No. 22-332

In the Supreme Court of the United States

TERRAFORM LABS PTE LTD., ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Rules of Practice of the Securities and Exchange Commission permit subpoenas to be hand-served on a subpoenaed party when that party's counsel has not filed a notice of appearance or agreed to accept service on the party's behalf.

2. Whether the court of appeals correctly held that the district court had specific personal jurisdiction over Terraform Labs Pte, Ltd. (Terraform), based on Terraform's purposeful and extensive U.S. contacts related to the conduct under investigation.

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OPINIONS BELOW

The summary order of the court of appeals (Pet. App. 1a-11a) is not published in the Federal Reporter but is available at 2022 WL 2066414. The oral order of the district court (Pet. App. 43a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2022. On August 25, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including October 6, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As part of a formal investigation of possible violations of the securities laws, the Division of Enforcement (Enforcement) of the Securities and Exchange

Commission (SEC or Commission) issued investigative subpoenas to petitioners Terraform Labs Pte, Ltd. (Terraform) and Do Kwon, Terraform's CEO. The district court granted the Commission's application to enforce the subpoenas, Pet. App. 43a-46a, and the court of appeals affirmed, *id.* at 1a-11a.

1. Terraform is a Singapore-incorporated technology company. C.A. App. A58-A59 ¶ 4. In 2020, it launched a blockchain-based protocol, known as the Mirror Protocol, through which users could create digital assets intended to mirror the price of securities traded on U.S. exchanges. *Id.* at A59 ¶ 6; *id.* at A61 ¶ 9. The digital assets, known as Mirrored Assets or "mAssets," could then be traded by investors through Terraform's website and web application. *Id.* at A60 ¶ 7. "According to Terraform's web application, the total value of mAssets outstanding under the Mirror Protocol [wa]s more than $437 million, as of November 8, 2021." *Ibid.*

The Mirror Protocol also allowed users to obtain "MIR tokens," another type of digital asset that Terraform described as the Mirror Protocol's "governance token." C.A. App. A60 ¶ 8. MIR tokens received value based upon, among other things, fees generated under the Mirror Protocol. *Ibid.* Investors acquired MIR tokens through several means, including by contract with Terraform and by purchasing tokens in the secondary trading market via various digital-asset trading platforms. *Id.* at A60-A61 ¶¶ 8-9. Neither Terraform itself, nor the mAssets and MIR tokens, nor any offers or sales of the mAssets and MIR tokens have been registered with the SEC in any capacity. *Id.* at A61 ¶ 11.

2. On May 7, 2021, the Commission issued a formal order of investigation authorizing Enforcement to

investigate whether any person or entity (including Kwon or Terraform) had violated federal securities laws in connection with the Mirror Protocol or by creating, promoting, and offering to sell mAssets and MIR tokens to U.S. investors. C.A. App. A62 ¶ 12.

In July 2021, as part of that investigation, Enforcement staff sought a voluntary production of documents from petitioners. C.A. App. A64 ¶ 16. Over the next several months, attorneys at Dentons LLP (Dentons) communicated with Enforcement staff on behalf of petitioners. *Id.* at A62-A67 ¶¶ 13-23. Ultimately, however, Terraform did "not produce[] any documents in response to the SEC's document request," *id.* at A67 ¶ 23, instead suggesting that Enforcement staff could obtain any necessary information about the Mirror Protocol and Terraform's operations from publicly available materials.[1]

Unable to obtain the necessary materials through voluntary cooperation, Enforcement staff prepared subpoenas for testimony (to Kwon) and for documents (to both Kwon and Terraform). C.A. App. A68 ¶ 29. On September 20, 2021, a third-party process server hired by the SEC hand-served the subpoenas on Kwon in New York City, where Kwon was a speaker at a digital-asset and blockchain conference. *Id.* at A67-A68 ¶¶ 26-29; *id.* at A69 ¶ 32. That same day, Enforcement staff also emailed the subpoenas to the attorneys at Dentons who had been communicating with the Commission on petitioners' behalf. *Id.* at A69 ¶ 32.

3. In November 2021, after determining that petitioners did not intend to comply with the subpoenas, the

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[1] Petitioners identify no record support for their assertion (Pet. 3) that they "voluntarily produc[ed] numerous requested documents to the SEC."

