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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The Rule 29.6 statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

CFTC's $290 million enforcement action against Monex is part of its aggressive strategy to assert power over small businesses that Congress never gave it, by expansively reading authority to regulate futures trading as authority to regulate nearly everything. And the agency is implementing this strategy in dramatic fashion.

After filing a case, CFTC regularly seeks an immediate receivership order—letting it take over the company's operations, unwind its transactions, waive its attorney-client privilege, and distribute its assets. And many of these cases are brought against individuals and small businesses that cannot fight back effectively. This is one of the few cases in which CFTC's power grab could be tested by this Court, because the district court agreed with Monex that CFTC had exceeded its statutory authority and denied CFTC's preliminary-injunction motion.

The agency argues mainly that its position is right, and secondarily that the Court should let the issue percolate longer—but given the agency's aggressive efforts to drain its targets dry, there may not be a drop left to percolate.

I. CFTC's Asserted Authority To Police Fraud In All Commodity Sales Warrants This Court's Review.

A. CFTC opposes certiorari primarily on the ground that it does, in fact, have authority to police fraud in retail commodity transactions, disconnected from any market manipulation. Opp. 11-18. Indeed, it hints that its view of its authority may be even

broader than the Ninth Circuit's. These arguments are misplaced.

1. The agency relies heavily on the repeated assertion that 7 U.S.C. § 9(1) *cannot* be read to focus on fraudulent manipulation, and that the statute is so "unambiguous" that no interpretive tools (such as the canon against surplusage and the rule of lenity) are relevant. Opp. 12, 15, 16, 18. That contention is remarkable given that *CFTC itself* publicly took the position at the beginning of the rulemaking process that "in this context fraud is a term of art" that is "not associated with all common law element[s] of fraud" but rather "mean[s] any conduct that impairs, obstructs, or defeats a well-functioning market or the integrity of the market." CFTC Public Meeting Tr. 108-109 (Oct. 26, 2010) ("10/26/2010 Meeting Tr.") (CFTC Associate General Counsel Mark Higgins)[1]; *see also id.* at 98 (Chairman Gensler) (new § 9(1) authority is the power "to police for fraud-based manipulation").

The agency *now* contends (without explanation) that "manipulative or deceptive" cannot possibly be read as a doublet. But the terms substantially overlap: "manipulate" and "manipulative" are regularly defined to include an element of deceit or fraud. *E.g.*, Concise Oxford English Dictionary 869 (12th ed. 2011) ("alter or present (data) so as to mislead"); Merriam-Webster Dictionary 301 (2019) ("to influence esp. with intent to deceive"). As the petition showed (at 24-25), the Commodity Exchange Act (CEA) is replete with doublets joined by "or," and it

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[1] https://www.cftc.gov/idc/groups/public/@swaps/documents/dfsubmission/dfsubmission29_102610-transcri.pdf.

is context that determines just how disjunctive "or" really is in any one provision.

2. The most crucial contextual indication that Congress did not give CFTC *general* anti-deceit authority is the care with which Congress gave it *specific* anti-deceit authority. Despite its quibbling, the agency never disputes that its position creates surplusage: "to cheat or defraud or attempt to cheat or defraud" in connection with commodity futures transactions is separately unlawful. 7 U.S.C. § 6b(a)(2)(A); *see* Opp. 16 (acknowledging this as an "anti-fraud provision"). CFTC tries to rescue from redundancy another antifraud provision that applies only to registrants, claiming that it is broader than § 9(1). Opp. 16-17. But CFTC's own regulations interpret § 9(1) to have *verbatim* the same meaning as that supposedly "broader" provision applying only to registrants. *Compare* 7 U.S.C. § 6*o*(1) *with* 17 C.F.R. § 180.1(a)(3).[2]

The agency tries to turn the surplusage canon to its own advantage by arguing that it would be nonsensical for § 9(1) to refer to "manipulation alone" given other provisions addressing "manipulative device[s]" and language in § 9(1) regarding disclosures.

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[2] The agency's attempts to save other provisions from surplusage are similarly misplaced. As just one example, the agency asserts that § 6b(a)(2)(D), (c), and (d) "address practices that are not necessarily fraudulent." Opp. 16. But § 6b(a)(2)(D), which prohibits conducting transactions in a way contrary to one's representations to the customer, plainly falls within the government's interpretation of § 9(1). And § 6b(c) and (d) are statutory *exemptions*, not prohibitions.

