No. 19-6607

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Allen Stanford, on behalf of himself

and the Stanford Estate,

Petitioner-Appellant

v.

Jay Clayton, Chairman, U.S. Securities and

Exchange Commission,

Respondent-Appellee

On Petition for Writ of Certiorari to the

United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves an extraordinary, extra-statutory overreach of the Securities and Exchange Commission (SEC); a civil enforcement action taken by that agency that effectively obliterated a global financial services company and brought great financial harm to its owner, the Petitioner, as well as thousands of his clients around the world...coupled with the SEC's decade-long efforts to avoid accountability via an (ad hoc) application of the sovereign immunity doctrine that was never considered by Congress when enacting the Federal Tort Claim Act (28 U.S.C. 1346, 2671-2680) and its exceptions.

The questions presented are:

1. Whether, in the absence of a "security" as defined by 15 U.S.C. 78c(a)(10), or any "in connection with the domestic purchase or sale of any security registered on a national exchange", the SEC's civil enforcement action charging securities violations against Stanford International Bank, Ltd. in Antigua, under 15 U.S.C.78j(b) (Exchange Act 10(b) and Rule 10b-5), in the pre-Dodd Frank era - 929P(b), 124 Stat. 1376 (15 U.S.C. 77v(c) - with no extraterritorial application of law, and in violation of this Court's statute-clarifying decision *in Morrison v. National Australia Bank, Ltd.* 561 U.S. 247 (2010)...constitutes a violation of the claimant's rights to Due Process under the Fifth Amendment.

And if so, whether the Court of Appeals erred in preserving the SEC's immunity in this enforcement action which violated a legal mandate and the U.S. Constitution, finding that it was nevertheless protected by the "discretionary function shield" in 28 U.S.C. 2680(a), in violation of *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) and its progeny.

2. Whether, after filing a civil enforcement action against a foreign bank (with no U.S. employees or office), the SEC's use of a court-appointed Receiver to search and seize certain electronically stored privacy law-protected customer account data, located outside the United States and beyond their territorial reach...constitutes an "unlawful, unreasonable, and arbitrary" investigatory search in violation of the Fourth Amendment, and *Heck v. Humphrey*, 512 U.S. 477 (1994), and an unlawful "interdependence" between the SEC and court-appointed Receiver, in violation of *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

And if so, whether the Court of Appeals erred in its 'tort law analysis' of this circumvention of United States and foreign law, an action designed to exceed the territorial scope of 15 U.S.C. 78u(b) by using a Receiver as a "state actor" proxy to engage in investigative or law enforcement activity...constituting a non-discretionary and unconstitutional 'abuse of process' not protected by the "discretionary function exception" in 28 U.S.C. 2680(a), or "law enforcement proviso" in 28 U.S.C. 2680(h), in violation of *Millbrook v. United States*, 569 U.S. 50 (2013).

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PETITION FOR WRIT OF CERTIORARI

Petitioner-Claimant Robert Allen Stanford should be awarded the total compensatory damages as sought in this proceeding under the Federal Tort Claim Act because the actions taken by the Securities and Exchange Commission were not authorized by Congress and violated his substantial rights under the Constitution.

On behalf of himself and the Stanford Estate, Stanford seeks the sum certain amount of $18.5 billion in compensation for the destruction of his financial services companies and loss of funds on deposit in Stanford International Bank, Ltd. (SIBL) as of February 16, 2009; the unlawful seizure of bank accounts, investments and projected profits of the companies comprising the global Stanford Financial Group.

Plenary grant is justified in this proceeding under the Federal Tort Claim Act ("FTCA") because this Court has yet to provide a definitive analysis of such governmental 'abuse of process' encompassing the 'ultra vires' conduct herein described, relative to compensable injury, and thus this case is one of first impression presenting such an opportunity.

