No. 19-933

In the Supreme Court of the United States

MONEX DEPOSIT COMPANY, ET AL.,
Petitioners,

v.

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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February 19, 2020

QUESTION PRESENTED

This brief will address the second question presented in the Petition for Writ of Certiorari:

> 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.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been involved in numerous cases seeking to ensure that federal agencies do not overstep their lawfully delegated authority. Current MSLF litigation, such as *Solenex, LLC v. Bernhardt*, concerns similar issues of unexpected agency reversal of longstanding policy, and the decision below poses a direct threat to those interests. Because this case concerns important matters of due process and agency authority with profound ramifications for MSLF's clients and mission, MSLF respectfully submits this amicus curiae in support of Petitioners and urging this Court to grant certiorari.

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[1] Pursuant to Supreme Court Rule 37.2(a) and 37.3(a), notice of intent to file this brief and requests for consent were submitted February 11, 2020. Consent to file was received from all parties by February 13, 2020. The case was docketed January 24, 2020, with *amicus curiae* briefs due February 24, 2020, but Respondent waived their right to respond on February 10, 2020. Because of this waiver, Amicus was unable to submit requests for consent more than ten days prior to the date on which the Petition and supporting documents are distributed to this Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from a dispute over the proper interpretation of Dodd-Frank's regulation of commodity futures trading. For years, the Commodity Futures Trading Commission ("CFTC") officially, consistently, and explicitly stated that Monex's business model—selling precious metals to retail buyers on margin, using the purchased metals themselves as collateral on the loan—did not constitute futures trading and was thus outside the CFTC's jurisdiction, only to suddenly reverse course and declare Monex's operations illegal. Worse still, the CFTC chose to apply its punishment retroactively, bringing a $290 million enforcement action against Monex for actions the family-owned company took in reliance on the CFTC's previously stated position. The district court found in favor of Monex, holding that the CFTC clearly exceeded its statutory authority and that, even if it wasn't, Monex's actions were in no way fraudulent or manipulative in a way Dodd-Frank prohibits. The Ninth Circuit reversed, and now Monex is seeking this Court's review.

The retroactive enforcement of penalties against Monex for business activities long acknowledged and accepted by CFTC as lawful constituted an arbitrary and capricious violation of basic norms of due process. Prior notice reasonably informing the regulated of the conduct that is prohibited or required is a central

component of due process. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (describing notice and hearing as the "central meaning of procedural due process"); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 475 (1986) ("The Supreme Court has often stated that the core rights of due process are notice and hearing."). CFTC's sudden and unexpected reversal, in an enforcement action, of its interpretation of the statutory term "actual delivery" robbed Monex of any notice that their business activities may not be legal, a gross violation of Monex's due process rights. This is especially true in light of this Court's recent decision in *Kisor v. Wilkie*, which counsels that courts should not defer to agency interpretations of their own regulations when the provision in question is not truly ambiguous and when the interpretation does not appear to be the product of fair and considered judgement. 139 S.Ct. 2400, 2414 (2019).

ARGUMENT

REASONS FOR GRANTING THE PETITION

I. CFTC'S REVERSAL OF ITS LONG-HELD AND PUBLICLY-AFFIRMED INTERPRETATION OF THE TERM "ACTUAL DELIVERY" IN ORDER TO JUSTIFY THE RETROACTIVE ENFORCEMENT OF A $290 MILLION JUDGEMENT AGAINST MONEX IS A GROSS VIOLATION OF DUE PROCESS.

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). In fact, this is "the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). A free people cannot be bound to follow a law to which they have not been made aware, and this principle applies with even greater force when failure to follow such an unknowable law results in substantial penalty of some kind. CFTC's attempt to retroactively enforce a $290 million judgment against Monex for engaging in behavior CFTC had explicitly endorsed as legally compliant in the past violates this basic principle of due process.