Opp. 13.[3] But Monex has never argued that § 9(1) *excludes* fraud or deceit. Rather, it addresses *fraudulent manipulation*. *E.g.*, Pet. 5-6; *supra* pp. 2-3. Conversely, § 9(3), titled "Other manipulation," addresses manipulation *not* involving fraud—another provision CFTC's interpretation would render superfluous.

3. Next, the agency argues that this Court should ignore the words Congress chose in *four separate headings* on the theory that Congress often does not choose its headings carefully. Opp. 15-16. The agency cites some higher-level headings that do not describe each sub-provision. But nearly all the supposedly discordant sub-provisions it cites actually have their own distinct sub-headings. Section 2, for example, *does* contain a subsection clearly labeled "Liability of principal for act of agent." 7 U.S.C. § 2(a)(1)(B).

By contrast, here Congress indicated repeatedly, consistent with the legislative history, that it was amending the CEA's existing anti-manipulation provision, 7 U.S.C. § 9 (2006), to give CFTC enhanced anti-manipulation authority, not authority over stand-alone fraud. That is why it labeled Section 753 of Dodd-Frank, § 9, § 9(1), *and* § 9(1)(A) to refer only to *manipulation*. The agency may be right that top-

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[3] Section 9(1)'s reference to disclosures memorializes CFTC's long-advocated position that, unlike the securities laws, the CEA does not prohibit insider trading by corporate officers. *See* 10/26/2010 Meeting Tr. 97, 114; Andrew Verstein, *Insider Trading in Commodities Markets*, 102 Va. L. Rev. 447, 462-463 (2016). But CFTC has recently abandoned even this limitation. *E.g.*, *CFTC v. EOX Holdings L.L.C.*, 405 F. Supp. 3d 697, 709-712 (S.D. Tex. 2019) (insider-trading enforcement action).

level titles sometimes omit peripheral sub-provisions, but the authority the agency is claiming is not peripheral. If it existed, it would be a centerpiece, yet Congress never mentioned it.

4. The agency ignores most of the history of the statute, Pet. 4-5, 20-21, and focuses on one tidbit: § 9(1)'s "manipulative or deceptive" language was taken from the Securities Exchange Act. Opp. 13-14. But the agency all but ignores the reason Congress did so, which did not concern fraud.

Where the Securities Exchange Act was mentioned, members of Congress made clear they were using that language to ensure that its lower scienter standard would apply in CFTC's anti-manipulation cases. Pet. 4-5, 20-21. There was *no* mention of giving CFTC authority to police fraud in retail transactions. This Court has repeatedly held that different contexts can give the same language different meanings. *E.g.*, *District of Columbia v. Carter*, 409 U.S. 418, 421 (1973). That recognition has particular force here given that SEC's authority is limited to securities, while CFTC's covers virtually every good sold in commerce. *See infra* p. 6. Where "the scope of the legislative power exercised in one case is broader than that exercised in another," a careful analysis of "the circumstances under which the language was employed" is necessary. *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). Those circumstances refute the agency's claim to broad new anti-fraud power.

5. The agency's response to the federalism canon is no response at all. It argues that *this case* involves interstate transactions, even though its argument depends on reading *the statute* to extend to purely

local transactions. And it argues that nothing in interstate commerce is really local. Opp. 17. Some federal laws expressly target fraud *in specific aspects* of interstate commerce, but basic retail fraud, even in commodities, remains a traditional subject of state regulation. Pet. 23-24; *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000).

6. Finally, the agency leans on *Chevron* (a rarity nowadays). But interpretive canons come before *Chevron*. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019); NCLA Br. 18-20. Moreover, CFTC contends that the statute is unambiguous—even though it previously read the statute differently—not that it is resolving ambiguity in an expert way. Judge-made deference doctrines are particularly hard to justify when agencies interpret their own authority, because deference encourages agency aggrandizement. NCLA Br. 9-17. If anything, the agency's resort to *Chevron*, even though the case for deference is weakest in this context, underscores the need for this Court's review.

B. The agency contests the importance of this issue by downplaying the breadth of CFTC's power as "not encompass[ing] every good sold in commerce." Opp. 19. Okay, not *every* good: the CEA excludes "onions" and "motion picture box office receipts" from the definition of "commodity"—but "all other goods and articles" are included. 7 U.S.C. § 1a(9). If "everything but the onions" is self-restraint by agency standards, shed a tear for federalism.