SEC sought a district court order requiring compliance. See D. Ct. Doc. 1 (Nov. 12, 2021). The district court granted the Commission's application in an oral ruling made after briefing and argument. Pet. App. 43a-48a.

The district court first determined that the SEC had properly served the subpoenas. The court rejected petitioners' argument that Rule 150(b) of the SEC's Rules of Practice barred the Commission from serving the subpoenas on Kwon personally. Pet. App. 44a; see 17 C.F.R. 201.150(b). That rule provides that, "[w]henever service is required to be made upon a person represented by counsel *who has filed a notice of appearance pursuant to § 201.102,* service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Commission or the hearing officer." 17 C.F.R. 201.150(b) (emphasis added). Here, Dentons had not filed a notice of appearance on behalf of petitioners or otherwise agreed to accept service on their behalf. See Pet. App. 14a. The court determined that Rule 150's provision requiring service on counsel under specified circumstances therefore was inapplicable "by its terms." *Id.* at 44a.

The district court also determined that it had personal jurisdiction over petitioners enabling the court to require compliance with the subpoenas. Pet. App. 44a-46a. The court held that it "d[id]n't need to decide the general jurisdiction question because [it] f[ou]nd that there [wa]s specific personal jurisdiction with respect to both Kwon and Terraform Labs." *Id.* at 44a. In support of that determination, the court found that petitioners had "purposely availed themselves of the privilege of doing business in the United States in several respects that are directly causally connected to the basis for the

subpoena at issue here," and it identified seven different contacts with the United States that supported the exercise of jurisdiction. *Ibid.* Those contacts included extensive promotion of the relevant digital assets in the United States through various media; contractual arrangements with various U.S. entities, including for the listing of MIR tokens on a U.S. exchange; having employees (including Terraform's general counsel) in the United States; and offering to U.S. customers mAssets that mimic U.S. stocks. *Id.* at 45a.

4. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-11a.

With respect to service, the court of appeals found it "clear that the SEC could serve the corporate entity Terraform through Kwon, the company's chief executive officer and authorized agent." Pet. App. 5a. Accordingly, on appeal "the sole issue" concerning "the SEC's compliance with the Rules" was "the method of service." *Ibid.* The court of appeals agreed with the district court that, "because [Dentons] never provided an address for service, [petitioners] cannot now claim that their counsel filed a notice of appearance that would make hand-service on Kwon improper under" Rule 150 of the Commission's Rules of Practice. Pet. App. 7a. The court further explained that, "even assuming [petitioners'] counsel should have been served, the subpoena copies sent via email to [petitioners'] counsel constituted proper service under Rule 150(c)," which allows electronic service on counsel who have filed a notice of appearance. *Ibid.*; see 17 C.F.R. 201.150(c).

The court of appeals also affirmed the district court's determination that it had "specific personal jurisdiction" over petitioners. Pet. App. 9a; see *id.* at 8a-11a. Pointing to the numerous case-specific contacts with the

United States that the district court had identified, the court of appeals held that petitioners had "purposefully availed themselves of the U.S. by promoting the digital assets at issue in the SEC's investigation to U.S-based consumers and investors"; by employing "U.S.-based employees, including a Director of Special Projects that has promoted these digital assets in the U.S."; and by "enter[ing] into agreements with U.S.-based entities to facilitate the trade of these same digital assets, including a $200,000 deal with one U.S.-based trading platform." *Id.* at 9a. In light of those connections to the United States, the court held that "exercise of jurisdiction was reasonable and would not 'offend traditional notions of fair play or substantial justice.'" *Id.* at 10a (citation omitted).

ARGUMENT

The court of appeals correctly held that direct service of the subpoenas on Kwon was permissible under Rule 150 of the Commission's Rules of Practice (Pet. App. 3a-8a), and that petitioners' extensive contacts with the United States in connection with the subject matter of the Commission's investigation made it constitutionally appropriate for the district court to exercise specific personal jurisdiction in this case (*id.* at 8a-11a). Those narrow, case-specific determinations do not implicate any division of authority in the courts of appeals or otherwise warrant this Court's review. Petitioners instead largely focus (Pet. 14-24) on whether the SEC's service of the subpoena on Kwon in the United States allowed the district court to exercise *general* personal jurisdiction based on a theory of corporate "tag" jurisdiction. But the courts below did not rely on that theory, and it accordingly is not implicated here. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that personal service of the subpoenas was consistent with the SEC's Rules of Practice. Pet. App. 3a-8a.

