremost, respondent's argument cannot be squared with the plain meaning of the term "jurisdiction," and it is that ordinary meaning that courts presume "accurately expresses the legislative purpose" of a statutory provision. *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal citation omitted). Respondent itself struggles with that plain meaning, asserting that Section 929P(b)'s amendments mean that "the antifraud provisions appl[y] extraterritorially *as a matter of subject-mat-*

ter jurisdiction." Opp. 18 (emphasis added). That articulation contradicts itself, the government's prior positions, and *Morrison*, where the Court held that subject-matter jurisdiction was "an issue quite separate" from the antifraud provisions' extraterritorial reach. 561 U.S. at 254.

Respondent would brush that aside on the theory that Congress meant "to codify" earlier decisions from the courts of appeals. Opp. 18. But that argument runs counter to the canon that Congress drafts legislation against the backdrop of *this* Court's precedents. Amicus Br. 13 (citing *Porter* v. *Nussle*, 534 U.S. 516, 528 (2002)). Respondent essentially assumes that the legislators who voted in favor of Dodd-Frank lacked comprehension not only of this Court's precedent in *Morrison* itself, but also of all the other precedents that made the Court's jurisdictional holding in *Morrison* so uncontroversial that the government, petitioner, and respondent all had agreed on the point. 561 U.S. at 254; see generally Pet. 15-16.

b. Respondent pushes back on these principles with some canons of construction of its own. It emphasizes the titles of both Section 929P and Section 929P(b) as supporting its view that Congress in Dodd-Frank intended to extend the SEC's ability to reach extraterritorial conduct or transactions. Opp. 20-21. But titles and section headings merely "'supply cues' as to what Congress intended;" they "cannot limit the plain meaning of a statutory text." *Merit Mgmt. Grp.* v. *FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (cited in Opp. 21) (quoting *Yates* v. *United States*, 135 S. Ct. 1074, 1083 (2015)).

The SEC also invokes the canon against superfluity. Opp. 21-22. Whether or not the plain meaning of Section 929P(b)'s amendments render them "practical nullit[ies]," Opp. 21, the Court has been clear that "the plain meaning" trumps "applying the rule against surplusage" and that

the surplusage canon should not be invoked to concoct ambiguity in an otherwise unambiguous text. *Lamie*, 540 U.S. at 536. Respondent tries to avoid *Lamie*'s instruction to prioritize the plain meaning by claiming that all "other indications" of statutory meaning here favor its interpretation. Opp. 22 (quoting *Lamie*, 540 U.S. at 536). As demonstrated above, however, that is not so. If anything, the "one, cardinal canon" of statutory construction—adherence to the plain meaning of the text—contradicts respondent's interpretation. *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).

c. A final canon of construction also supports petitioner's interpretation of Section 10(b) and Section 17(a). Even if there is ambiguity about the meaning of the jurisdictional amendments, the rule of lenity resolves that ambiguity in favor of narrowing the effect of the jurisdictional amendments on the substantive antifraud provisions. Respondent does not suggest that the rule of lenity cannot apply. Opp. 23 n.2. Instead, it argues that petitioner waived this argument by not raising it below. But the rule of lenity is merely another argument as to why Section 929P(b)'s amendments did not modify the antifraud provisions. See *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); Stephen M. Shapiro et al., *Supreme Court Practice* § 6.26(b), at 6-104 (11th ed. 2019) (noting that while "the Court generally declines to review *issues* not pressed or passed upon by the lower courts, it has allowed petitioners to make new *arguments*").

Respondent again hangs its hat on the notion that all the rules of statutory construction favor its reading. Opp. 23 n.2. That remains a strange argument given that the plain language of Section 929P(b) indicates that its amendments pertain only to the jurisdiction of the district courts. To the extent that any uncertainty remains, the rule of lenity's "teaching that ambiguities about the

breadth of a criminal statute should be resolved in the defendant's favor" further suggests that the broad effect given to Section 929P(b) by respondent and the court below is misplaced. *United States* v. *Davis*, 139 S. Ct. 2319, 2333 (2019).

