No. ____

IN THE

Supreme Court of the United States

MONEX DEPOSIT COMPANY, ET AL.,
Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Commodities can be anything sold in commerce. The federal Commodity Exchange Act defines "commodity" broadly, reaching items from pigs to potatoes. 7 U.S.C. § 1a(9). But the federal law, and the federal agency it creates, regulate commodity *futures,* not every transaction in any commodity.

This case concerns the limits on the authority of the Commodity Futures Trading Commission (CFTC) to regulate, and penalize, transactions outside the commodity futures markets.

The questions presented are:

1. Whether 7 U.S.C. § 9, the Commodity Exchange Act's "Prohibition Against Manipulation," empowers CFTC to punish conduct that does *not* manipulate any commodities market, simply because the conduct involves a retail transaction in a commodity.

2. Whether CFTC violated fundamental principles of due process when it abruptly reversed its 30-year position that petitioners' business model was not subject to CFTC's regulatory authority and retroactively applied its new and incorrect position in this $290 million enforcement action.

PARTIES TO THE PROCEEDING

Petitioners, the defendants-appellees below, are Monex Credit Company, a California Limited Partnership; Monex Deposit Company, a California Limited Partnership; Newport Services Corporation; Michael Carabini; and Louis Carabini.

Respondent, the plaintiff-appellant below, is the Commodity Futures Trading Commission.

RULE 29.6 STATEMENT

Newport Services Corporation does not have a parent company and no publicly held company owns 10% or more of its stock. The other petitioners are limited partnerships or individuals.

RELATED PROCEEDINGS

Central District of California:

Commodity Futures Trading Comm'n v. Monex Credit Co., No. SACV 17-01868 JVS (May 1, 2018).

U.S. Court of Appeals for the Ninth Circuit:

U.S. Commodity Futures Trading Comm'n v. Monex Credit Co., No. 18-55815 (July 25, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Monex Credit Company, Monex Deposit Company, Newport Services Corporation (together, "Monex"), Michael Carabini, and Louis Carabini respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-23a) is reported at 931 F.3d 966. The decision of the district court granting petitioners' motion to dismiss (Pet. App. 25a-54a) is reported at 311 F. Supp. 3d 1173.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2019. A petition for rehearing was denied on October 3, 2019 (Pet. App. 24a). On December 23, 2019, Justice Kagan extended the time to file a petition for certiorari to and including January 23, 2020. No. 19A702. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the Appendix, *infra*, at 55a-59a.

INTRODUCTION

This case arises from a $290 million enforcement action brought by the Commodity Futures Trading Commission (CFTC) against a family-owned business and its owners, which have operated under the same business model for more than 30 years. That enforcement action is the product of an extraordinary effort by CFTC to expand its authority, sweeping conduct that has long been regulated by the states into the ever-expanding federal domain. And not content to exert its newly-seized authority going forward, CFTC has sought to apply it *retroactively*, punishing small businesses and individuals—including petitioners here—for actions they took in reliance on CFTC's repeated assurances that their conduct was lawful. CFTC's actions disregard the carefully crafted limits on its power and contravene basic principles of due process.

This Court's review is urgently needed to enforce the statutory and constitutional limits on CFTC's authority. Agencies already "wield[] vast power [that] touches almost every aspect of daily life," *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010), and are continually seeking to "extend[] the sphere of [their] activity and draw[] all power into [their] impetuous vortex," *The Federalist No. 48*, at 306 (James Madison) (Clinton Rossiter ed., 1961). If left unchecked, CFTC's abuse of its power will continue. And because its targets are often small businesses that are unable to mount a defense or hire counsel, this Court may not soon have another opportunity to review the lawfulness of CFTC's action. The Court should grant certiorari.

STATEMENT

A. CFTC's Regulatory And Enforcement Authority.

The Commodity Exchange Act (CEA) creates a "comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 355 (1982) (quotations omitted). Originally limited to futures contracts in agricultural commodities, since 1974 the CEA has covered all commodities "in which contracts for future delivery are presently or in the future dealt in"—so-called "futures contracts." *Dunn v. CFTC*, 519 U.S. 465, 469 (1997) (quoting 7 U.S.C. § 2). The 1974 amendment created CFTC to regulate the futures markets. *See* Pub. L. No. 93-463, 88 Stat. 1389 (1974); Jerry W. Markham, *The History of Commodity Futures Trading and its Regulation* 60-61, 66-72 (1987). A "futures contract" is a "commitment[] to buy or sell [a] commodit[y] at a specified time and place in the future." *Futures contract*, Black's Law Dictionary 676 (6th ed. 1990). Futures contracts rarely "actually lead[] to delivery of a commodity." *Id.*

But regulation of commodity *futures* does not equal regulation of *commodities*, writ large. An egg, a peanut, and a cow are all commodities, 7 U.S.C. § 1a(9), but CFTC does not step in every time one is sold. Contracts for the immediate delivery of a good—called "spot contracts"—have long been regulated by state law (often adopting the Model State Commodity Code).

This case involves two ways in which Congress modestly expanded CFTC's authority in the Dodd-

Frank Wall Street Reform and Consumer Protection Act.[1] The first strengthened CFTC's ability to address manipulation of the futures markets. The second gave CFTC some authority to regulate spot contracts that functioned like futures contracts. In each instance, CFTC has sought to stretch its new authority well beyond the gap Congress sought to fill—to conduct involving *no* manipulation and spot contracts that do *not* function like futures contracts.

1. Congress Extends CFTC's Anti-Manipulation Authority By Making Manipulation Easier To Prove.

Congress originally created CFTC to combat large-scale price manipulations that were endemic in futures markets. But CFTC interpreted the CEA to require a showing of "specific intent" to manipulate prices *and* proof that artificial prices actually existed. Jerry W. Markham, *Manipulation of Commodity Futures Prices—The Unprosecutable Crime*, 8 Yale J. on Reg. 281, 282, 356-357 (1991). Hampered by this self-imposed limitation, CFTC won just one manipulation case in 35 years. 156 Cong. Rec. S3348 (daily ed. May 6, 2010) (Sen. Cantwell).