a. Rule 150(d) of the Commission's Rules of Practice states that ordinarily, "service * * * of an investigative subpoena * * * may be made by delivering a copy of the filing." 17 C.F.R. 201.150(d). "Delivery" includes "handing a copy to the person required to be served" or "[s]ending the papers through a commercial courier service or express delivery service." 17 C.F.R. 201.150(d)(1) and (3) (emphasis omitted). A separate provision addresses circumstances in which "service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to [17 C.F.R.] 201.102." 17 C.F.R. 201.150(b). In those circumstances, "service shall be made * * * upon counsel" through electronic transmission, "unless service upon the person is ordered by the Commission or the hearing officer." *Ibid.*; see 17 C.F.R. 201.150(c).

Petitioners "do not maintain that" their attorneys "filed a formal notice of appearance" under 17 C.F.R. 201.102. Pet. App. 7a. By its plain terms, therefore, Rule 150(b) did not require the SEC to make service upon petitioners' attorneys. Enforcement staff could instead accomplish service directly by "handing a copy to the person required to be served" or "[s]ending the papers through a commercial courier service or express delivery service." 17 C.F.R. 201.150(d)(1) and (3). Enforcement staff appropriately effected service by arranging for hand-delivery of the subpoenas to Kwon, Terraform's CEO, by a third-party process server. C.A. App. A67-A68 ¶¶ 26-29; *id.* at A69 ¶ 32. And while the Rules did not require service on petitioners' counsel, Enforcement staff also emailed the subpoenas to

petitioners' attorneys, thereby ensuring that counsel had prompt notice, and electronic copies, of the subpoenas. *Id.* at A69 ¶ 32.

b. Petitioners contend (Pet. 25-29) that the Commission failed to accomplish proper service of the subpoenas. Those arguments lack merit.

i. Petitioners contend (Pet. 25-27) that their attorneys' interactions with Enforcement staff were sufficient, as a practical matter, to constitute an "appear[ance] before the SEC" on behalf of petitioners. Pet. 26. Under Rule 150(b), however, the SEC's obligation to serve a represented party through counsel does not turn on a functional inquiry into the extent of counsel's representational activities. Instead, the Rule adopts an easily administrable bright-line standard under which the Commission must make service upon a party's attorney only where the attorney "has filed a notice of appearance pursuant to [17 C.F.R.] 201.102." 17 C.F.R. 201.150(b). Petitioners' counsel did not file such a notice here.

Even if Rule 150(b) contemplated a functional inquiry of the sort petitioners advocate, moreover, the court of appeals correctly determined that petitioners' attorneys had not provided all of the information necessary to enter an appearance. Pet. App. 6a-7a. The provision to which Rule 150(b) refers is entitled "Designation of address *for service*; notice of appearance; power of attorney; withdrawal." 17 C.F.R. 201.102(d) (emphasis altered). In light of that title and the context and purpose of the provision, its requirement that counsel supply a "business address" and "email address" in the notice of appearance is therefore best understood to require counsel to supply an address at which service can be accomplished. See Pet. App. 6a. In the proceedings

below, however, petitioners "conceded that counsel was not authorized to accept service at the time Kwon was served or at any time thereafter." *Id.* at 7a. Petitioners' attorneys therefore could not, and did not, provide a business address at which they could be served on petitioners' behalf. *Ibid.*

Petitioners argue (Pet. 28-29) that the court of appeals' reliance on the heading of Rule 102(d), 17 C.F.R. 201.102(d), was improper, and that the text of that Rule does not specifically provide that counsel must agree to accept service on the client's behalf when entering a notice of appearance. But "the title of a statute or section can aid in resolving an ambiguity in the * * * text," *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991), and the court below did not treat the title of Rule 102(d) as superseding the Rule's own terms. Rather, the court viewed the text and context of Rule 102(d) as making clear that the required addresses are ones at which service can be made. Pet. App. 6a. Petitioners' alternative understanding "is contrary to the text and would produce absurd results by allowing a party to insist on service through counsel, but allow the party to block said service by not authorizing their counsel to receive any filings." *Ibid.*

ii. Petitioners additionally contend (Pet. 9-13) that service of the subpoena for documents on Terraform was deficient for the separate reason that the subpoena was handed to Terraform's CEO directly, rather than being served on Terraform in some other manner (which petitioners do not identify). Petitioners did not raise that argument below, and it lacks merit in any event.