The agency nods at, but carefully does not endorse, the Ninth Circuit's suggestion that there is no need for alarm because § 9(1) might extend only to "leveraged" retail commodities transactions—an in-

vented limitation lacking any textual support. Pet. App. 22a-23a. The agency will not even concede *that* limitation on its authority: it just says that non-leveraged commodities were "not … before" the court. Opp. 19. Neither were peanuts or eggs, *see* Pet. 8, but the agency's theory plainly reaches every transaction in those commodities as well. The agency's equivocal nod to the Ninth Circuit's atextual limitation, seeking to reassure this Court that its power grab is not *that* extreme, confirms the need for certiorari.

Even though the agency is "focus[ing]" on enforcement actions like this one, Opp. 19, the agency contends that the Court can wait to grant review in a different case, because *not every* defendant lacks the resources to defend itself. Opp. 19-20. But even the agency's cherry-picked cases do not support it. In *CFTC v. Powderly*, supposedly an example of a § 9(1) case involving "vigorous defenses" "mount[ed]" by "sophisticated counsel," the defendant appeared pro se for a year until the court appointed counsel—who simply entered into a consent order. No. 17-cv-3262 (N.D. Ill.), ECF Nos. 32, 40. In *CFTC v. Slemmer*, the defendants likewise just entered into a consent order. No. 16-cv-80867 (S.D. Fla.), ECF No. 31. And the agency's other two examples did not involve non-manipulative fraud. *CFTC v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1334 (11th Cir. 2018) ("the fraud alleged involves a manipulation of stock price"); *CFTC v. EOX Holdings L.L.C.*, 405 F. Supp. 3d 697, 709-712 (S.D. Tex. 2019) (insider-trading claims).

This case is an excellent vehicle, and CFTC has defended its power grab primarily on the merits. If

the Court does not rein it in now, it may not have another opportunity.

II. CFTC's Blatant Due Process Violation Warrants This Court's Review.

CFTC does not dispute that the Due Process Clause prohibits retroactively applying a new interpretation of law to past conduct, or that an agency's violation of this constitutional protection is sufficiently important to warrant certiorari. *See* Pet. 27-29; MSLF Br. 4-6. Instead, CFTC argues that it has maintained the same interpretation of "actual delivery" all along. That is astonishing. For one thing, it is contradicted by CFTC's own on-the-record statements in other proceedings. Pet. 14-15. While the agency now says those proceedings involved "a different business," Opp. 25 n.3, it does not dispute that its interpretation involved "transfer[ring] title to metals physically stored at an independent depository"—as here. Pet. 14 (citation omitted). The agency suggests that it merely clarified its view. Opp. 25 n.3. But as one court that watched the switcheroo first-hand expressly stated, CFTC "reversed its position with regard to the [actual] delivery issue." *CFTC v. Worth Grp., Inc.*, 2014 WL 11350233, at *3 (S.D. Fla. Oct. 27, 2014).

CFTC's statements were not just made in court; officials from CFTC *and* National Futures Association (NFA) represented to Congress that extending the CEA to retail commodity sales would not affect Monex. Pet. 11-12. The agency does not try to reconcile those statements with its current position; instead, it asks the Court to disregard them because no legislation had been drafted and "nobody discussed the

meaning of 'actual delivery.'" Opp. 24. That is incorrect: CFTC and NFA officials spoke at length about the types of transactions they sought to prohibit *and specifically identified Monex* as a company that "would not [be] affect[ed]" because it makes "actual delivery." *Hearing to Review Implications of the* CFTC v. Zelener *Case: Hearing Before the Subcomm. on Gen. Farm Commodities & Risk Mgmt. of the H. Comm. on Agric.*, 111th Cong. 21, 23, 26 (June 4, 2009) ("*Zelener* Hearing"); *accord* Pet. 11-12. It was already clear that "actual delivery" was and would continue to be the statutory phrase: a year before, Congress had extended the CEA to foreign-currency contracts, while exempting contracts "result[ing] in actual delivery." 7 U.S.C. § 2(c)(2)(C)(i)(II)(bb)(AA); *see* Pet. 8. The only issue being considered at these hearings was whether Congress should extend the CEA to retail commodity transactions in the same way, using the same statutory phrase. *See Zelener* Hearing 10, 21. Monex was entitled to rely on those officials' assurances that its business would not be affected. *See Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 629 (D.C. Cir. 2000) (regulated entity entitled to rely on agency statements regarding an earlier-enacted provision with "virtually identical" language).