To lighten CFTC's burden, Congress amended the CEA in Dodd-Frank, incorporating a stand-alone bill by Senator Cantwell. *See* S. 1682, 111th Cong. (2009). The bill included two provisions creating "Civil Penalties for Market Manipulation": one, entitled "Prohibition Regarding False Information," made it unlawful to file false or misleading reports with CFTC. *Id.* § 2. The other, entitled "Prohibition Regarding Market Manipulation," made it "unlawful

[1] Pub. L. 111-203, 124 Stat. 1376 (2010).

for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate." *Id.*

Senator Cantwell observed that "[c]urrent law makes it very difficult for [CFTC] to prosecute market manipulation cases." 155 Cong. Rec. S9557 (daily ed. Sept. 17, 2009). She then explained that her bill was intended to address this issue by "giv[ing] the CFTC the same anti-manipulation standard currently employed by the SEC," which "just has to prove that the defendant acted 'recklessly.'" *Id.*

Senator Cantwell's proposal became Section 753 of Dodd-Frank, entitled "Anti-Manipulation Authority." 124 Stat. at 1750. It kept the same titles, substantively identical statutory language, and Senator Cantwell's same explanation that the legislation would "strengthen[] [CFTC's] authority to go after manipulation and attempted manipulation in the swaps and commodities markets" by allowing it to prosecute market manipulation using the SEC's "reckless" scienter standard. 156 Cong. Rec. S3347-S3348 (Sen. Cantwell).

2. CFTC Stretches Its New Authority To Reach Beyond Manipulation.

Thereafter, CFTC proposed a rule "to implement [the] new anti-manipulation authority in section 753" of Dodd-Frank, which CFTC said had "expanded and clarified [CFTC's] authority to prohibit ma-

nipulative behavior." 75 Fed. Reg. 67,657, 67,657 (Nov. 3, 2010). In the proposed rule—entitled "Prohibition of Market Manipulation"—CFTC interpreted the provision to reach using "any manipulative or deceptive contrivance *for the purpose of impairing, obstructing, or defeating the integrity of the markets subject to the jurisdiction of the Commission*." *Id.* at 67,657, 67,659 (emphasis added).

Despite the focus on fraud-based manipulation in futures markets, the proposed text appeared to encompass *non-manipulative* conduct *beyond* the futures markets. The proposed regulation, entitled "Prohibition against manipulation," provided that it would be unlawful for any person to use "any manipulative device scheme, or artifice to defraud," *or* to make "any untrue or misleading statement of a material fact," *or* to engage in any act that "would operate as a fraud or deceit upon any person," among other prohibitions. *Id.* at 67,662.

Because CEA provisions predating Dodd-Frank already included anti-fraud authority, industry groups were unsure whether the proposed rule would "grant[] the Commission any new antifraud authority." FIA, ISDA, and SIFMA, Comment Letter on Proposed Rule 9 (Dec. 28, 2010), https://www.isda.org/a/xUiDE/cftc-manipulation-fia-isda-sifma.pdf. Several groups asked CFTC to clarify that its rule would not apply to transactions involving *non-manipulative* fraud that were already governed by state contract and tort law or extend beyond transactions involving *futures* contracts and swaps. API & NPRA, Comment Letter on Proposed Rule 2-4, 9-12 (Jan. 3, 2011), https://www.afpm.org/

sites/default/files/issue_resources/API_NPRA_CFTC.pdf.

CFTC responded by dramatically changing how it framed its final rule. Now entitled "Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation," the final rule characterized Dodd-Frank as having given CFTC "additional and broad authority to prohibit fraud and manipulation" and further stated that it would prohibit "fraud and fraud-based" conduct "regardless of whether the conduct in question was intended to create or did create an artificial price." 76 Fed. Reg. 41,398, 41,398, 41,399 (July 14, 2011). CFTC also declined to limit the rule to transactions in connection with futures contracts and swaps, though it said it "expect[ed] to exercise its authority" over "transactions related to the futures or swaps markets," commodity prices, or "fraud or manipulation [that] has the potential to affect cash commodity, futures, or swaps markets or participants in these markets." *Id.* at 41,401.

But CFTC ultimately eschewed such restraint. Following the rulemaking, CFTC brought numerous actions alleging fraudulent misrepresentations in commodity transactions without any alleged manipulative impact. *See, e.g.*, Compl. ¶¶ 50-56, *U.S. CFTC v. Global Precious Metals Trading Co. LLC*, No. 1:13-cv-21708-UU (S.D. Fla. May 13, 2013), ECF No. 1; Compl. ¶¶ 1-7, 116-122, *U.S. CFTC v. Parker*, No. 2:16-cv-00983-BSJ (D. Utah Sept. 21, 2016), ECF No. 2; Compl. ¶¶ 24-34, 50-56, *CFTC v. Dupont*, No. 8:16-cv-03258-TMC (D.S.C. Sept. 29, 2016), ECF No. 1.

3. Congress Examines Retail Commodity Transactions, Including Monex's Business Model, And Continues To Bar CFTC From Regulating Retail Contracts Involving "Actual Delivery."

The other provision at issue keeps CFTC from claiming limitless jurisdiction over the retail market in commodities, down to peanut vendors and egg stands. Congress has given careful attention to where to draw the line, including specific attention to Monex's business model.

a. Some foreign currency dealers sought to skirt CFTC's jurisdiction over futures contracts by trading in contracts that functioned like futures contracts but lacked some of their defining features. For instance, the defendant in *CFTC v. Zelener*, 373 F.3d 861 (7th Cir. 2004), sold foreign currency under *de facto* futures contracts, which nominally provided for settlement and delivery within two days but allowed the sellers to continually "roll" the contract forward without making delivery. *Id*. at 863-864. The Seventh Circuit held that these rolling spot contracts were not futures contracts and so did not fall within CFTC's jurisdiction. *Id*. at 869.

Congress responded by making all contracts "in foreign currency" "offered, or entered into, on a leveraged or margined basis" subject to the CEA. *See* Pub. L. No. 110-246, § 13101, 122 Stat. 1651 (2008) (codified at 7 U.S.C. § 2(c)(2)(B), (C)(i)(I)-(II)). But it was not long before fraudsters begun using rolling spot contracts to trade "in other commodities, especially precious metals like gold, silver and platinum." *Hearing to Review Implications of the* CFTC v. Zelener *Case: Hearing Before the Subcomm. on General*

Farm Commodities & Risk Mgmt. of the H. Comm. on Agric., 111th Cong. 5 (June 4, 2009) ("*Zelener* Hearing") (Stephen Obie, Acting Director of Enforcement, CFTC).

b. Monex's business model is nothing like these rolling spot contracts, because Monex *does* settle and deliver. As Congress understood, Monex's business model is typical in the retail commodity industry and has been for decades.

Monex is a family-owned business that has sold precious metals to retail buyers since 1967. It has used its current business model since 1987, operating in plain sight and complying with state law governing retail commodity transactions.