In the court of appeals, petitioners asserted that the district court had "erred in two ways in granting the

SEC's application." Pet. C.A. Br. 14. First, they argued that, "when an entity represented by counsel is interacting with the SEC, the SEC may not serve documents on that entity without a specific order issued by the Commission" under Rule 150(b). *Ibid.* Second, petitioners argued that the district court had "erred in finding personal jurisdiction here." *Id.* at 15; see pp. 11-14, *infra*. But petitioners did not dispute that, under the Commission's Rules of Practice, service of a subpoena on a company's CEO is a permissible way of serving the company itself. See Pet. 9-13. Accordingly, because petitioners "did not raise it below," that "argument [is] forfeited." *United States* v. *Jones*, 565 U.S. 400, 413 (2012); see *Johnson* v. *Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022) ("'[W]e are a court of review, not of first view.'") (brackets in original; citation omitted).[2]

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[2] Indeed, petitioners implicitly accepted below that, if the Commission had entered an order under Rule 150(b) authorizing "service of the [s]ubpoenas directly on Mr. Kwon," such service would have been permissible as to Terraform. Pet. C.A. Br. 7; see Pet. C.A. Reply Br. 9 ("The SEC could have avoided this issue in its entirety by simply getting such an order."). That position is irreconcilable with petitioners' current argument (Pet. 13) that, under Rule 150(b), corporate officers are not "authorized to accept service of investigative process for the corporation itself." And while petitioners contend that they argued before the district court (but not the court of appeals) that "personal service on Kwon did not result in proper service on" Terraform, Pet. 4 (citing Pet. App. 27a), their argument in the district court was simply that "handing a subpoena to an officer of a company, when he or she happened to be transiting through the United States, is not sufficient *to get jurisdiction* over the entity as opposed to the individual," Pet. App. 27a (emphasis added). That argument concerning personal jurisdiction bore no resemblance to petitioners' current argument that service on a corporate officer is impermissible under the Commission's Rules of Practice.

The argument also lacks merit. The SEC's Rules of Practice permit service of investigative subpoenas by, *inter alia*, "handing a copy to the person required to be served" or "[s]ending the papers through a commercial courier service or express delivery service." 17 C.F.R. 201.150(d)(1) and (3). Hiring a third-party process server to deliver a subpoena directly to a corporation's CEO is consistent with the plain text of those provisions (just as it would be consistent with the Rules for a courier to deliver the subpoena to an attendant in the company's mailroom). Petitioners identify no authority for their contrary position (Pet. 13) that the Commission's Rules contain a "lacuna" making it impossible to serve process on a corporation through such means.

2. The court of appeals also correctly held that the district court had specific personal jurisdiction over petitioners based on their extensive contacts with the United States in connection with the subject matter of the Commission's investigation. Pet. App. 8a-11a.

a. The court of appeals explained that, "[f]or a court to exercise specific jurisdiction over these nonresidents, three conditions must be satisfied." Pet. App. 8a. First, petitioners must have "purposefully availed" themselves of the privilege of conducting activities in the United States or have "purposefully directed" their conduct into the United States. *Ibid.* (citation omitted). Second, the subject matter at issue "must arise out of or relate to [petitioners'] forum conduct." *Ibid.* (citation omitted). And third, "the exercise of jurisdiction must be reasonable under the circumstances." *Ibid.* (citation omitted).

The court of appeals agreed with the district court that all of those requirements for specific personal jurisdiction were satisfied here. See Pet. App. 9a-11a.

Relying on "seven contacts with the U.S." as to which the district court had made express findings, the court of appeals held that petitioners had "purposefully availed themselves of the U.S. by promoting the digital assets at issue in the SEC's investigation to U.S.-based consumers and investors." *Id.* at 9a. The court of appeals concluded that, in light of petitioners' conduct purposefully directed toward residents of the United States, "the district court's exercise of jurisdiction was reasonable and would not 'offend traditional notions of fair play or substantial justice.'" *Id.* at 10a (citation omitted).

b. Petitioners do not substantively address the court of appeals' holding regarding the district court's exercise of "specific personal jurisdiction." Pet. App. 9a. In particular, they do not contest the lower courts' findings regarding petitioners' extensive contacts with the United States in connection with the subject matter of the Commission's investigation. See *ibid.* Nor do they contest the conclusion that, in light of those extensive contacts, the exercise of specific personal jurisdiction to order compliance with the SEC's subpoenas was consistent with due-process principles of fair play and substantial justice. See *id.* at 10a.