A. The Law Disfavors Retroactivity

The D.C. Circuit Court of Appeals recently explained American law's hostility to retroactive application of laws by federal agencies thusly: "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."). *PHH Corp. v. CFPB*, 839 F.3d 1, 46 (D.C. Cir. 2016), *restated in relevant part*, 881 F.3d 75, 83 (D.C. Cir. 2018) (*en banc*). This aversion to retroactive application of law is absolutely fundamental to the American system of ordered liberty. *See Greene v. U.S.*, 376 U.S. 149, 160 (1964) ("the first rule of construction is that legislation must be considered as addressed to the future, not the past . . . (and) a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be . . . the manifest intention of

the legislature.") (internal quotation omitted); Glenda K. Harnad, *et al.*, *Presumption Against Retroactivity*, 82 C.J.S. Statutes § 583 (Feb. 2020) ("In the absence of anything in the statute to overcome it, the presumption is that a statute operates prospectively only.").

This Court has long held that the retroactive enforcement of penalties based on activities that were apparently legal at the time is unlawful. In *Greene*, the Department of Defense attempted to deny restitution to a wrongfully dismissed contractor based on 1960 regulations rather than the 1955 regulations in effect at the time of the incident. This Court refused to allow the retroactive application of the 1960 regulation, reasoning that it would be unfair to hold the contractor's complaint to standards that did not even exist at the time the complaint was filed. *Greene*, 376 U.S. at 160.

In *FCC*, the FCC imposed a forfeiture order against 44 broadcast stations for airing an episode of television that purportedly violated the FCC's indecency standards. The FCC had repeatedly stated, including through formal guidance, that isolated instances of vulgarity or nudity were not actionable, and had failed to take enforcement action under similar circumstances in the past. This history made it "apparent that the Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent; yet Fox and ABC were found to be in violation." *FCC*, 567 U.S. at 254. The Court held that the FCC had failed to provide adequate notice of what content was actionable, violating the broadcasters' due process rights. *Id.*

The facts in this case are analogous to those in *FCC*. In *FCC*, the government indicated—both via inaction and formal agency guidance—that fleeting expletives and nudity were not actionable before suddenly reversing and retroactively punishing such previously non-actionable content. Here, the government also repeatedly indicated—both through allowing Monex to operate under essentially the same, unchanged business model from 1987 to 2017, and during congressional testimony prior to the enactment of Dodd-Frank—that Monex's operations were perfectly legal. And just like in *FCC*, the government's reversal came without notice in the form of an enforcement action over activities that had previously been explicitly authorized.

B. CFTC's New Interpretation of "Actual Delivery" Represents an Abrupt and Inadequately Explained Departure from Agency Precedent.

"[A]n agency action which is supported by the required substantial evidence may in another regard be 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law'—for example, because it is an abrupt and unexplained departure from agency precedent." *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Federal Reserve*, 745 F.2d 677, 683 (D.C. Cir. 1984); *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010) ("Like a court, [n]ormally, an agency must adhere to its precedents in adjudicating cases before it. Thus, [a]n inexcusable departure from the essential requirement of reasoned decision making.") (internal quotation omitted). While federal agencies

may have some limited authority to revise their policies or their interpretations of operative statutes as factual and political realities change over time, basic principles of due process enshrined in the U.S. Constitution, the Administrative Procedure Act, and this Court's precedent, prohibit agencies from doing so in an arbitrary and capricious manner. An "abrupt," "eleventh-hour" about-face—wherein long-established agency precedent is thrown aside in a way that punishes those who relied on previous agency pronouncements—as happened here, cannot be allowed to stand. *See FCC*, 556 U.S. at 683; *Texas Oil & Gas Corp. v. Watt*, 683 F.2d 427, 431 (D.C. Cir. 1982) (holding that an agency's reinterpretation of its operative statute that constituted an "eleventh-hour" about-face from its prior interpretation is "owed no great degree of deference.").