Customers can purchase metals outright or through a leveraged, or "margin," transaction. Pet. App. 27a. In a margin transaction, the buyer finances up to approximately 75 percent of the purchase price, using the purchased metals as collateral. *Id.*

Monex owns all the precious metals it sells. Buyers may either take physical delivery of their metals or have them stored in fungible bulk form with an independent depository. Pet. App. 29a. If a buyer finances a purchase using the metals as collateral, they remain in the independent depository, in the buyer's name, until full payment is made and the security interest is released. Pet. App. 27a, 29a. But whether the buyer finances the transaction or purchases outright, Monex transfers title to the metals to the buyer at the time of delivery, which occurs within 28 days of sale. Pet. App. 29a. The buyer can then sell their metals at any time, using the proceeds

to pay off a loan balance (just as a homeowner does with a home mortgage).

As is characteristic of financed or leveraged transactions, Monex requires customers to maintain a minimum level of equity relative to their loan balance. Pet. App. 28a. If a customer's account drops below the minimum level—for example, because the market price of the purchased metal falls substantially—Monex can require the buyer to increase equity by either paying down the loan or adding more collateral to her account (a "margin call"). If the equity drops below 50% of the required level, Monex can liquidate the collateral and apply the proceeds to the loan balance. Pet. App. 27a-28a.

c. In June 2009, a House subcommittee held a hearing about how to give CFTC authority over schemes like the one in *Zelener*. Stephen Obie, CFTC's Acting Director of Enforcement testified, along with Daniel Roth, the President of the National Futures Association (NFA),[2] and Philip Feigin, an attorney for Monex. CFTC and NFA officials urged Congress to extend the CEA to *Zelener*-like contracts in all commodities, but they also emphasized that federal law should not "in any way impair or interfere with the legitimate spot market" in which the purchased commodity is physically delivered. *Zelener* Hearing 9. The CFTC enforcement director agreed "that regulating the spot market is not something we are interested in." *Id.* at 31. "Our middle

[2] NFA is the registered self-regulatory association for the futures industry; it exercises delegated authority from CFTC and is responsible for taking disciplinary action against its members, subject to CFTC review. *See* 7 U.S.C. § 21.

name is futures," he explained, "and we don't see any issue where delivery is occurring." *Id.* at 26. These officials were clear that they sought no more than to restore the "pre-*Zelener* state" when CFTC could regulate "leverage[d] contracts offered to retail customers where there is no expectation of delivery." *Id.* at 23 (Daniel Roth); *id.* at 27-28 (same).

Monex was discussed extensively during the hearing. Chairman Marshall explained that he "had a discussion [with Monex] about their operation," noted that "they sound like they are pretty straightforward," and confirmed that the NFA "wouldn't have a problem with what they do." *Id.* at 21. Mr. Roth, the NFA's president, responded that "the proposal that we have been advocating would not affect Monex." *Id.* Chairman Marshall also asked whether "[going] back to the pre-*Zelener* era" would solve the problem while "Monex and others who are … actually delivering would be okay and they wouldn't have to fool with you guys." *Id.* at 23. Mr. Roth responded, "I think that is right, Congressman." *Id.* Likewise, when asked what the "consequences" would be "to Monex's business if Congress adopted … a broad *Zelener*-fix," Monex's attorney stated—without contradiction—"I don't think the NFA is seeking here to shut Monex down." *Id.* at 20. All this led Chairman Marshall to conclude that "Monex won't be hurt at all" by the proposed extension of the CEA. *Id.* at 22.

Congress heard similar assurances during other hearings. For instance, another NFA official represented to the Senate Agriculture Committee that extending the CEA to all retail commodity transactions "would not invalidate" a 1985 guidance letter from CFTC "which Monex and other similar firms current-

ly rely on to sell gold and silver to their clients." *Regulatory Reform & the Derivatives Market: Hearing Before the S. Comm. on Agric., Nutrition, & Forestry*, 111th Cong. 42 (2009). That 1985 guidance addressed a business that sold precious metals on margin and utilized the same method of delivery as Monex. *See* CFTC, Office of the General Counsel, Interpretive Letter No. 85-2 (Aug. 6, 1985).[3] CFTC concluded that these transactions were not futures contracts—and were therefore outside CFTC's jurisdiction—because they "require[d] payment and transfer of ownership of the precious metals to occur." *Id*. at 2.

These representations were made with full knowledge of Monex's business operations. In his testimony, Mr. Feigin explained Monex's business model in detail, including that "title to the full amount of the metals purchased passes to the customer," that in margin transactions the purchaser's "recognized depository" will receive the gold "within 28 days," and that "[t]he precious metals … [are] the collateral for the loan." *Zelener* Hearing 12-15. He also explained that CFTC had investigated Monex twice before and brought no enforcement action. *Id*. at 17.

d. Following these hearings, in Dodd-Frank, Congress extended CFTC's regulatory authority to retail commodity transactions but excluded "contracts of sale that … result[] in actual delivery within 28 days." § 742(a)(2), 124 Stat. 1733 (codified at 7 U.S.C. § 2(c)(2)(D)(ii)(III)(aa)). The legislation did not include an additional provision CFTC had want-

[3] https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/85-02.pdf.

ed, which would have defined "actual delivery" to "not include delivery to a third party in a financed transaction in which the commodity is held as collateral." S. 3217, 111th Cong. § 742(a)(2) (2010).[4]

4. Years Later, CFTC Changes Its Interpretation And Asserts Jurisdiction Over More Retail Transactions.

CFTC initially read the statutory term "actual delivery" relatively narrowly. The statute has not changed, but CFTC's interpretation has—and CFTC is asserting that new view retroactively.

a. Three years after Dodd-Frank, CFTC issued a rule interpreting the term "actual delivery." *See* 78 Fed. Reg. 52,426 (Aug. 23, 2013). CFTC explained that it would employ a "functional approach" to assess whether "actual delivery" had occurred. *Id.* at 52,428.

Although CFTC listed multiple factors that it would consider, it also gave examples "to provide the public with guidance." *Id.* at 52,427. One example provided that delivery "will have occurred if, within 28 days" the seller has both "transferred title … to the buyer" and "[p]hysically delivered" the commodity purchased, "including any portion … made using leverage, margin, or financing, whether in specifically segregated or fungible bulk form, into the possession of a depository other than the seller and its … affiliates." *Id.* at 52,428. This example, CFTC ex-

[4] The CFTC Chairman had proposed that language in an August 17, 2009 memorandum to the Senate Agriculture Committee.

plained, was meant to track the concept of "physical delivery" in state commodity codes. *Id.* at 52,428 n.25. This is precisely the delivery mechanism Monex has long used. *See supra* at 9-10, 12.