Instead, petitioners assert that "a court cannot exercise *general* jurisdiction over a foreign corporation without finding it 'essentially at home' in the forum." Pet. 21 (quoting *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U.S. 915, 920 (2011)) (emphasis added). They further contend that the district court violated that principle here by "finding [Terraform] 'essentially at home' in New York or Washington D.C." Pet. 22. Those arguments, and petitioners' extended discussion of the exercise of general personal jurisdiction over

corporations based on a "tag" theory, see Pet. 14-24, lack any meaningful connection to the lower courts' actual reasoning in this case.

As petitioners observe (Pet. 6), this Court has "recogniz[ed] two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction," *Ford Motor Co.* v. *Montana Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). General jurisdiction applies "when a defendant is 'essentially at home' in the" forum, and "extends to 'any and all claims' brought against a defendant." *Ibid.* (citation omitted). "Specific jurisdiction is different: It covers defendants less intimately connected with a [forum], but only as to a narrower class of claims. The contacts needed for this kind of jurisdiction often go by the name 'purposeful availment.'" *Ibid.* (citation omitted).

The court of appeals stated plainly that only "specific personal jurisdiction" was at issue here. Pet. App. 9a; see *id.* at 8a (discussing the requirements "[f]or a court to exercise specific jurisdiction over these nonresidents"); see also *id.* at 44a (statement by district court that "I don't need to decide the general jurisdiction question because I find that there is specific personal jurisdiction with respect to both Kwon and Terraform Labs"). There was accordingly no need for either of the courts below to determine whether petitioners were "essentially at home" in the forum, *Ford Motor Co.*, 141 S. Ct. at 1024 (citation omitted), and those courts did not do so.

Nor did either of those courts embrace what petitioners refer to (Pet. 6) as "corporate 'tag' jurisdiction," *i.e.*, treating the fact that service was made within the forum as an independently sufficient ground for exercising

personal jurisdiction over the defendant. In concluding that it had specific personal jurisdiction over petitioners, the district court identified seven specific contacts with the United States, but the fact that the subpoenas were served in this country was not one of them. See Pet. App. 44a-46a (listing contacts). The court of appeals agreed with the district court's contacts analysis, again without alluding to service in this country as a contact relevant to the jurisdictional inquiry. *Id.* at 9a. Thus, far from treating service within the forum as independently sufficient to establish personal jurisdiction, the courts below did not even invoke that service as a factor in holding that petitioners had sufficient case-specific contacts with the United States.

Petitioners' contentions (Pet. 14-24) regarding the assertion of general personal jurisdiction over a corporation based on personal service of a corporate representative accordingly have no bearing on the correctness of the lower courts' exercise of personal jurisdiction here. Those courts did not rely on general personal jurisdiction, and they did not base their exercise of specific personal jurisdiction on the fact that the subpoenas were served in the United States.

3. The decision below does not implicate any conflict in the courts of appeals or otherwise warrant this Court's review.

Petitioners identify no court that has ever adopted their understandings of the SEC's Rules of Practice with respect either to service on corporate officers, or to service on investigatory targets whose counsel have not filed a notice of appearance with the Commission or otherwise indicated a willingness to accept service on the client's behalf. Petitioners likewise identify no conflict regarding the court of appeals' fact-specific holding

that petitioners' extensive contacts with the United States in connection with the subject matter of the SEC's investigation were sufficient to establish specific personal jurisdiction here.

Petitioners instead focus (Pet. 14) on an asserted "split on the constitutionality of corporate tag jurisdiction." See Pet. 14-18. For the reasons just discussed, however, no issue concerning that rationale for exercising personal jurisdiction is implicated by the lower courts' findings of specific personal jurisdiction in this case. Those findings were not premised even in part on the fact that Kwon was personally served while he was physically present in the United States. This case therefore would be an unsuitable vehicle for clarifying the rules used to determine whether, and to what extent, service on a corporate officer within the forum can support a court's exercise of personal jurisdiction over a corporate defendant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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