That CFTC originally interpreted actual delivery to encompass Monex's business disposes of the agency's assertion (at 20-21) that the statute or CFTC's 2013 interpretive rule should have raised "serious question[s]" regarding Monex's form of delivery. But even taken on its own terms, CFTC's reinterpretation of the 2013 rule is wrong. The agency lists (at 21) a number of features of Monex's delivery method it believes are incompatible with the 2013 rule and

claims (at 25) that they render Monex's delivery a "sham." But it ignores that the features CFTC now alleges to be "sham" are *inherent* in the delivery method endorsed by Example 2 of the 2013 rule, which says that delivering metals to an independent depository in "fungible bulk form" as part of a financed purchase *is* actual delivery, 78 Fed. Reg. 52,426, 52,428 (Aug. 23, 2013)—even if the metals are "already physically located" there, *id.* at 52,427. What CFTC now calls "a book entry" (Opp. 21) is exactly the "transfer[of] title," identifying "the specific … depository … with possession of the commodity," that CFTC's guidance demanded. 78 Fed. Reg. at 52,428.

Finally, the agency claims (at 21-22) that the Eleventh Circuit's decision in *CFTC v. Hunter Wise Commodities, LLC*, 749 F.3d 967 (2014) and its own investigation of Monex constitute notice that Monex's delivery method was unlawful. But neither *Hunter Wise* nor CFTC's investigation suggested that CFTC was abandoning its prior interpretation. Hunter Wise, unlike Monex, *did not own* the metals it purported to sell. *Id.* at 979-980. *Hunter Wise* never addressed whether delivery to an independent depository in a leveraged transaction qualifies.

The agency cites a single circuit decision for the proposition that merely being investigated can constitute fair notice. Opp. 22. But no authority suggests that an investigation can self-justify where it rests on an interpretation *that contradicts the agency's public position*. That is why *the same circuit* subsequently held that an investigation and subsequent penalty by the CFPB violated due process: the regulated business had reasonably relied on agency

interpretations. *PHH Corp. v. CFPB*, 839 F.3d 1, 46-50 (D.C. Cir. 2016) (Kavanaugh, J.), *reinstated in relevant part*, 881 F.3d 75, 83 (D.C. Cir. 2018) (en banc). Then-Judge Kavanaugh was right: trying to punish conduct undertaken in reliance on the agency's own public position violates "Rule of Law 101." *Id.* at 48.

III. This Case Is An Excellent Vehicle, And Delay Will Frustrate The Court's Ability To Decide These Important Issues.

The Court should grant review while it still can. The agency does not contest that it is aggressively seeking an injunction that would prohibit Monex from entering into any leveraged or financed transactions with customers, and the appointment of a monitor with authority to seize control of Monex's entire operations. Pet. 36. The agency nonetheless suggests (at 20, 26-27) that further proceedings and more "percolation" are needed. But CFTC's aggressive enforcement strategy is geared to prevent the issue from returning to this Court. Reversal would end this matter. The Court should put a stop to CFTC's overreach *now*, rather than allow it to continue running rampant.

The agency wrongly argues (at 27) that Monex's discovery request in the district-court proceedings renders review premature. Monex has sought discovery on whether CFTC permitted Worth Group to continue operating using Monex's depository delivery method. ECF 220, at 7. That information—though relevant to whether CFTC is consistently applying its new interpretation—is not "necessary" for the due process claim presented in the petition, which is

based on established due process law and CFTC's public statements and guidance.

Nor is the actual-delivery exception's status as an affirmative defense a barrier. Opp. 26-27. The Court need not decide which of CFTC's competing interpretations of actual delivery is correct to resolve Monex's due process claim; it need only decide that CFTC has retroactively applied a new interpretation of law.[4]

Confronted with this same agency flip-flop, the *Worth* court found a due process violation and refused to allow CFTC to assert the same interpretation of actual delivery the Ninth Circuit reached and the agency defends. 2014 WL 11350233, at *3. That the Ninth Circuit refused to face the due-process implications of its interpretation is no reason to deny review. With or without reasoning, the decision is the same: it allows the agency to pursue the same theory of retroactive liability that the *Worth* court barred. This Court should put a stop to it before it is too late.

[4] Regardless of the posture, the Ninth Circuit decided the actual-delivery issue, and the correctness of its interpretation is within the question presented. Pet. i.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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