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

REPLY BRIEF FOR THE PETITIONERS

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REPLY

Respondents' opposition rests largely on the proposition that the Second Circuit *could* have decided this case another way—that the court of appeals did not need to hold that a domestic transaction represents an insufficient basis for establishing a domestic application of a statute with a transactional focus. True or not (and it is mostly not), this is beside the point; what matters to this Court is not what could have been decided, but what the Second Circuit held. And respondents' problem is that the Second Circuit's holding—which assumed away all the alleged complications respondents try to smuggle back in—unambiguously conflicts with both the Ninth Circuit and this Court's post-*Morrison* decisions.

The current territoriality rule in the Second Circuit for statutes that regulate domestic transactions is the opposite of the rule in the Ninth Circuit. In the latter, *Morrison* supplies the fully sufficient test; in the former, the claims are analyzed under the very conduct-and-effects test that *Morrison* explicitly rejected. Indeed, respondents do not even *try* to defend the Second Circuit's rule in light of *Morrison* and its progeny. This Court should not permit this situation to persist just because respondents believe they could have prevailed on grounds that have nothing to do with extraterritoriality.

To be sure, the Second Circuit also held that plaintiffs' domestic transactions are insufficient here because the substantive Commodity Exchange Act (CEA) provisions at issue are focused on manipulative conduct and not manipulated transactions. But this alternative basis for resurrecting the conduct-and-

effects test for the CEA, after *Morrison* interred it for the Securities Exchange Act (SEA), also demands review. Two former heads of the CFTC's Office of International Affairs have confirmed what the CFTC's briefing below demonstrates—namely, that the Second Circuit's alternative holding has disastrous consequences for the government's longstanding enforcement efforts. And while respondents try to distinguish this case from those enforcement efforts, their distinctions have nothing to do with the basis on which the Second Circuit ruled. There is thus ample reason to grant this petition without further delay. If, however, there is any question whether the potential consequences of the decision below are as important as advertised, this Court can simply ask the Solicitor General whether the United States stands behind the concerns the CFTC expressed below.

ARGUMENT

I. There Is An Unambiguous Circuit Conflict On The First Question Presented.

Although they bury it below other arguments, respondents eventually suggest that there is no circuit conflict on the core question presented because the decision below is about the CEA, whereas *Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018), was about the SEA. *See* BIO 19-21. This ignores both the context and content of the decision below.

First, there was *already* a disagreement between these two circuits that arose in securities cases like *Stoyas* and *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014). The Solicitor General's sole argument against resolving that split when this Court recently considered the

issue was uncertainty over whether the Second Circuit would adhere to its *Parkcentral* rule in future cases. *See* Pet. 2; 21-22; U.S. Toshiba Br. 20. This case confirms that preexisting split because the Second Circuit decision self-consciously "extend[s] *Parkcentral*'s holding to the instant case." Pet.App. 18a. That is reason enough to grant review.

Meanwhile, the decision below itself demonstrates that the CEA and SEA are indistinguishable for purposes of the first question presented. In fact, the Second Circuit applied *Parkcentral* here for precisely that reason—because it (correctly) regarded both CEA Section 22 and SEA Section 10(b) as *equally* focused on domestic transactions:

> [g]iven that courts "have looked to the securities laws" when asked "to interpret similar provisions of the CEA," we do not hesitate in applying *Parkcentral*'s gloss on domestic transactions under Section 10(b) to domestic transactions under Section 22 of the CEA.

Pet.App. 19a. There is thus no substance to respondents' suggestion that the Second Circuit simply "cited *Parkcentral*" in a decision otherwise driven by Section 22's unique text. *See* BIO 21. The Second Circuit could not have made it clearer that this case implicates the exact same circuit conflict that *Stoyas* identified, and which the Solicitor General hoped (in vain) the Second Circuit would resolve in subsequent cases like this one.

The courts of appeals now squarely disagree about whether a domestic transaction suffices to establish a domestic application of a statute that has a

transactional focus. The Ninth Circuit said "yes" in *Stoyas*; the Second Circuit said "no" in *Parkcentral* and again here. As *amicus* Toshiba explains, district courts are reaching divergent outcomes in similar cases, as those plaintiffs who have the option of bringing cases in the Ninth Circuit do so. *See* Toshiba Br. 16-17. This situation requires speedy resolution by this Court.