CFTC spent years repeatedly and explicitly stating that Monex's business model did not constitute futures trading authorizing CFTC regulation under the Commodity Exchange Act ("CEA"). In 2009, when Congress was debating how to address futures contracts with no expected delivery of goods masquerading as ordinary spot contracts, Monex's business operations were discussed at length, and an attorney for Monex even testified before a House subcommittee alongside the acting director of enforcement for CFTC and the president of the National Futures Association ("NFA").[2] The chairman of the subcommittee stated that he "had a discussion [with Monex] about their operation," noted that "they

[2] The NFA is a commodity futures trading industry association with certain self-regulatory powers delegated to it by the CFTC.

sound like they are pretty straightforward," and confirmed that the NFA "wouldn't have a problem with what they do." *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. 21 (June 4, 2009). At another hearing, an NFA official stated that the proposed legislation "would not invalidate" a 1985 guidance letter from the CFTC "which Monex and other similar firms currently 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). The guidance letter explained that transactions like those Monex engages in were not futures contracts because they "require payment and transfer of ownership of the precious metals to occur." *Id*. at 2.

It was only in 2014 that CFTC first publicly reinterpreted "actual delivery" to exclude the deposit of precious metals in an independent depository (Monex's primary method of delivery). Notably, this reversal was not the product of reasoned decision-making and notice-and-comment rulemaking, but occurred in the context of an enforcement action. *See CFTC v. Worth Grp., Inc*., 2014 WL 11350233, at *1 (S.D. Fla. Oct. 27, 2014). This enforcement action against Worth Group, purportedly based on dicta in an Eleventh Circuit opinion, *U.S. CFTC v. Hunter Wise Commodities, LLC*, 749 F.3d 967 (11th Cir. 2014), was the only indication prior to CFTC's $290 million enforcement action against Monex that CFTC's long-standing interpretation of the statutory

language had changed.[3] Such announcements of interpretive changes, made "for the first time in an enforcement proceeding" are disfavored. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012).

This Court has repeatedly refused to allow agencies to hold regulated parties liable for activities that the agencies themselves have consistently held to be authorized. In *SmithKline Beecham*, this 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 the Department's "very lengthy period" of "conspicuous inaction" against the conduct it now said was unlawful. 567 U.S. at 158–59. Earlier, in *Raley v. Ohio*, this Court held that a state could not punish a citizen for declining to answer questions at a hearing after government officials repeatedly assured him that he was under no legal obligation to respond. Doing so "would be to sanction the most indefensible sort of entrapment by the State." 360 U.S. 423, 425–26 (1959). And in *Smiley v. Citibank (S. Dakota), N.A.*, this Court held that—while the particular facts of the case indicated that the relied-upon statements were not the official statements of the agency—a change in an agency's long-held position "that does not take account of legitimate reliance on" the agency's prior expressed position may constitute arbitrary and capricious conduct. 517 U.S. 735, 742 (1996). This is further supported by general equitable principles. *See Dickerson v. Colgrove*, 100 U.S. 578, 580–81 (1879)

[3] CFTC did issue a proposed interpretive rule to that effect, but not until after it had instituted this enforcement action against Monex. *See* 82 Fed. Reg. 60,335, 60,335 (Dec. 20, 2017).

(discussing principle that "he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.").

Here, Monex operated for years in reliance upon CFTC's established interpretation of "actual delivery," operating under the reasonable assumption that CFTC would conduct itself honestly and in good faith. The agency's sudden reversal of its interpretation was a sucker punch aimed at Monex that violates basic principles of due process.

II. *KISOR V. WILKIE* FURTHER UNDERMINES JUSTIFICATIONS FOR AGENCY DEFERENCE IN THIS CASE

Finally, while this case concerns CFTC's reinterpretation of statutory language rather than its own regulations, this Court's recent decision in *Kisor v. Wilkie* indicates that CFTC's new interpretation of "actual delivery" is not entitled to deference. *See* 139 S.Ct. 2400, 2415–16 (2019) (analogizing new, stricter *Auer* analysis to *Chevron* analysis).