More specifically, beyond the impermissible "exercise of policy judgment" defined in *Berkovitz v. United States*, 486 U.S. 531 (1988), and the "violation of a mandatory regulation" defined in *United States v. Gaubert*, 499 U.S. 315 (1991), this Court has provided no further analysis concerning an "abuse of process" since *United States v. LaSalle National Bank*, 437 U.S. 298 (1978) of the sort that can be applied to the governmental actions here.

Moreover, in *LaSalle*, this Court noted that its prior analysis in *United States v. Powell*, 379 U.S. 48 (1964) was not definitive and that..."Future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." That is, a future 'abuse of process' case like this one, where the Court can establish a bright red line when such purposeful circumventions of constitutional protections and governing law, the United States will cease to be protected by sovereign immunity.

OPINIONS BELOW

The opinion of the court of appeals (App. A), is reported at *Robert Allen Stanford on behalf of himself and the Stanford Estate v. Jay Clayton, Chairman, U.S. Securities and Exchange Commission*, No. 18-5273 (D.C. Circuit 2019). The judgment of the district court (App. B), is not reported.

NOTE: Because the plaintiff in this case was proceeding pro se, the district court converted the defendant, Jay Clayton, to the United States of America pursuant to 28 U.S.C. 2679(a).

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2019 and the court of appeals denied rehearing, rehearing en banc, on June 14, 2019. Petitioner's deadline for filing a petition for a Writ of Certiorari is November 11, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states in relevant part that..."The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

The Fifth Amendment to the United States Constitution states in relevant part that..."No person shall be deprived of life, liberty or property without due process of law."

STATEMENT

On February 16, 2009, in the wake of the epic 2008 Financial Crisis and as part of an agency-wide effort to restore public confidence after its abysmal failure to discover the Bernard Madoff scandal, the Securities and Exchange Commission (SEC) launched a reckless and unconstitutional 'search and destroy' mission against the privately-owned Stanford Financial Group (SFG) (founded in 1932), through its foreign affiliate, Stanford International Bank, Ltd. (SIBL) (established in 1985).

Without statutory authority or extraterritorial jurisdiction - and more notably, without a single customer complaint or unfulfilled debt/investment obligation in SIBL's history of operation - the

SEC adopted a "legal strategy" that was crafted and provided to them by two recently terminated employees of Stanford's U.S.-based broker-dealer, Stanford Group Company (SGC) (established in 1995); two financially-desperate financial advisors fired for corrupt business practices who were attempting to evade the FINRA arbitration-ordered repayment of their million dollar loans from SGC, referred to in the industry as EFL's ("Employee Forgivable Loans"). These individuals knew that reported allegations of fraud, amid the epic Financial Crisis, could destroy a financial services company, literally overnight...especially allegations of a "Ponzi scheme".

With the SEC eager to accept whatever they had to offer, these two men entered into a 'quid pro quo', whereby they would help the agency craft a complaint based on allegations of "securities fraud", and in return the SEC would convince FINRA to change their arbitration ruling to "wrongful termination", therein rescuing them from the loan repayment to SGC.

Specifically, the complaint would allege, and ultimately did allege that the Certificates of Deposit (CDs) issued from SIBL were fraudulent "securities" being sold within the United States, thereby claiming jurisdiction under United States law.

From the start, both of these individuals and the Enforcement Division of the SEC, knew that none of this was true. Beyond the fact that for the past 24 years the SIBL CDs had been redeemable upon demand, they were not securities under Title 15 of the U.S. Code. Even more obvious in this "critically flawed" legal strategy, is the allegation that the global group of Stanford companies were operating a massive "Ponzi scheme". Both of these men, and the SEC,

knew that 'Ponzi schemes' don't last for decades, don't have $60 billion in investments and assets, and don't need or ever employ 5,000 highly trained professionals who worked from 126 offices in 14 countries around the world - as the Stanford Financial Group did.

But none of this would inhibit the SEC at all. Their need to bring a major "securities fraud" case to quell the post-Madoff criticisms eclipsed all facts, legal impediments and ethical concerns. With allegations of a Ponzi scheme and the needed "legal strategy", they fixed their enforcement sights and might on the privately held Stanford Financial Group of companies and its third-generation owner, Texas billionaire Robert Allen Stanford.