That is particularly so because, while respondents defend the Second Circuit's decision on *other* grounds, they do not even attempt to square *Parkcentral*'s "necessary-but-not-sufficient" rule with *Morrison* or its progeny. *See* BIO 22-24. That is because the Second Circuit's effort in *Parkcentral* and again here to rehabilitate the conduct-and-effects test—*even for admittedly transactional statutes*—is indefensible after *Morrison* spent several pages explicitly rejecting it in that very context. This is why the Petition correctly describes the Second Circuit as having "thumb[ed] its nose" at this Court." *See* Pet. 3, 25-26; *contra* BIO 3.

II. The Ninth Circuit Would Have Decided This Case In Petitioners' Favor On The Second Question.

Because the case for certiorari on the first question presented is so strong, most of respondents' opposition is devoted to defending the Second Circuit's ruling on the second question presented. As further explained in the Petition (at 28-30) and below (at 6-7), the Second Circuit's alternative holding—which eschewed *Morrison*'s transactional test and limited the territorial reach of the CEA's substantive provisions to purely domestic manipulation—is a bad basis on which to deny review in an otherwise certworthy case because it is both clearly wrong and enormously

important in its own right. But, in any event, there is an almost certain circuit conflict on the second question as well.

In particular, respondents far too quickly dispose of the Ninth Circuit's recent decision in *CFTC v. Monex Credit Co.*, 931 F.3d 966 (9th Cir. 2019), which indicates that the Ninth Circuit would have reached the opposite conclusion in this precise case. As respondents admit, the only basis on which to argue that the substantive provisions of the CEA have a different "focus" from SEA Section 10(b) for *Morrison*'s purposes is a difference in their text. *See* BIO 18-19; 24-25. But when the Ninth Circuit in *Monex* was asked to interpret the very CEA provision at issue here, it called it the "mirror image of §10(b) of the Securities Exchange Act." 931 F.3d at 976. Because *Morrison* squarely holds that this "mirror image" text has a transactional focus, and because *Stoyas* is so critical of *Parkcentral*, it is quite clear that the Ninth Circuit would not endorse the Second Circuit's effort to resuscitate the conduct-and-effects test here through the CEA's substantive provisions.

It is also noteworthy that the holding below respecting the CEA's substantive provisions is directly contrary to the CFTC's position, *see* Pet. 14-16, and to the transactional focus identified here by two former heads of the Commission's Office of International Affairs. *See* Former Officials' Br. 8-14. These critical voices demonstrate that the Second Circuit's holding below is an aberration from the prevailing and longstanding legal rule, and strongly recommend in favor of review.

III. The Decision Below Is Incorrect.

Respondents next argue that the Court should pretermit review on both questions because the Second Circuit decided (only) the second question correctly. (As noted above, there is *no* defense of the merits of the Second Circuit's rule on the first question—*i.e.*, that *Morrison* generally provides only a necessary and not sufficient test for a domestic application of a transactional statute.) For this Court to avoid reviewing a holding that divides the circuits and that even respondents cannot defend, the Second Circuit's "alternative" holding should be airtight. Respondents' defense of that holding, however, demonstrates that it is anything but.

The Petition demonstrated that the Second Circuit departed from *Morrison* by failing to account for the perfectly parallel language of CEA Section 6(c)(1) and SEA Section 10(b). *See* Pet. 32-33. The Petition did this by quoting both sections at length and noting that they "merely use different, defined terms for parallel constructs." *Id.* at 33. Respondents do not contest that parallelism. In particular, respondents concede that the "registered entity" referred to in the Commodities *Exchange* Act is the direct parallel to the "national securities exchange" in the Securities *Exchange* Act. *See* Pet. 32-33, BIO 18-19, 24-25. This ought to render *Morrison*'s reasoning about Section 10(b) dispositive here, given that it is explicitly premised on "[t]he primacy of the domestic exchange" in Section 10(b). *See Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 267 (2010).