CFTC initially adhered to this interpretation in its enforcement actions. In an action against an entity that owned no metals—and thus had none to deliver—CFTC affirmed that retail commodities sales would not be subject to its regulatory authority where a seller "transfers title to metals physically stored at an independent depository." Opp. to Mot. to Dismiss 8 & n.12, *U.S. CFTC v. Hunter Wise Commodities, LLC*, No. 9:12-cv-81311 (S.D. Fla. Feb. 8, 2013), ECF No. 63 (citing 76 Fed. Reg. 77,670, 77,670-77,672 (Dec. 14, 2011)). In another enforcement action, CFTC expressly disavowed any assertion that the defendant's similar method of delivery did not constitute actual delivery, stating that there is nothing "violative with [the] practice of making 'actual delivery' by physically delivering metal to a depository and allocating it into an account held in the customer's name." *CFTC v. Worth Grp., Inc.*, 2014 WL 11350233, at *3 (S.D. Fla. Oct. 27, 2014) (citation omitted).

b. CFTC abruptly changed course and adopted a new interpretation of "actual delivery" based on dicta in the Eleventh Circuit's decision in *U.S. CFTC v. Hunter Wise Commodities, LLC*, 749 F.3d 967 (11th Cir. 2014).[5] It argued for the first time in the *Worth*

[5] In *Hunter Wise*, the court held that a company that did not own the metals it purported to sell, and so did not deliver any physical metals, did not make "actual-delivery." 749 F.3d at 979-980. Rejecting the defendant's argument that they made delivery under the Uniform Commercial Code, the court in

proceeding that the delivery of metals to an independent depository to be held in the buyer's name was not "actual delivery" because the buyer did not "have both possession and control of the physical metals" to which it had received title. *Worth Grp., Inc.*, 2014 WL 11350233, at *1. As the *Worth* court noted, CFTC "itself concede[d] that it [was] changing its own prior interpretation of [actual delivery] based on its interpretation of [*Hunter Wise*]." *Id.* at *3. CFTC did not, however, modify its interpretive rule taking the contrary view.

B. CFTC Files A $290 Million Enforcement Action Against Monex.

CFTC brought a civil enforcement action against Monex in September 2017, threatening the company's very existence. CFTC alleged (in relevant part) that Monex violated 7 U.S.C. § 2 by conducting its retail commodity transactions without using a commodities exchange, and made misrepresentations to customers in violation of 7 U.S.C. § 9(1). C.A. E.R. 664-669. CFTC sought to halt Monex's business operations, appoint a monitor to assume control over Monex's operations, and freeze Monex's assets. C.A. E.R. 638-640. CFTC also sought years' worth of

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passing described the actual-delivery exception as requiring that the buyer or buyer's agent have physical possession and control of the commodity. *Id.* at 979. But the court did not suggest that delivery to a depository fails to confer that possession and control. To the contrary: *Hunter Wise* recognized that under CFTC's 2013 interpretive rule delivery of a commodity to an independent depository as collateral *is* "actual delivery," and it distinguished that form of delivery from the "constructive delivery" at issue in that case. *Id.* at 980.

damages, penalties, and other relief, totaling at least $290 million.

1. The district court granted Monex's motion to dismiss. First, the court held that Monex's sales fell outside CFTC's regulatory authority because Monex makes "actual delivery" of the precious metals it sells. Pet. App. 40a. The court rejected CFTC's argument that Monex's form of delivery was a "sham" because Monex customers who purchase metals on margin are subject to "margin calls" and do not have control, authority, and possession of their metals when the metals are held as collateral by an independent depository. Pet. App. 36a. The court recognized that these features are characteristic of the "business model of selling commodities on a leveraged basis," *id.*—a model the CEA expressly contemplates *will* qualify for the actual-delivery exception, 7 U.S.C. § 2(c)(2)(D). Thus, the court noted, under CFTC's interpretation *no* leveraged transaction could fall within the actual-delivery provision. Pet. App. 36a-37a.

Second, the district court rejected CFTC's only remaining claim, for fraud under 7 U.S.C. § 9(1). After conducting an extensive analysis of § 9(1)'s text, legislative history, and statutory context, the court held that § 9(1) does not apply in the absence of actual or potential market manipulation. Pet. App. 44a-54a.

2. The Ninth Circuit reversed. The court reasoned that actual delivery requires some "meaningful degree of possession or control" over the metals, and held that CFTC's allegations describing Monex's practice of delivering purchased metals to an independent depository and transferring title to the buyer did not qualify. Pet. App. 15a-18a. The Ninth

Circuit did not address Monex's argument that CFTC's retroactive application of its new interpretation of actual delivery violates the Due Process Clause. Monex C.A. Br. 28-31.

The Ninth Circuit also held that § 9(1) grants CFTC jurisdiction over freestanding fraud claims, relying entirely on Congress's use of the phrase "manipulative or deceptive device," which the court held compelled a disjunctive reading. Pet. App. 19a. The court did not examine § 9(1)'s legislative history or statutory context, and it acknowledged that its reading produced "partial redundancy" with other CEA provisions, but it said that that redundancy did not justify a contrary conclusion. Pet. App. 20a.

REASONS FOR GRANTING THE WRIT

This case is just the most recent example of CFTC's increasingly expansive view of its authority to include markets and businesses that Congress never placed within its mandate, and conduct that Congress (and previously CFTC itself) never contemplated CFTC could prosecute. The Ninth Circuit allowed CFTC to disregard the statutory and constitutional constraints on its regulatory power in two ways that warrant this Court's review. First, the Ninth Circuit dramatically expanded the CEA's limited "Prohibition Against Manipulation" provision to give CFTC authority to prosecute misrepresentations in ordinary commercial transactions that have no effect on futures markets or trading and that are already governed by a robust body of state law. Second, the Ninth Circuit disregarded CFTC's unconstitutional attempt to retroactively apply a new inter-

pretation of law to punish conduct that CFTC had long interpreted as lawful.

This Court's review is warranted to confine CFTC to its limited role. The Ninth Circuit wrongly resolved both issues, and its errors are important. Together, they allow CFTC to reach beyond the manipulation of commodity-futures markets, to any transaction in any commodity. And businesses that did not anticipate the agency's change in position are now exposed to massive, life-threatening, and *retroactive* liability.

