NO. 19-1141

In the Supreme Court of the United States

ATLANTIC TRADING USA, LLC, ET AL.,
Petitioners,

v.

BP P.L.C., ET AL.,
Respondents.

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

BRIEF OF AMICI CURIAE FORMER OFFICIALS OF THE COMMODITY FUTURES TRADING COMMISSION SUPPORTING PETITIONERS

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BRIEF OF AMICI CURIAE FORMER OFFICIALS OF THE COMMODITY FUTURES TRADING COMMISSION SUPPORTING PETITIONERS

STATEMENT OF INTEREST[1]

Amicus **Andrea Maharam Corcoran** founded her consulting firm Align International in 2008 following a long career in the public sector. Nationally, she served as the Director of two Divisions of the U.S. Commodity Futures Trading Commission (CFTC)—the Division of Trading and Markets and the Inaugural Office of International Af-

[1] Both Petitioners and Respondents received 10-days' notice that this brief would be filed and have consented to its filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

fairs. Internationally, she served as the Chair of the International Organization of Securities Commissions' (IOSCO) Task Force on Implementation of the Objectives and Principles of Securities Regulation, and led multiple projects related to setting standards for the oversight of listed derivatives contracts based on globally traded physical commodities.

Her work in these capacities brought her into close contact with the cross-border world of financial market regulation. Ms. Corcoran was the architect of the CFTC's original regulations for cross-border derivatives transactions. And she directed policy responses to some of the largest international commodities manipulation and malfeasance cases in history: the Barings collapse and the impact in the U.S. futures market of the Sumitomo manipulation of the cash forward market at the London Metals Exchange. She is an expert on the maintenance of market infrastructure integrity, protection of customer funds, international standards, bankruptcy, self-regulation, and in U.S. futures law. She provides advice and second opinions on regulatory design and oversight to both government and private clients on five continents.

Amicus **Jeffrey Bandman** in 2017 founded his consulting firm, Bandman Advisors, which advises clients on regulatory and strategic issues in financial services. Before that, Mr. Bandman served in four senior leadership roles within the CFTC with deep engagement in cross-border financial market regulation. Mr. Bandman led the CFTC's Division of Clearing and Risk, which oversees many of the world's largest commodities clearinghouses, and led negotiations on the international status of derivatives clearinghouses resulting in "Clearinghouse Equivalence" with the

European Commission. Mr. Bandman also led negotiations with the European Commission on the status of regulated boards of trade, resulting in equivalence for U.S. futures exchanges. He further served as co-chair of IOSCO Committee 7 on Commodity Derivative Markets. As an advisor to Chairman J. Christopher Giancarlo and the CFTC's first FinTech Advisor, he was Founding Director and architect of LabCFTC, the CFTC's hub for engagement with FinTech innovation—the first established by a U.S. market regulator. He also led FinTech and RegTech coordination with domestic and international regulators and chaired a new international regulator workstream on post-trade digital innovation. He joined the Commission as Special Counsel to Chairman Timothy G. Massad, and also led the CFTC's Office of International Affairs.

Mr. Bandman has spent his career as a lawyer, business executive and regulator in international financial services in Washington, New York and London. Mr. Bandman is an expert on financial and commodity market structure, international standards, market infrastructure and derivatives as well as emerging fields such as law, policy and regulation surrounding innovations in financial technology, regulatory technology, blockchain and virtual currencies. He advises both government and private sector clients in the U.S. and around the world.

Amici have devoted substantial portions of their lives to the CFTC, which plays a central role in ensuring the transparency, stability, and integrity of the domestic commodities markets. They write to explain the focus of congressional concern in the Commodities Exchange Act (CEA), and the jurisdiction of the CFTC in enforcing its anti-manipulation provisions to oversee global commodity