Accordingly, the "context" to which respondent points indicates that *Morrison*'s holding still applies and Section 10(b) and Section 17(a) do not apply extraterritorially. 561 U.S. at 265. To the extent the Court deems it appropriate to consider the Section 929P(b) amendments as illuminating the meaning of Section 10(b) and Section 17(a) at all, respondent has surely not shown that the amendments provide the requisite "clear indication of extraterritorial effect" necessary to overcome the presumption against extraterritoriality. *E.g.*, *RJR Nabisco*, 136 S. Ct. at 2102. The decision below is inconsistent with this Court's extraterritoriality decisions and ordinary principles of statutory interpretation.

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

1. Respondent implies that the question presented is unimportant because few other courts have "ruled on" the issue. Opp. 24. But other courts that have considered the question have expressed confusion over the effect of Section 929P(b)'s jurisdictional provisions. See *Parkcentral Global Hub Ltd.* v. *Porsche Auto. Holdings SE*, 763 F.3d 198, 211 n.11 (2d Cir. 2014) (observing that the "import of [Section 929P(b)] is unclear * * * because *Morrison* itself explicitly held that the Court there had jurisdiction to decide the case"); *SEC* v. *A Chicago Convention Ctr., LLC*, 961 F. Supp. 2d 905, 911 (N.D. Ill. 2013) ("Section 929P(b), on its face, merely addresses subject-matter jurisdiction * * * rather than the substantive reach of Section 10(b) of the Exchange Act.").

2. The case is also a strong vehicle to consider this important question. Respondent wisely does not suggest that there is any bar to considering the case in its current interlocutory posture. *See* Opp. 24. Review is necessary now given that the preliminary injunction and receivership of Traffic Monsoon has frozen that company's and petitioner's assets. See *Luis* v. *United States*, 136 S. Ct. 1083 (2016) (plurality opinion) (reviewing interlocutory orders freezing defendant's assets); *Winter* v. *Natural Res. Def. Council*, 555 U.S. 7 (2008) (reviewing preliminary injunction); *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam). And review is appropriate now given that the question presented is a pure issue of law.

Respondent notes that the district court and a single member of the Tenth Circuit panel opined that "the transactions at issue were domestic transactions" within the meaning of *Morrison*. Opp. 24-25. But the decision under review said nothing on that subject, even though the panel was undoubtedly aware that it had "discretion" to begin with the domestic-transaction question to avoid the "'difficult questions'" posed by Section 929P(b). *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 236-237 (2009)). That the court of appeals majority passed up the narrower option strongly suggests that it did not agree with the district court's alternative holding.

The same goes for the court of appeals's silence regarding the district court's conclusion that Section 17(a) of the Securities Act applies to domestic "offers" to sell securities, not just domestic sales. Pet. App. 73a-74a. Neither the Tenth Circuit majority nor Judge Briscoe's concurrence opined on this point. Indeed, the court below did not distinguish between Section 10(b) and Section 17(a) in its extraterritoriality analysis, see Pet. App. 20a n.6, and cited *Morrison*'s observation that the Securities

Act and Exchange Act exhibit the "same focus on domestic *transactions*." *Ibid.* (emphasis added) (quoting *Morrison*, 561 U.S. at 268). If Section 17(a) applies of its own force to transactions in which the "offer" is domestic but the "sale" takes place abroad, it is not clear why the drafters of Section 929P(b) tried to codify the "conduct" portion of the conduct-and-effects test, which would have the same coverage. See 15 U.S.C. 77v(c)(1).

* * * * *

The decision below gives extraterritorial reach to the SEC's enforcement powers, and the Department of Justice's prosecution powers, on the ground that amendments to two jurisdictional provisions effect substantive amendments of the core antifraud provisions of the federal securities laws. Because there are no obstacles to this Court's review of this important question, the Court should grant the petition.

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 set the case for briefing and argument.

Respectfully submitted.

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