With this reckless mindset, the SEC filed a complaint alleging various securities violations, sought a Temporary Restraining Order (TRO) and the appointment of an Equity Receiver.

Immediately upon his appointment by the Northern District Court of Texas and armed with what can only be described as an SEC-drafted "writ of assistance", this Receiver began liquidating and dissipating the Stanford assets through "fire sales", multi-million dollar 'Fee Applications', and astonishing and unexplainable "give-aways" of assets to other broker-dealer firms, such as Oppenheimer & Company, which were market-valued in the billions of dollars.

And, at the SEC's urgent and very specific request, and in order to "numerically justify" their disastrous 'enforcement action', this Court-appointed Receiver literally "hacked" into Stanford International Bank's (Temenos/DataPro) customer account database which was protected by the

privacy laws of Antigua & Barbuda. With this data in hand, which in no way supported the SEC's "Ponzi scheme", the SEC's Receiver then paid a single accountant to manipulate the Bank's assets-versus-liabilities data; deliberately concealing in that process, billions of dollars in other assets (some of which had been unjustly confiscated and nationalized by other nations based on nothing more than the SEC's allegations of fraud)...all done to fit the complaint's "insolvency" (Ponzi scheme) narrative.

REASONS FOR GRANTING THIS PETITION

I.

The Certificates of Deposit at issue in this petition were issued from a foreign bank and not subject to regulation under federal law

The certificates of deposit (CDs) sold by Stanford International Bank, Ltd. in Antigua were not "securities" as defined by and regulated under federal law. 15 U.S.C. 78c(a)(10).

That is because they were "debt obligations" of the Bank with a fixed rate of interest, rate of return and date of redemption; none of which were influenced or affected by fluctuations of the financial market.

More specifically, as the SEC was admittedly aware, the SIBL CDs did not meet either of the statutes' two very clear and unambiguous contexts defining the limited set of circumstances when a CD becomes a security under federal law. That is, they were aware that no CD issued from the Bank was ever used as collateral for a security, and no investor/depositor was ever afforded privilege on a CD purchased by and held by another investor/depositor.

As the Office of the Inspector General would later reveal in its March 31, 2010 report (OIG-526), the enforcement staff at the Fort Worth Office of the SEC had previously acknowledged, and thus were acutely aware, that there was a "serious question" as to whether the SIBL CDs were securities within their jurisdiction.

Nevertheless, even though an enforcement action involving the SIBL CDs raised serious jurisdictional concerns and would take them "beyond their regulatory activity", would not be "grounded in policy", and would admittedly exceed the scope of their constitutional authority, the SEC disregarded these limitations and concerns and proceeded anyway.

Accordingly, because this unlawful action "involved an element of judgment or choice" that was not "grounded in policy", the SEC is not protected by the "discretionary function shield" in 28 U.S.C. 2680(a). See, *Berkovitz v. United States*, 486 U.S. 531, 536 (1988)(Government has no policymaking discretion to violate a federal statute, regulation or policy specifically prescribing a course of action for its employees to follow.)

Compounding this catastrophic misapplication of 15 U.S.C. 78c(a)(10) and in order to protect the SEC's case from dismissal on those grounds, on November 30, 2011 the Northern District

Court of Texas, Dallas Division "judicially amended" this statute in a manner that rendered ALL certificates of deposit to be securities, no matter their context. (App. C)

See, *McQuiggins v. Perkins*, 569 U.S.13 (2013)("Judicially amending a validly enacted statute in this way is a flagrant breach of separation of powers."); see also, *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014) (Federal courts do not have..."a roving licence to disregard clear language simply on the view that...Congress must have intended something broader.")

II.