As discussed *supra*, deference is inappropriate in contexts where an agency change of interpretation represents an abrupt and unexplained or under explained departure from agency precedent. *See, e.g., Raley*, 360 U.S. at 425–26; *FCC*, 567 U.S. at 254; *Ass'n of Data Processing Service Orgs.*, 745 F.2d at 683; *Texas Oil*, 683 F.2d at 431. Deference is similarly inappropriate here, particularly in light of this Court's recent guidance on the subject.

First, this Court held in *Kisor* that, in order for courts to defer to agency interpretations of ambiguities in regulatory language, the language must be *actually* ambiguous—not merely difficult or dense—"even after a court has resorted to all the standard tools of interpretation." 139 S.Ct. at 2414; *see also Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (deference under circumstances where there is only one reasonable construction of a regulation would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

As Monex explained at length in its Answering Brief before the Ninth Circuit below, the meaning of "actual delivery" is not ambiguous. Defendants-Appellees' Answering Brief at 10–26, *Monex Credit Co. v. CFTC*, 931 F.3d 966 (9th Cir. 2018) (No. 18-55815). Absent an explicit definition of "actual delivery" within the statutory text, a court first looks to the plain meaning of the words. Nothing within the standard legal definitions of "actual" or "delivery" as found in Black's Law Dictionary implies that the buyer must physically possess the commodities they purchase. *Id.* at 10–11. In fact, the storing of commodities in an independent repository is a normal attribute of exactly the sort of leveraged transactions Congress explicitly included the actual delivery exception to protect. *Id.* at 11. As the district court found, under CFTC's interpretation, practically "every financed transaction would violate Dodd-Frank." *Id.* at 12. Perhaps even more damning for CFTC's position, the legislative and regulatory context of the CEA and Dodd-Frank clearly militate in favor of Monex's (and CFTC's original) interpretation of

"actual delivery." CFTC has issued two formal interpretations—one in 1985 and one in 2011—which both stated that leveraged metals transactions resulting in prompt delivery to third-party depositories would not be subject to CFTC jurisdiction. CFTC, Office of the General Counsel, Interpretive Letter No. 85-2 (Aug. 6, 1985), https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/85-02.pdf; 78 Fed. Reg. 52,426 (Aug. 23, 2013). And, as previously discussed, *supra*, the application of Dodd-Frank to Monex was directly addressed during congressional debates.

Further, this Court elaborated in *Kisor* that an agency interpretation deserves deference only when it reflects the "agency's authoritative, expertise-based, 'fair[, or] considered judgment." *Id.* at 2414. This means that "agency interpretations advanced for the first time in legal briefs" should, in general, not receive deference, and that "a court may not defer to a new interpretation, whether or not introduced in litigation, that creates 'unfair surprise' to regulated parties." *Id*. at 2417–18 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007)).

Particularly relevant to the case at hand, this Court recently "refused to defer to an agency interpretation of its regulation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed." *Id*. at 2418; *SmithKline Beecham*, 567 U.S. at 155–56. The Court reiterated the point made in *SmithKline Beecham* that an unexpected new interpretation may be unlawful if preceded by a long silence. Here, CFTC is not merely announcing a new

policy for the first time where before it had remained silent; it is directly contradicting previous long-standing statements, including those made under oath before Congress.

Just as in *Kisor*, *SmithKline*, and other cases, deference to the CFTC is misplaced here because the term "actual delivery" in the regulations is not truly ambiguous and because evidence indicates that CFTC's eleventh-hour reinterpretation was not the product of fair or considered judgment.

* * *

Upholding CFTC's interpretation, and therefore allowing CFTC's unjust $290 million enforcement action against Monex to stand, would be a grave violation of the bedrock principle that the laws under which a free society acts must give fair notice of what conduct is forbidden and what conduct is required. This is, after all, "the first essential of due process of law." *Connally*, 269 U.S. at 391.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

DATED: February 19, 2020

Respectfully submitted,

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