pricing. Regardless of whether the Petitioners' claims in this case have factual merit—and amici take no position about whether they do—amici hope to demonstrate how the Second Circuit's decision in this case risks making intentionally wrongful acts that deliberately manipulate prices on a U.S. CFTC-regulated market fall completely outside the reach of the CEA—and the CFTC—if performed offshore. This in turn would severely undermine the CFTC's enforcement and oversight authority, hamper its ability to combat global threats, and endanger the American economy as a whole. Amici also believe it is urgent for the Court to solicit the CFTC's views on these critical matters, then grant review in this case and overturn the lower court's erroneous decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the very core of every commodity transaction—whether it concerns oil, wheat, natural gas, jet fuel, or sugar—is confidence in the integrity of commodity prices and the related markets in which they are formed. It is that confidence that makes it prudent, not naive, for buyers and sellers to believe they can "mitigate price risk" through the use of "futures" contracts, a type of financial transaction in which parties agree to "buy or sell a commodity or financial instrument at a later date" to lock in an advantageous price as specified in (normally standardized) contract terms. Nat'l Futures Assn., *Opportunity and Risk: An Educational Guide to Trading Futures and Options on Futures* 4, 14 (2006). That confidence also allows commercial parties and sophisticated speculators to engage in derivative transactions, where futures are bundled and traded in myriad "highly complex" ways, with their prices tied to those basic future contracts, confident

that their projections will not be undermined by hidden manipulations or frauds. Robert O'Harrow, *A primer on financial derivatives*, Wash. Post, Apr. 21, 2010, at A13.

And since prices for many commodities transactions "are generally quoted and disseminated throughout the United States" and the world, and are based on transactions occurring everywhere, that same confidence enables many others throughout our Nation's economy who never enter the commodities markets themselves to use valuable information from established commodities benchmarks to make economic projections and enter transactions. Pub. L. No. 67-331, sec. 3, 42 Stat. 998, 999 (the '22 Act). A restauranteur can decide when it is best to make staples purchases and manage its supply chain. A farmer can know equally quickly how much seed it makes sense to buy. An airline can keep an eye on whether it is getting the best deal on jet fuel. And others, including governments, may use established market prices as references in long term contracts, keying the prices in their private contractual arrangements to those established benchmarks (such as a sale where the unit contract price "is equal to Brent Crude minus $250.00"on the date of delivery"), simply to provide an established, easily referenced shorthand. And when these actors—and many others—trade on these established market prices, that improves the markets themselves, by making price projections more reliable, and making the markets themselves more efficient, transparent, liquid, and ultimately more stable, allowing markets to more precisely reflect the laws of economics, of supply and demand.

Yet the integrity of commodity prices is continually susceptible to misconduct and depends upon close over-

sight of the trading process worldwide. There is an international interconnectedness between the markets for commodities, as well as between the different *kinds* of commodities markets. Futures and derivatives markets may exist separately from "cash" or "physical" markets in which the assets themselves are bought and sold, but the prices of cash commodities and derivatives are closely linked. At a high level, this is because if a price disparity arises, arbitrageurs will take advantage of the difference, and the gap disappears. And the cash and derivative prices converge at maturity. This process may involve cash market or derivatives transactions anywhere in the world.

That interconnectedness means a wrongdoer could deliberately target commodity markets here in the United States from another part of the world. And the "methods and techniques of manipulation are limited only by the ingenuity of man." *CFTC* v. *Kraft Foods Grp., Inc.*, 195 F. Supp. 3d 996, 1005 (N.D. Ill. 2016). Many such manipulations have wreaked severe economic disruption throughout our Nation's history.

The CEA's manifest objective is to prevent such manipulations from negatively impacting the price integrity on which commodities markets depend. Indeed, the CEA contains a statement of findings that "[t]he transactions subject to [this statute] are entered into regularly in interstate and international commerce" and "are affected with a national public interest," including in "liquid, fair, and financially secure trading facilities." 7 U.S.C. § 5. This national interest shall be protected by, among other things, "prevent[ing] price manipulation or any other disruptions to market integrity." *Id.*

Preventing such manipulative conduct from compromising prices is a prime objective of the anti-manipulation provisions of the CEA at issue in this case. Those provisions aim to prevent manipulation of domestic market prices, regardless of where the source of that manipulation might be located. It is this concern with the price integrity of American commodities transactions that falls within the "object[]" of the CEA's "solicitude," *Morrison* v. *National Australia Bank, Ltd.*, 561 U.S. 247, 226 (2010) and the core of the statute's focus. The law of extraterritoriality should therefore not be understood (however it is interpreted) to inhibit the CEA from reaching egregious and intentional manipulations of domestic commodity prices, simply because those manipulations occurred abroad. And the CFTC has long exercised its regulatory authority consistent with that legal understanding.