I. The Ninth Circuit Wrongly Ratified CFTC's Assertion Of Power To Police Fraud In Every Retail Commodity Transaction.

Congress wrote a "Prohibition Against Manipulation," but the Ninth Circuit has turned it into a power to police any retail transaction in a commodity. That interpretation misapplies the text, structure, and history of the CEA and disrupts the federal-state balance without the requisite clear statement by Congress. The Ninth Circuit ignored all of these indicia of statutory meaning, instead focusing myopically on a single word in isolation—exactly what this Court has repeatedly said courts should *not* do. *E.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). This Court should grant certiorari to restore the limitations Congress placed on CFTC's enforcement authority, and the federal-state balance of power over fraud in retail transactions.

A. The CEA's "Prohibition Against Manipulation" Gives CFTC Authority Over Manipulation, Not Fraud.

The CEA makes it "unlawful … to use or employ … in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance." 7 U.S.C. § 9(1). Established principles of statutory construction demonstrate that § 9(1) does not vest CFTC with authority to police stand-alone fraud in retail transactions.

First, Congress expressly labeled new § 9(1) a "Prohibition Against Manipulation" and enacted it in a section of Dodd-Frank headed "Anti-Manipulation Authority." 7 U.S.C. § 9(1); Dodd-Frank § 753, 124 Stat. 1750. Those clear, descriptive headings "supply cues" about the scope of the provisions they introduce. *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015); *accord Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 886 (2018). As labeled, § 9(1) provides CFTC with the power to go after market *manipulation*.

The structure of § 9 confirms that point. That provision is captioned "Prohibition Regarding Manipulation and False Information." Subsection (1) addresses manipulation; subsection (2) addresses false information. But there is no prohibition on false information *in a transaction*: rather, every provision dealing with false information is limited to false or misleading information *provided to CFTC, id.* § 9(2), or included in a *report concerning crop or market information or conditions*, *id.* § 9(1)(A). It is exceptionally odd to suggest that when Congress wrote these

specific, targeted prohibitions, it also subtly adopted a much broader prohibition on misrepresentations to *anyone* in connection with *any* commodities transaction. The much more sensible reading is that § 9(1) addresses manipulation, as its heading says. The exception proves the rule: Congress wrote a special provision, § 9(1)(A), stating that providing false crop reports, or similar misinformation *that affects price*, is unlawful manipulation. If any misrepresentation in connection with a commodity transaction were actionable under § 9(1), then there would be no need for § 9(1)(A)'s prohibition on manipulation by false reporting.

Furthermore, § 9(1)'s heading "does not reflect careless, or mistaken, drafting, for the title is reinforced by a legislative history that speaks about" Congress's intent to grant CFTC anti-manipulation authority. *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). Congress included Section 753 in Dodd-Frank for a specific purpose—to address CFTC's longstanding and well-documented inability to address market manipulation. Senator Cantwell, the principal author, made that clear both in introducing the original stand-alone legislation and in discussing its incorporation into Dodd-Frank. *See supra* at 4-5. The chair of the committee with jurisdiction over the CEA agreed, consistently describing the new section as an "anti-manipulation" provision and never as a provision that would authorize CFTC to prosecute fraud in individual retail transactions. *See, e.g.*, 156 Cong. Rec. S5924 (daily ed. July 15, 2010) (Sen. Lincoln) ("Section 753 adds a new anti-manipulation provision to the [CEA] addressing fraud-based manipulation, including manipulation by false reporting."); 156 Cong. Rec. S3349 (Sen. Lin-

coln) ("Senator Cantwell's amendment will give the CFTC a very important new weapon in its arsenal to combat ever-evolving forms of manipulative trading schemes ….").[6]

Nor does the Ninth Circuit's interpretation make sense within the CEA's broader context. The CEA already addressed fraud in a number of specific ways,[7] yet as the Ninth Circuit grudgingly admitted, its reading leaves those provisions superfluous. Pet. App. 20a (acknowledging "partial redundancy"). All these provisions are limited to fraudulent conduct relating to commodities exchanges, brokers, and transactions over which CFTC has regulatory authority, not fraud or misrepresentation that occurs during retail commodities transactions. If Congress had wanted to provide CFTC with expanded enforcement authority to prosecute fraud generally—swallowing up more specific provisions that bar fraud involving futures contracts, swaps, or commodities exchanges—it would have done so expressly and conspicuously, not buried in a new subsection designed to address market manipulation. Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *accord Epic Sys. Corp. v. Lewis*, 138 S. Ct.

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[6] Indeed, in the same statement in which Senator Lincoln described Section 753 as a "new anti-manipulation provision," she spoke at length about CFTC's anti-fraud authority contained in *other* CEA provisions. *See* 156 Cong. Rec. S5924.

[7] *See, e.g.*, 7 U.S.C. § 6b(a)(2)(A) (entitled "Contracts designed to defraud or mislead"); *id.* § 6*o*(1) (entitled "Fraud and misrepresentation by commodity trading advisors, commodity pool operators, and associated persons"); *id.* § 6c(a)(7) (prohibiting using swaps to defraud a third party).

1612, 1627-1628 (2018). That is especially so where the supposed alteration would leave existing provisions with no work to do. But statutes must be interpreted to give each provision independent meaning, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011), unless there is "clear evidence that Congress intended th[e] surplusage," *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018).

Any remaining doubt as to § 9(1)'s meaning is resolved by two substantive canons of statutory interpretation. First, the federalism canon: this Court has long held that courts must be "certain of Congress' intent" before construing a federal statute to intrude on police powers that have historically been exercised by the States. *Bond v. United States*, 572 U.S. 844, 858 (2014) (citation omitted). In *Bond*, for example, this Court interpreted the Chemical Weapons Convention Implementation Act to not reach a "local crime" involving a wife's attempt to poison her husband's lover with arsenic and other chemical compounds. *Id.* at 848, 852. The Court required a "clear indication" that Congress wanted federal law to reach "local criminal conduct" historically policed by the States and, finding none, read the statute narrowly to avoid upsetting the "usual constitutional balance of federal and state powers." *Id.* at 858, 860 (citations omitted); *see also, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (declining to read the Clean Water Act as conferring jurisdiction over intermittent flows because Congress had not made a "clear and manifest statement" that it intended to authorize an intrusion into this type of local land use regulation, which "is a quintessential state and local power") (citation omitted).