15 U.S.C. 78j(b) (Exchange Act 10(b) and Rule 10b-5)

had no extraterritorial reach prior to July 21, 2010

In February of 2009, prior to the enactment of Dodd-Frank, 15 U.S.C. 77v(c), on July 21, 2010, the Securities and Exchange Act of 1934 (15 U.S.C. 78j(b) had no extraterritorial reach. This was confirmed in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), where this Court held that..."[w]hen a statute gives no clear indication of extraterritorial application, it has none. [] In short, there is no affirmative indication in the Exchange Act that 10(b) applies extraterritorially, and we therefore conclude that it does not."

In an attempt to avoid this reality in the instant case, the SEC asserted that the U.S. purchasers of the CDs issued from the foreign-based Stanford International Bank, Ltd. in Antigua had incurred

"*irrevocable liability*" in the United States. That is because, the SEC claimed, the sales of the CDs were completed/consummated when the purchasers delivered their checks (payable to SIBL) or wire transfer instructions (authorizing transfer to SIBL) together with their SIBL account-opening application to an SGC employee...who forwarded these documents to SIBL in Antigua.

This claim has no merit. As the D.C. Circuit Court held in *Securities and Exchange Commission v. Securities Investor Protection Corporation, Inc.* 758 F3d. 357 (D.C. Cir. 2014), a Stanford-related case, the purchases of the SIBL CDs occurred in Antigua, not in the United States. Specifically, because that case turned on the same determination, the D.C. Circuit held that "[a]ll of the funds went to SIBL...investors either wrote checks that were deposited into SIBL accounts and/or filled out or authorized wire transfer requests asking that the money be wired to SIBL for the purpose of opening their accounts at SIBL and purchasing CDs."

Putting *Morrison v. National Australia Bank, Ltd.* together with *SEC v. SIPC*, the inescapable conclusion is that in 2009, SIBL was beyond the SEC's reach.

Accordingly, because the SEC's 2009 enforcement action against SIBL "involved an element of judgment or choice" that was not "grounded in policy", they are not protected by the "discretionary function shield" in 28 U.S.C. 2680(a). See, *Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (Government has no policymaking discretion to violate a federal statute, regulation or policy specifically prescribing a course of action for its employees to follow)

III.

When Obtaining the Privacy Law-Protected Banking Records of Stanford International Bank, Ltd. in Antigua, the Securities and Exchange Commission Circumvented the Governing Laws of the United States and an Explicit Order from the High Court of Antigua & Barbuda

When filing its original complaint against Stanford International bank, Ltd. in Antigua, the SEC did so using a "legal strategy" provided by two financial advisors who had been terminated by Stanford Group Company for corrupt business practices. In addition to the statutory flaws in this private sector-provided legal strategy, the SEC crafted their complaint on the premise that SIBL was insolvent and thus incapable of repaying the debt owed to the CD depositors. The SEC made this claim based only on the hearsay evidence of the two SGC financial advisors and without any banking records in support. In fact, on March 31, 2010 the report from the Office of the Inspector general (OIG-526) revealed that the SEC was admittedly aware of the "major jurisdictional issues" involving an action against the Antiguan bank. Specifically, in e-mail exchanges between SEC enforcement staff officials Wright and Degenhardt, and Prueitt and Prescott, it was acknowledged that..."[a]ll the bank records and sales records are maintained offshore in Antigua" (OIG-526, Exhibit 87)...[and thus]..."[t]he international dimensions concern me because it limits our investigatory powers." (OIG-526, Exhibit 114)

This meant that, based on the investigatory limitations set forth in 15 U.S.C. 78u(a) and (b), they would be unable to subpoena the records from the foreign bank, in order to validate their "insolvency" claim...the premise for an enforcement action.

To overcome this 'investigatory powers' impediment, upon filing their 2009 complaint the SEC requested the appointment of an Equity Receiver who would be judicially mandated to:

"Promptly provide the United States Securities and Exchange Commission with all information they may seek in connection with its regulatory or investigatory activities." (App. D, at section 5.(k))

Within days of his February 16, 2009 appointment, and armed with an order from a U.S. District Court mandating that he promptly provide to the SEC... "all information they may seek in connection with its regulatory or investigatory activities" (which included the banking records from SIBL that were beyond the SEC's subpoena powers) the court-appointed Receiver presented his order of appointment to government officials in Antigua, seeking access to SIBL's privacy law-protected data.