Yet the Second Circuit in this case departed from this settled understanding of the CEA's permissible scope, making its anti-manipulation provisions ineffective against even devastating, intentional attempts to manipulate American commodities' markets, so long as the conduct causing the manipulation emanates from abroad. That result cannot be squared with the CEA's text, this Court's precedent, the connectivity between U.S. futures and foreign commodity markets, or longstanding regulatory practice. And if applied to the CFTC itself—whose regulatory authority is tied to those same anti-manipulation provisions, it would have tremendous implications for the legitimate scope of the CFTC's authority, reduce the law's effectiveness in developing international cooperation on enforcement issues, and require wholesale changes in its regulatory practices. Accordingly, leaving the Second Circuit's erroneous ruling in place could inhibit the

CFTC's efforts to combat foreign threats to American commodities markets, leaving wrongdoers free to manipulate our commodities markets, so long as they do so remotely, from safe havens beyond our borders. That would leave commercial users and investors unprotected and deal a severe blow to the price integrity upon which the entire economy depends. That makes this a vitally important case for the Court to consider and to seek the opinion to the U.S. CFTC to ensure that the scope of the CEA continues to reflect 45 years of experience and international benchmarks in how best to protect the enforcement of the laws that keep the commodities markets safe.

The petition should be granted.

ARGUMENT

I. The CEA's focus does not excuse manipulation of U.S. commodity markets that is performed from outside the U.S.

Petitioners do not here contend that the CEA authorizes extraterritorial application, so the analysis in this case begins and ends with an examination of the CEA's "focus"—the "second step" required in an extraterritoriality analysis. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). And as text, precedent, and longstanding practice all confirm, the CEA's focus," and the "focus" of its anti-manipulation provisions, has remained the same: preventing manipulation of domestic commodity prices, regardless of the geographic source of that manipulation.

a. When the CEA was originally enacted, Congress recognized a national public interest in protecting commodity prices, acknowledging that futures transactions in them "are susceptible to speculation, manipulation, and

control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control." '22 Act, § 3, 42 Stat. at 99. Even then, Congress discerned that preventing these abuses domestically might require acting internationally, in part because it recognized that "conditions * * * in this and other countries" had potential to "affect the markets" in the United States. '22 Act § 8, 42 Stat. at 1003 (emphasis added).[2]

By 1974, when Congress created the CFTC to bring "all futures trading * * * under a single regulatory umbrella," H.R. Rep. No. 93-975, at 41-42 (1973), Congress recognized that the international, interdependent world it had foreseen was occurring. Domestic exchanges had begun to offer futures on many overseas commodities, including coffee, cocoa, and butter. *Id.* at 41, 62. Indeed today, the Chicago Mercantile Exchange (CME) offers contracts based on Black Sea Wheat, Malaysian Palm Oil, and Swiss Francs. NASDAQ Futures offers contracts based on German and Nordic electricity. And NYMEX offers contracts based on Australian coal, Turkish scrap metal—and numerous contracts based on the price of Brent oil.

And right around the time Congress was deliberating over the CFTC's creation, America was coming to understand the extent to which trades in commodities and events abroad could influence commodity and commodity derivative prices here. At that time, the so-called "Great

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[2] The Court struck down the first legislation that would become the Commodities Exchange Act, Futures Trading Act of 1921, Pub. L. No. 67-66, 42 Stat. 187 ('21 Act), on constitutional grounds, *Hill* v. *Wallace*, 259 U.S. 44 (1922), but upheld the '22 Act, *Bd. of Trade of Chicago* v. *Olsen*, 262 U.S. 1 (1923).

Russian Grain Robbery" was just beginning to unravel. In that debacle, Russia bought 10 million tons of foreign wheat, unwittingly subsidized by the United States, causing a worldwide production shortage that almost wiped out international stockpiles, inducing sharp increases on the price of domestic grain, and initiating both a food price crisis and surging inflation. See John A. Schnittker, *The 1972-73 Food Price Spiral*, Brookings Institution (1973), https://brook.gs/2ROyLu9; see also Joseph Albright, *The full story of how Amepuka got burned and the Russians got bread*, N.Y. Times, Nov. 25, 1973), https://nyti.ms/34KlTdx.

For these reasons, Congress determined that that all commodities should be regulated equally, regardless of their geographic source, because whether the commodity "is produced in the United States or outside" of it matters little "to those in this country who buy, sell, [] process," or use "the commodity, or to the U.S. consumers whose prices are affected by the futures market in that commodity." S. Rep. 93-1131, at 19 (1974). That too was prescient, because events would demonstrate that the Great Russian Grain Robbery was just the beginning.