Allowing CFTC to make a federal case out of fraud in retail transactions that is untethered to allegations of market manipulation and does not involve futures contracts, swaps, or futures exchanges would create precisely this type of intrusion on traditional state police powers. Fraud has long been governed by state law and is a paradigmatic example of conduct falling within the domain of traditional state regulation. *See, e.g.*, *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 177 (1st Cir. 2009); *Trus. of AFTRA Health Fund v. Biondi*, 303 F.3d 765, 775 (7th Cir. 2002); *United States v. Morgan*, 230 F.3d 1067, 1074 (8th Cir. 2000). Indeed, fraud in retail transactions has been governed by California's unfair competition laws, with both civil *and* criminal penalties, for decades. *E.g.*, Cal. Bus. Prof. Code §§ 17200, 17500.

Given the central role state police powers have played in addressing fraud, Congress's "clear and manifest" statement that it intended to upset the traditional federal-state balance is necessary before reading a statute to federalize all forms of fraud in retail commodities transactions. *Rapanos*, 547 U.S. at 738 (citation omitted). But it is nowhere to be found in the CEA's text or legislative history.

Finally, the federalism canon often operates in tandem with the rule of lenity, which instructs courts to adopt the more lenient of two possible interpretations of a statute in the absence of a "clear and definite" indication that Congress intended "the harsher alternative." *Jones v. United States*, 529 U.S. 848, 858 (2000) (citation omitted). The rule of lenity applies where, as here, the statute has both criminal and civil applications. *See* 7 U.S.C.

§ 13(a)(5) (criminal penalties for violating the CEA); *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).

B. The Ninth Circuit Erred In Interpreting § 9(1) In Isolation From Its Statutory Context.

Despite the text, context, and history that contradict its reading, the Ninth Circuit focused myopically on Congress's use of the word "or" in the phrase "manipulative or deceptive device," and held that "[this] two-letter conjunction … decide[d] this case." Pet. App. 4a, 19a. But "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," not by "examining a particular statutory provision in isolation." *Brown & Williamson*, 529 U.S. at 132-133 (citation omitted); *see also Yates*, 135 S. Ct. at 1081 ("[w]hether a statutory term is unambiguous … does not turn solely on dictionary definitions of its component words"). This case demonstrates the importance of paying attention to context rather than to a single, common word.

As the Ninth Circuit recognized, Pet. App. 19a, "or" can be used both conjunctively and disjunctively. So can "and." *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) ("Unsurprisingly, statutory context can overcome the ordinary, disjunctive meaning of 'or.'"); *De Sylva v. Ballentine*, 351 U.S. 570, 573 (1956) (noting that the "trouble with the word ['or'] has been with us for a long time" and interpreting "or" conjunctively in a provision of the Copyright Act); *Union Ins. Co. v. United States*, 73 U.S. 759, 764 (1867) (interpreting "or" conjunctively in an admiralty statute); *OfficeMax, Inc. v. United*

States, 428 F.3d 583, 588 (6th Cir. 2005) (tax code "does not simply turn on the intuition that 'and' means 'and,' 'or' means 'or,' and never the twain shall meet"). Indeed, there are many common phrases, especially in legal texts, in which "or" joins synonyms. Those phrases (often called "doublets") are not parsed as if there were a need to give independent meaning to each word; the words are simply linked together by tradition. *See United States v. Woods*, 571 U.S. 31, 45 (2013) ("or" "can sometimes introduce an appositive—a word or phrase that is synonymous with what precedes it"); *see*, *e.g.*, Bryan A. Garner, *Garner's Dictionary of Legal Usage* 294-295 (3d ed. 2011) ("amount or quantum"; "annoy or molest"; "way, shape, or form").

The CEA provides a case study for why courts should not interpret these terms in isolation from their statutory context: the statute does not even consistently use "and" conjunctively and "or" disjunctively *in § 9*. For example, the phrase "rules and regulations" in § 9(1) is actually disjunctive: conduct is unlawful if it contravenes *either* CFTC's rules *or* CFTC's regulations, not both. And although "or" is sometimes used disjunctively, in other places it is used in a doublet (*e.g.*, "use or employ" and "device or contrivance").

The Ninth Circuit acknowledged that "or" is not uniformly disjunctive—yet proceeded to hold that "or" resolves this case. Then, seeking to cabin its holding to avoid the massive enlargement of agency power Monex had pointed out, it arbitrarily asserted that its decision applied only to "stand-alone fraud claims in the sale of leveraged commodities," not all retail commodity transactions. Pet. App. 23a. But it

offered no explanation for why "or" is unambiguous *here*, and no textual reason why its interpretation of § 9(1) would not cover all retail commodity transactions rather than just leveraged ones. *See* Pet. App. 23a. Looking to the rest of the text, and to other tools of statutory interpretation, shows that § 9(1) gives CFTC the important, but limited, authority to police manipulation in relation to the futures markets, not to prosecute fraud in everyday commercial transactions. The extraordinary expansion of CFTC's jurisdiction effected by the Ninth Circuit's decision, coupled with the "intrusion into traditional state authority" that its interpretation authorizes, is a grave error warranting this Court's review.

II. The Ninth Circuit Wrongly Allowed CFTC To Seek Penalties Based On A New Legal Interpretation, Retroactively Applied.

The Due Process Clause prohibits the government from retroactively applying new interpretations of law to past conduct. Yet that is precisely what CFTC has done here. For years before and even after Dodd-Frank, CFTC made repeated public assurances—including in an interpretive rule—that Monex's business would *not* be affected. Then CFTC abruptly adopted a new interpretation of "actual delivery" and sought to retroactively apply that interpretation in this enforcement proceeding to shut down Monex's business and extract hundreds of millions of dollars from it. Due process does not permit such arbitrary government action.

A. The Due Process Clause Prohibits Agencies From Retroactively Imposing New Interpretations Of Law To Punish Past Conduct.

It is "[a] fundamental principle in our legal system …. that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). This long-recognized principle is "the first essential of due process of law," *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926), which exists so "that regulated parties should know what is required of them" and to prevent "those enforcing the law [from acting] in an arbitrary or discriminatory way," *Fox*, 567 U.S. at 253.

This Court has repeatedly applied these principles to prohibit agencies from retroactively applying new interpretations of law to past conduct. In *Fox*, this Court held that the Federal Communications Commission violated the Due Process Clause when it retroactively applied a new interpretation of federal indecency standards against television networks. 567 U.S. at 253-255. Though the FCC had repeatedly stated, including through formal guidance, that isolated instances of vulgarity or nudity were not actionable, *id.* at 245-246, it brought an enforcement action on precisely those grounds, *id.* at 247-248. This Court held that due process forbade the FCC's action, as would be true "with respect to a regulatory change this abrupt on any subject." *Id.* at 254, 253-255; *see also PHH Corp. v. CFPB*, 839 F.3d 1, 46 (D.C. Cir. 2016) (Kavanaugh, J.) ("[A] new agency interpretation that is retroactively applied to proscribe past conduct … contravenes the bedrock due

process principle that the people should have fair notice of what conduct is prohibited."), *reinstated in relevant part*, 881 F.3d 75, 83 (D.C. Cir. 2018) (en banc).