Instead, respondents argue that *Morrison*'s analysis was not rooted in Section 10(b)'s references to domestic exchanges, but rather in Section 10(b)'s

references to the "purchase or sale" of securities—language that is allegedly absent from the CEA. *See* BIO 24-25. This argument is specious because—just like with "national securities exchanges"—while the CEA may not include those exact words, it does include the precise parallel term applicable to the CEA context. Accordingly, CEA Section 6(c)(1) proscribes fraud "in connection with any … ***contract of sale …*** for future delivery ***on or subject to the rules of any registered entity***," 7 U.S.C. §9(1) (emphasis added), just as SEA Section 10(b) proscribes fraud "in connection with the ***purchase or sale*** of any security registered ***on a national securities exchange***." 15 U.S.C. §78j(b) (emphasis added). Petitioners claim injury "in connection with [their] contract[s] of sale," just as securities plaintiffs under Section 10(b) claim injury "in connection with [their] purchase or sale." These "mirror image" statutes, *Monex*, 931 F.3d at 976, thus plainly share the same transactional focus.

Remarkably, respondents' defense of the Second Circuit's analysis of the CEA's "statement of purpose" is even weaker. *See* BIO 26. The Petition demonstrated at length that the Second Circuit simply omitted as inconvenient the many places where the CEA's statement of purpose reflects a transactional focus. *See* Pet. 33-34. Respondents address this argument in a single paragraph that contains no reasoning. Moreover, respondents' complete failure to grapple with the CEA provisions that manifest a transactional focus reflects how far the Second Circuit strayed from *Morrison* and the "plain text" of the CEA in the decision below.

IV. Respondents' Alleged Vehicle Problems Lack Substance.

Respondents offer two supposed problems with this case as a vehicle for addressing the Second Circuit's errors on the questions presented. Both amount to the view that the Second Circuit *could* have rejected petitioners' CEA claims on other grounds. These arguments are both wrong and immaterial.

1. Respondents erroneously suggest (BIO 27-28) that the Second Circuit has already held that petitioners cannot establish that respondents' manipulation of the Dated Brent Assessment (DBA) was a proximate cause of the injuries they sustained in connection with their Brent futures trades. Respondents base this argument on the Second Circuit's purported finding that the DBA—which the respondents manipulated—is not incorporated into the ICE Brent Index, which determines the settlement price for certain of the Brent Futures petitioners traded. *See* BIO 28. Respondents are doubly wrong.

As an initial matter, while respondents (mistakenly) rely on inapposite language from the Second Circuit's unpublished summary order addressing petitioners' antitrust claims, the Second Circuit itself was perfectly clear that causation had been adequately alleged in the *published* decision respecting *the question on review*. The published opinion—which will govern all future Second Circuit cases—thus acknowledges petitioners' allegation that "ICE Futures Europe … incorporated the manipulated Dated Brent Assessment into the ICE Brent Index." Pet.App. 7a; *see also id.* at 6a ("[T]he ICE Brent Index incorporates an average of certain designated price-reporting assessments, one of

which, Plaintiffs allege, is the Dated Brent Assessment."). This suffices to reject respondents' argument.

Moreover, respondents badly overstate the content of the Second Circuit's unpublished antitrust decision in this case. That decision does not hold that respondents' manipulations had *no* proximate causal effect on petitioners' futures trades. Instead, it suggested only that the ICE Brent Index was not "directly pegged" to the DBA. Pet.App. 29a-30a. That holding was relevant only to an esoteric Second Circuit rule about "antitrust injury" in interrelated relevant markets and had nothing to do with petitioners' CEA claims. *See* Pet.App. 28a-30a (discussing Second Circuit's relevant-market rule from *In re Aluminum Warehousing*, 833 F.3d 151 (2d Cir. 2016)). Thus, even assuming that the ICE Brent Index is not "directly pegged" to the DBA, that is irrelevant here, because the CEA does not require that the spot price for a commodity be a direct mathematical input of a related futures contract's settlement price for its provisions to apply. Indeed, the Second Circuit's special rules about antitrust injury in interrelated relevant markets cannot be applied to CEA claims at all, because CEA claims do not require defining relevant markets.