In no uncertain terms, the Antiguan government rejected the order from a U.S. District Court as having "no standing" in that country, and the High Court of Antigua & Barbuda then quickly issued an order making clear that any unauthorized access to this detailed customer account data was strictly prohibited under the International Business Corporation Act, Cap. 244(1)(App. E).

Upon this unanticipated rejection and with the SEC's need for SIBL's banking records unfulfilled, the Receiver returned to the United States and quickly issued a "Letter of Authorization" (App. F) to the former Stanford Financial Group employee who had created the protective "firewall" (in SIBL's Temenos/DataPro database) restricting access to its privacy law-protected customer account data...instructing him to disregard the laws of Antigua & Barbuda, and to "hack" into SIBL's database to perform a "datadump" of all records maintained by the Bank. This unlawful "Letter of Authorization", which also disregarded section 12(c) of the Order Appointing Receiver (App. D) mandating that any production of documents or records comply with "the laws of any foreign country", was never made part of the official record.

In the days to follow his "prompt provision" of this unlawfully obtained "datadump" to the SEC, the Receiver filed a report to the District Court in which, under "Assistance To And Communication With Governmental and Regulatory Agencies"... he confirmed:

"The Receivership Order directed the Receiver to promptly provide the SEC and other governmental agencies with all information and documentation they may seek in connection with their regulatory or investigatory activities. The Receiver and his team have spent substantial amounts of time on these activities. The principle such activities have been coordination with the SEC, the FBI, and the Department of Justice, in identifying and gathering large amounts of documents and information relevant to their ongoing investigations, and responding to numerous and extensive requests from the SEC, the FBI and the Department of Justice to analyze and provide information and documents." (App. G, at page 25)

Through any prism, this activity rendered the Receiver a "state actor" whose relationship with the SEC can only be described as one of an impermissible "interdependence" as defined in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Under the governing statute (15 U.S.C. 78u), the SEC was unable to investigate and obtain this privacy law-protected data with a subpoena, and only managed to obtain it and "validate" their "hearsay-based" complaint, through the utilization of a court-appointed Equity Receiver.

In sum, because the SEC utilized the Receiver as a law enforcement proxy to investigate and seize evidence that was beyond their jurisdictional reach, and the Receiver did so in violation of the laws of another nation and his order of appointment, this activity (and "interdependence") cannot be said to be grounded in the policy of the SEC's regulatory regime, or allowed by the Fourth Amendment...and went beyond "normal regulatory activity". See, *Millbrook v. United States*, 569 U.S. 50 (2013) (protection under 'law enforcement proviso' applies only to permissible exercise of policy judgment, and does not require officer to personally be engaged in investigative or law enforcement activity...[and thus]..."tortious conduct can occur in the course of executing a search or seizing evidence."); see also, *United States v. Gaubert*, 499 U.S. 315 (1991) (discretionary function exception does not apply where mandatory regulation has been violated); (*Berkovitz v. United States*, 486 U.S. 531 (1988) (Under the law enforcement proviso of the FTCA (28 U.S.C. 2680(h))..."[i]t is the nature of the conduct, rather than the status of the actor, that governs whether the exception applies to a given case").

And finally...

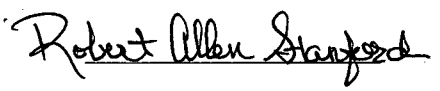
In *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court compared the tort of "abuse of process" in 28 U.S.C. 2680(h), with a civil rights action brought under 42 U.S.C. 1983. Referring to it as "the most closely analogous tort", the Court held that... "[i]n order to recover compensatory damages, the plaintiff must prove not only that the search was unlawful, but that it caused compensable injury."

Because the SEC's extra-statutory and extraterritorial enforcement action, and subsequent seizure of protected data was not authorized by statute, not grounded in policy, and violated the Fourth Amendment, it is indisputable that it caused this plaintiff "compensable injury".

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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