These due process safeguards also apply where the public reasonably relies on an agency's *informal* indication of what the law requires—even when that indication is mere silence. For example, in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Court declined to defer to the Department of Labor's newly announced reading of the Fair Labor Standards Act because that reading was irreconcilable with DOL's "very lengthy period" of "conspicuous inaction" against the conduct it now said was unlawful. *Id.* at 158. As this Court explained, "[i]t is one thing to expect regulated parties to conform their conduct to an agency's interpretation once the agency announces them," but it "is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding." *Id.* at 158-159; *see also United States v. Moss*, 872 F.3d 304, 312, 315 (5th Cir. 2017) (rejecting agency enforcement action premised on a new interpretation of law that was inconsistent with "over sixty years' prior administrative practice").

Likewise, the Due Process Clause prohibits the government from imposing punishment where the defendant reasonably relied on statements by government officials as to what the law requires. Thus, in *Raley v. Ohio*, 360 U.S. 423 (1959), the Court held that a state could not punish a citizen for declining to answer questions at a hearing after government officials repeatedly assured the citizen that he was un-

der no legal obligation to respond. *Id*. at 426-427, 437-438. Allowing punishment under these circumstances, the Court held, "would be to sanction the most indefensible sort of entrapment by the State." *Id*. at 438.

B. CFTC's Attempt To Retroactively Apply Its New Interpretation Of "Actual Delivery" Violates Due Process.

CFTC's $290 million enforcement action against Monex violates these bedrock principles of due process. The Ninth Circuit agreed with CFTC's new interpretation of "actual delivery,"[8] but it entirely failed to consider whether due process allows CFTC to apply its new interpretation retroactively to Monex.

For over 30 years, CFTC consistently recognized that Monex's business model falls outside CFTC's jurisdiction. In its 1985 guidance letter, CFTC made clear that the sale of precious metals on margin, with title transferred to the buyer and delivery made to an independent depository, is not within the CEA's purview, but is instead a matter for state law. *See supra* at 11-12. And on at least two occasions thereafter, CFTC investigated Monex and "took no enforcement action of any kind" against it. *Zelener* Hearing 17. The 2010 amendment to the CEA gave CFTC limited jurisdiction over certain retail commodity transactions, not broad authority over everyday retail sales.

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[8] That interpretation is incorrect, but due process precludes applying it to Monex in any event.

CFTC and NFA officials made this plain in their testimony before the House Agriculture Committee just months before the 2010 amendment. The president of the NFA made clear that adopting the proposal "would not affect Monex." *Id*. at 21 (Mr. Roth). CFTC's Acting Director of Enforcement agreed with NFA regarding the scope of the proposed *Zelener* fix: the proposal was only intended to address "look-alike paper contracts" that operated like futures contracts in which no "tangible products are delivered." *Id.* at 31. Thus, when Chairman Marshall inquired whether "Monex and others who are … actually delivering would be okay and they wouldn't have to fool with you guys," Mr. Roth responded, "I think that is right, Congressman." *Id*. at 23; *see also supra* at 10-12 (discussing congressional testimony). These statements were made after Monex's business model, including its method of delivery, had been described in detail. *See supra* at 12. Not once did either official—or any member of Congress—suggest that Monex's business would be considered an illegal, off-exchange trading operation.

CFTC's 2013 interpretive rule reaffirmed this understanding. Example 2 of that rule describes the precise form of delivery that Monex has utilized for more than 30 years—storing metals at an independent depository and transferring title to the buyer—as an example of delivery that satisfies the actual-delivery exception. 78 Fed. Reg. at 52,428; *see also supra* at 13-14. And even in enforcement proceedings, CFTC did not allege "that there [i]s [any]thing violative with [the] practice of making 'actual delivery' by physically delivering metal to a depository and allocating it into an account held in the custom-

er's name." *Worth Grp., Inc.*, 2014 WL 11350233, at *3 (quotation marks omitted); *see supra* at 14.

But in 2014, CFTC abruptly altered its interpretation of "actual delivery" based on its erroneous reading of dicta from *Hunter Wise*. *See supra* at 14-15 & n.5. Even where it had previously disclaimed any objection to Worth's method of delivery, CFTC began arguing that the defendant did not make actual delivery. CFTC made no effort to reconcile its two positions; in fact, it "*concede[d]* that it [was] changing its own prior interpretation of [the actual-delivery exception]." *Worth Grp., Inc.*, 2014 WL 11350233, at *3 (emphasis added).

The change in CFTC's position is also made clear by a proposed interpretive rule it issued on actual delivery "within the specific context of retail commodity transactions in virtual currency." *See* 82 Fed. Reg. 60,335, 60,335 (Dec. 20, 2017). This new interpretive rule—made after this enforcement action was filed—purports to be consistent with the 2013 interpretive rule, *id*. at 60,339, but it diverges in material respects: the 2017 interpretive rule states that actual delivery *will not* be found where (a) the buyer does not have "full control" over the cryptocurrency, including the ability to remove it immediately from the depository; or (b) there are liens on the cryptocurrency after the 28-day window for delivery has passed. *Id*. at 60,339-60,340. These criteria are incompatible with the concept of margin retail commodity sales because they would prohibit using a purchased commodity as collateral.

CFTC's attempt to retroactively apply its new interpretation of law against Monex is a blatant violation of the "fundamental principle" that the govern-

ment "give fair notice of conduct that is forbidden or required." *Fox*, 567 U.S. at 253. CFTC's interpretive rule—which remains unchanged—told Monex that its model was permissible. CFTC "gave no notice" that Monex's method of delivering metals to independent depositories amounted to an illegal, off-exchange commodities trading operation, *id.* at 254, and Monex justifiably relied on the numerous agency representations that its business model was secure. *See PHH Corp.*, 839 F.3d at 48. Due process forbids CFTC from punishing Monex for failing to "divine" the interpretation of "actual delivery" that CFTC "announce[d] … for the first time in an enforcement proceeding." *SmithKline*, 567 U.S. at 158-159.