1979 saw the great Hunt Silver manipulation, in which Texas Billionaire brothers Bunker and Herbert Hunt cornered the world market for silver—often through purchases abroad. The Hunts and their Saudi allies succeeded in buying up 9 percent of all the silver in the world, and 77 percent of the silver in private hands, pushing domestic silver prices from $6 an ounce to $50 an ounce by 1980. See Kim Iskyan, Business Insider, *Here's the story of how the Hunt brothers tried to corner the silver market* (May 17, 2016), https://bit.ly/3etDPh6.

And in 1986, one of the most audacious financial scandals of all time came to light with the revelation of the Sumitomo copper manipulation, which occurred when Yasuo Hamanaka, a rogue Japanese employee of the Sumitomo Corporation, bought over a ten-year period immense quantities of copper through an American broker and a Zambian copper producer on the London Metal Exchange, shaking the copper markets worldwide, causing artificially high prices in cash and futures markets in copper, including those in the United States, and bringing both Congressional inquiry and CFTC enforcement action. Benjamin E. Kozinn, *Great Copper Caper: Is Market Manipulation Really a Problem in the Wake of the Sumitomo Debaucle*, 69 Fordham L. Rev. 243, 244, 270-276 (2000); *In re Sumitomo Corp.*, CFTC No 98-14, 1998 WL 236520 (CFTC May 11, 1998) (copper on the London Metals Exchange) (settlement).

And it was in 1982, in response to yet another disaster, the "London Options Scandal," that Congress amended the CEA to grant CFTC authority to regulate foreign actors seeking to participate on American exchanges with the Futures Trading Act of 1982, 96 Stat. 2294, Pub. L. No. 97-444, sec. 101(a) (Jan. 11, 1983). See *British American Commodity Options Corp.* v. *Bagley*, 552 F.2d 482 (2d Cir. 1977) (discussing the London Options Scandal); see also Lower, *The Regulation of Commodity Options*, 1978 Duke L. J. 1095, 1111-1117 (1978) (same). Then, in 1997, the CFTC created the Office of International Affairs within the CFTC, and Congress encouraged the CTFC to participate more robustly in international standard setting bodies like International Organization of Securities Commissions (IOSCO), recognizing that "derivatives markets serving United States industry are increasingly global in

scope—and that "strengthening of international cooperation for customer and market transactions" ought therefore to be encouraged. Commodity Futures Modernization Act of 2000, sec. 126 (a)(1), Pub. L. No. 106-554, 114 Stat. 2763.

Today, Congress has retained in the CEA a statement of purpose to "deter and prevent price manipulation or any other disruptions to market integrity," regardless of the source of those manipulations. 7 U.S.C. § 5. It has retained broad prohibitions against all forms of manipulation, 7 U.S.C. §§ 6c, 9(a)(1), 13(a)(2), knowing that this brought "transactions that are entered into regularly in interstate and international commerce" into the Act's regulatory ambit. *Id.* § 5(a). And it has deliberately included overseas commodities within the scope of the CEA, to ensure that foreign manipulations do not escape the CEA's reach—or that of the CFTC. *Id.* § 1a(9); S. Rep. No. 93-1131, at 19; H.R. Rep. No. 93-975, at 41, 62-63. An express purpose of the CEA is therefore to protect the national interest in fair trading facilities that are free of market manipulation. 7 U.S.C. § 5. The statute contains no loophole that would permit such intentional and wrongful acts as Petitioners allege, based simply on the fact that the alleged wrongdoer was operating from a foreign country using a means located offshore.

b. Since its inception in 1975, the CFTC has acted consistently with the understanding that the CEA's focus might be trained on domestic manipulation, but that international action might be necessary to fulfill that mission. The CFTC has passed regulations to control foreign commodities investment in the United States, and participated in international standard-setting bodies that have recognized that "the potential for market integrity concerns is

compounded by the increasingly global nature of commodit[ies]," and "interlinkages among markets," which create the potential that "manipulative or other abusive activities" anywhere could "damage the integrity and ultimately the liquidity of markets" everywhere. *Tokyo Communique On Supervision of Commodity Futures Markets* 4, 28 (Oct. 31, 1997), and related reports on oversight of commodities markets. See www.IOSCO.org/publicreports.