In reality, it would be beyond silly to say that the DBA does not affect the ICE Brent Index, which probably explains why the Second Circuit did not say that. ICE itself has said that "the ICE Brent Futures contract is linked to … the underlying Dated Brent market," and the Complaint repeats that quotation verbatim. *See* C.A.App. A-1995. It would make no sense for the market's assessment of futures prices to somehow divorce itself from the most well-known price reports in the spot market. There is thus no question that

petitioners have alleged—and can ultimately prove—an adequate causal relationship for their CEA claims.

In any event, this is wholly beside the point, and demonstrates only why certiorari should be granted. The Second Circuit's extraterritoriality analysis does not rely in any way on this causation theory, demonstrating that it would have rejected petitioners' claims as extraterritorial even if the DBA was the sole price term in every one of petitioners' futures contracts and respondents admitted that they manipulated the DBA knowing it would affect those domestic transactions. This is why both the CFTC and its former officials view the decision below as so troubling without regard to whether those claims will ultimately prevail, and why this Court should rein in the Second Circuit's dangerous precedent.

2. Respondents' suggestion that petitioners "fail[ed] adequately to allege … the *intent* to distort the price of futures traded on a U.S. exchange" is equally meritless. BIO 29-31. No court has ever agreed with this theory—indeed, both the district court, *see* Pet.App. 42a-43a, and the CFTC below, *see id.* at 86a-87a; 107a, recognized petitioners' intent allegations. And it is plain wrong: Respondents themselves acknowledge that the complaint includes pages of allegations related to intent that are premised on defendants' public statements. *See* BIO 30 (citing fourteen pages of the complaint). Defendants dismiss these allegations as too "vague" because the members of their conspiracy might have had varied intentions. *See* BIO 30-31. But this discussion fails to cite a single case, because the well-known conspiracy rule is the opposite, allowing "intent [to] be proved by the acts or declarations of *some* of the conspirators in furtherance

of the common objective." *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (emphasis added). Meanwhile, it is hard to believe that, in a conspiracy that included *futures traders in the United States*, and defendants who had large U.S. futures positions, there was no relevant intent to affect U.S. futures prices.

Again, however, this is all irrelevant because respondents do not even try to explain how the quality of petitioners' intent allegations matters to the extraterritoriality holding at issue here. Once the Second Circuit held that the focus of the CEA's substantive provisions is on the location of the manipulation, respondents' intent became irrelevant. Respondents' attempt to distinguish this case from the CFTC's "Black Sea Wheat" hypothetical based on allegations of intent is thus the reddest of herrings: It amounts to nothing more than the suggestion that future courts will somehow find that the same statute has a different focus in cases where there is more evidence of defendants' bad intent.

Rather than dwell on positions on which respondents did not prevail below, this Court must address the actual holdings below. Those holdings—and their natural consequences for future cases—demand review.

V. The Questions Presented Are Obviously Important.

Respondents' hodgepodge of importance arguments fails for similar reasons. Although respondents attempt to distinguish longstanding CFTC enforcement efforts on the basis of case-specific facts, BIO 29-32, they ignore that even "clean set[s] of facts" like the CFTC's "Black Sea Wheat" hypothetical are fully covered by the Second Circuit's new extraterritoriality

rule for CEA claims. And while they suggest (at 32-33) that some manipulation abroad might be covered by the recently added provisions of 7 U.S.C. §2(i), that subsection is only applicable to swaps, and is in fact only a partial *limitation* on the applicability of certain newer CEA provisions to "activities outside the United States." *Id.* But worst of all is respondents' suggestion (at 35) that *Parkcentral* needs no review because it was a "*sui generis*" decision on unusual facts. The Second Circuit said the opposite in *this very case*, explaining that it would "not hesitate in applying *Parkcentral*'s gloss" in similar cases. Pet.App. 19a.

Instead of following respondents' distractions, this Court should take the Second Circuit—and the CFTC—at their words. The government warned the court of appeals against holdings that would disrupt public enforcement of the CEA, and the Second Circuit nonetheless adopted those exact holdings, disregarding both the government's arguments and the on-point decisions of this Court. There is thus no doubt that the questions presented merit review. But if any question remains, this Court could once again seek the views of the Solicitor General.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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