"When a government agency officially and expressly tells you that you are legally allowed to do something, but later tells you 'just kidding' and enforces the law *retroactively* against you … for actions you took in reliance on that government's assurances, that amounts to a serious due process violation." *PHH Corp.*, 839 F.3d at 48. Allowing CFTC to bring an enforcement action against Monex based on its new interpretation of law would "be to sanction the most indefensible sort of entrapment." *Raley*, 360 U.S. at 438.

III. The Petition Raises Exceptionally Important And Outcome-Determinative Issues Involving Agency Overreach That Warrant This Court's Review.

The Ninth Circuit's decision is not only erroneous but important. CFTC's self-aggrandizement threatens to sweep in an enormous share of ordinary transactions that are properly regulated by state

law. This Court should grant review to ensure that federal administrative agencies wield their enormous power within the bounds prescribed by Congress and the Constitution.

The Founders could never have envisioned the "vast and varied federal bureaucracy" that now exists. *Free Enter. Fund*, 561 U.S. at 499. Agencies "now wield[] vast power [that] touches almost every aspect of daily life," *id.*, and this expansion of agency power poses "a significant threat to individual liberty," *PHH Corp.*, 839 F.3d at 6. That threat may arise from any action taken by the "already titanic administrative state," *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J.). It is particularly acute in the context of agencies to which Congress has given "sweeping authority" over large segments of the U.S. economy. *CFTC v. Schor*, 478 U.S. 833, 836 (1986).

This is true of CFTC. Congress has created CFTC as an "independent agency of the United States Government," 7 U.S.C. § 2(a)(2)(A), part of what "is routinely described as the 'headless fourth branch of government,'" shielded in various ways from executive control. *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting). On its own, it can institute investigations, bring civil enforcement actions, seek massive civil penalties, and obtain injunctive relief. *See, e.g.*, 7 U.S.C. §§ 9, 9a, 13, 13a-1, 13b. In this very proceeding, CFTC has sought to enjoin Monex's leveraged commodity sales; unwind all of Monex's prior leveraged transactions; and impose in excess of *$290 million* in damages, penalties, and other monetary exactions that will permanently shut down Monex's business. C.A. E.R. 671-672.

What limits there are on the CFTC's power come from its authorizing statute, and the Constitution.

It "is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well." *City of Arlington*, 569 U.S. at 327 (Roberts, C.J., dissenting). This case calls for the Court to fulfill that obligation, because CFTC has stepped well beyond its proper role as defined by the statute and the Constitution. This Court has frequently reviewed the scope of agency authority, *see, e.g.*, *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *Brown & Williamson*, 529 U.S. 120; *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994), even without a clear disagreement among the circuits, *see, e.g.*, *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019); *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016); *Klein & Co. Futures, Inc. v. Bd. of Trade of the City of N.Y.*, 552 U.S. 1085 (2007); *Fox*, 567 U.S. 239.

This Court's review is also warranted to ensure that CFTC's unbridled interpretation of its anti-manipulation authority under 7 U.S.C. § 9(1) does not undermine fundamental principles of federalism. This Court has repeatedly recognized the importance of maintaining the Constitution's "system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Constitution's diffusion of power between the federal and state governments "is not merely an end unto itself," *Bond*, 572 U.S. at 863, but it serves to "reduce the risk of tyranny and abuse from either front." *Ashcroft*, 501 U.S. at 458. To preserve this structural protection, this Court has long been reluctant to interpret federal law in a

manner that would blur the "distinction between what is truly national and what is truly local," *United States v. Lopez*, 514 U.S. 549, 567-568 (2000), and "authorize[] … a stark intrusion into traditional state authority," *Bond*, 572 U.S. at 866.

The Ninth Circuit's expansive interpretation of § 9(1)'s anti-manipulation authority would make *any and all* fraud in connection with the sale of a commodity in interstate commerce a federal offense: a grocer who misrepresents the sweetness of corn would be subject to CFTC's jurisdiction. That interpretation "convert[s] an astonishing amount" of conduct normally regulated by state law "into a matter for federal enforcement." *Id.* at 863 (citation omitted). This is precisely the type of case this Court has previously considered meriting review. *See, e.g.*, *Bond*, 572 U.S. 844 (deciding whether the Treaty Power authorizes Congress to prohibit assault).

This Court should not delay vindicating these principles. CFTC has adopted an aggressive enforcement strategy against small businesses and individuals that will frustrate this Court's review of these issues in future cases. Since Dodd-Frank's enactment in 2010, CFTC has brought numerous civil enforcement actions against small businesses under § 9(1) to prosecute misrepresentations with no alleged connection to market manipulation. In these enforcement actions, CFTC has sought to have a receiver appointed to unwind thousands of transactions, assume control over the business, and even waive the defendant's attorney-client privilege. *See, e.g.*, *U.S. CFTC v. Hunter Wise Commodities, LLC*, 2013 WL 718503, at *3, *12-19 (S.D. Fla. Feb. 26, 2013), *aff'd,* 749 F.3d 967 (11th Cir. 2014). Many of these busi-

nesses lack the resources to mount a defense—or to even hire counsel. *See, e.g.*, *CFTC v. McDonnell*, 332 F. Supp. 3d 641, 651 (E.D.N.Y. 2018) (pro se defendant); *U.S. CFTC v. Trademasters, USA, LLC*, 2018 WL 3603019 (D. Nev. June 22, 2018) (same); *CFTC v. Dupont*, 2018 WL 3148532 (D.S.C. June 22, 2018) (same). As a result, there will be little opportunity for lower courts to further develop these issues, making this case an ideal vehicle for the Court to resolve these questions.

CFTC has taken the same aggressive approach in this enforcement action. On January 8—three weeks after the Ninth Circuit's mandate issued—CFTC renewed its motion for a preliminary injunction against Monex, asking the district court to enjoin Monex's leveraged commodity transactions and to appoint a monitor with authority to assume control over all funds and property in any way related to those transactions, to "[t]ake all steps necessary to secure the business and other premises under the control of Monex," and to take any other action the monitor deems necessary—"including the suspension of operations"—to preserve Monex's value. *See* Renewed Mot. for Preliminary Injunction 32-34, 36, No. 8:17-cv-01868 (C.D. Cal. Jan. 8, 2020), ECF 205-3. These actions would inflict irreparable damage on Monex's business and preclude any possibility for appellate review at a later stage. The magnitude of this $290 million enforcement action and the irreversible damage it will inflict on Monex—a family-owned business that has been operating for over three decades in plain sight—warrants this Court's review *now*. The Court should grant review—before it is too late.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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