The CFTC and DOJ have, since *Morrison*, continued to protect American markets and investors against wrongdoing by overseas actors, and overseas actions, for behavior that affects U.S. markets and exchanges. *United States* v. *Sindzingre*, No. 17-CR-0464 (JS), 2019 WL 2290494, at *1-3 (E.D.N.Y. May 29, 2019) (prosecution based on banks' overseas manipulation of the London Interbank Offered Rate, the benchmark interest rate for the British Bankers' Association); *CFTC* v. *Parnon Energy, Inc.*, 875 F. Supp. 2d 233, 238 (S.D.N.Y. 2012) (manipulators located in the U.K., Switzerland and Australia); *In re Statoil ASA*, CFTC No. 18-04, 2017 WL 5517034 (CFTC Nov. 14, 2017) (far east propane) (settlement); *In re Barclays PLC*, CFTC No. 12-25, 2012 WL 2500330 (CFTC June 27, 2012) (LIBOR) (settlement).

c. In each of these cases, the CFTC applied the same specific anti-manipulation provisions being applied here: Section 9(a), 7 U.S.C. § 13(a), which contains a long-established prohibition against "manipulat[ing] or attempting to manipulate the price of any commodity in interstate commerce," and Section 6(c)(1), a newer provision prohibiting use of a manipulative device "in connection with any swap, or a contract of sale of any commodity in interstate commerce." *id.* § 6(c)(1), 7 U.S.C. § 9(a)(1). In none of

these cases did CFTC's foreign enforcement raise concerns of extraterritorial application.

The reasons why are clear. Both provisions may focus on the "manipulation" of domestic transactions, whether through a "device," 7 U.S.C. § 9(a)(1), or more generally, *id.* § 13, serving the CEA's general concern with protecting integrity in the price of those transactions and preventing manipulation of that price. But the statute is agnostic about where the conduct that provides the mechanism for the manipulation must occur, because that mischief is not regulated in the abstract. It is regulated only in "connection" with how it affects U.S. commodities transactions and U.S. commodities markets. 7 U.S.C. § 9(a)(1). It therefore makes no difference if those actions occurred overseas. They remain within the CEA's focus.

d. Petitioners here allege that they were parties to derivatives transactions that took place in the United States on a CFTC-registered futures exchange. Pet. at 11. Regardless of whether their claims have merit—and amici take no position about whether they do—those claims directly implicate the focus of congressional concern in the integrity of U.S. markets, and the CEA's concern that those markets remain free from manipulation and misconduct originating from abroad that impacts them.

II. The Second Circuit's contrary understanding eviscerates critical barriers to manipulative conduct and undermines the CFTC's proper regulatory authority.

a. Yet the court of appeals in this case interpreted the scope of the CEA's anti-manipulation provisions to be entirely confined to domestic activities, excluding from their scope any action where the manipulative conduct did not

occur *entirely* within the United States. The CFTC relies on those same anti-manipulation provisions for its enforcement operations, and thus if the Second Circuit's ruling in this case were applied to the Commission, the consequences would be tremendous. The CFTC would no longer be able to pursue enforcement actions for manipulative conduct that occurred abroad—even manipulative conduct whose intentional, harmful, tangible effects on American commodities markets could be proved. In that scenario, wrongdoers could freely and brazenly engage in manipulative conduct in markets and transactions regulated by the CFTC, so long as they did so from outside the country. There would be no recourse against them—civil, regulatory, or criminal.

b. That is not, and cannot be, a correct interpretation of Congress's intent as clearly manifested in the CEA. It is a result that would deal a devastating blow to the integrity of the commodities markets and thereby their usefulness to commercial users, customers and investors who trade and use them based on expectations of price integrity, in turn potentially adversely affecting the economy as a whole. As such, it could be devastating to the price integrity upon which virtually all commodities trading depends. Amici thus believe it is critically important that the Court take this case to undo this erroneous result.

c. At the same time, of course, amici do not speak for the Commission, and the Court deserves to hear from the Commission itself. Accordingly, the Court should solicit the CFTC's views on whether the Second Circuit's extraterritoriality rulings are correct and ask it to explain the impacts the Commission anticipates those rulings will have on the integrity of America's derivatives markets and the Commission's regulatory authority. That said, amici

feel confident, based on their years of experience with commodity derivatives markets and the Commission, that this is a critically important case to take, to ensure that the law takes a properly nuanced approach to the oversight of our financial markets—one that recognizes their complexity and scope and protects the integrity of our Nation's markets.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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