No. 22-332

In the Supreme Court of the United States

TERRAFORM LABS PTE, LTD. AND DO KWON,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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

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REPLY BRIEF

Stephen R. McAllister
Counsel of Record
Douglas W. Henkin
Michael E. Harriss
Parker B. Bednasek
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2400
stephen.mcallister@dentons.com

Counsel for Petitioners Terraform Labs Pte, Ltd. and Do Kwon

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INTRODUCTION

As this Court recognized long ago, corporate tag jurisdiction, or personal jurisdiction based on "service upon an officer accidently within its jurisdiction [is] so contrary to natural justice" that it should never be permitted. *St. Clair v. Cox*, 106 U.S. 350, 359 (1882). The theory of corporate tag jurisdiction has caused a circuit split which members of this Court already have identified. See *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1038 n.4 (2021) (Gorsuch, J., concurring). Indeed, the uncertainty regarding the validity of corporate tag jurisdiction was reiterated in an oral argument while this Petition has been pending. See Oral Argument at 25:47, *Mallory v. Norfolk So. Ry. Co.*, No. 21-1168 (2022) (Justice Gorsuch posing the question: "[I]f tag jurisdiction was always permissible since time immemorial for persons, how can it be [an] unconstitutional condition to say a corporation must abide by more or less the same rules we require of individuals?").

Yet, for reasons the Court can see without squinting, the government attempts to reframe the questions presented to sidestep the certworthy issue in this case. It claims both that TFL forfeited the corporate tag jurisdiction claim and that the case was rightly decided on specific jurisdiction grounds alone. The government is wrong on both points. TFL indisputably raised the issue in the courts below, and the lower courts' specific jurisdiction analysis was predicated on, and implicitly approved, corporate tag jurisdiction.

The government offers no reason why the Court should not use this case to address the constitutionality of corporate tag jurisdiction. The issue is clearly and squarely presented here, and its constitutionality has split the circuits. The split is real, several lower courts now have addressed corporate tag jurisdiction in detail, and only a decision by this Court can resolve the circuit split. The Court should decline the government's invitation to sidestep the issue and grant the Petition instead.

ARGUMENT

I. Corporate Tag Jurisdiction Is Directly Implicated in This Case.

This case can only be decided by relying on tag jurisdiction principles. The government offers empty suggestions to the contrary, none of which refute that corporate tag jurisdiction is the real issue in the case, that it is squarely presented, and that it cannot be avoided. The government tries to proceed directly to a personal jurisdiction analysis, but no court could exercise any form of personal jurisdiction over TFL unless there had *first* been effective service of process. Unless service on a corporation through personal service on a corporate officer is appropriate as a threshold matter, the question of whether personal jurisdiction exists cannot be addressed. The government points to 17 C.F.R. § 210.150 as the source of its effective-service "authority," but its reading of Rule 150 is nothing but a "hidden meaning," not supported by the plain text of the provision, and fundamentally disfavored by the Court.

Without a viable basis for service, no assertion of personal jurisdiction over TFL here can avoid implicating corporate tag jurisdiction, which is the sole method upon which the Second Circuit relied.

A. This Case Cannot Be Decided on the Basis of Specific Jurisdiction Without First Addressing Corporate Tag Jurisdiction.

In its rush to defend the Second Circuit's personal jurisdiction analysis as sufficient to deny this Petition, the government ignores that TFL was never properly served. Asserting this case does not implicate corporate tag jurisdiction at all, Br. in Opp. 11-12, is simply wrong. The lower courts relied *solely* on tag jurisdiction principles to find proper service of process, which is a prerequisite to any personal jurisdiction analysis. See App. 5a (noting initially that "[o]ur precedent makes clear that the SEC could serve the corporate entity Terraform through Kwon").

Thus, the specific jurisdiction analysis is not the real issue in this case. Indeed, TFL has conceded "for the sake of argument that there may have been minimum contacts with the United States" sufficient for specific jurisdiction. Pet. 13. The government's asserted "narrow, case-specific determinations" that are the focus of its argument, Br. in Opp. 6, 11-14, are irrelevant to whether certiorari is warranted. The point of TFL's concession is to demonstrate that, because it relied on tag jurisdiction to find that there had been proper service of process, the Second Circuit should have never reached a specific jurisdiction analysis *in the first place*. That issue warrants this Court's review.

The Petition is premised on the uncontroversial principle that effective service is a necessary condition for a court to conduct a personal jurisdiction analysis. Effective service is lacking here because there is no clear authority establishing that service on a corporation can be effected through personal service on a transiting corporate officer. Corporate tag jurisdiction itself is unconstitutional, and service here is not supported by the SEC's own Rule 150, meaning it cannot provide a basis for effective service on TFL or a basis for the court to exercise personal jurisdiction over TFL.

By claiming that service on Kwon was effective service on TFL, the Second Circuit placed the constitutionality of corporate tag jurisdiction squarely at issue.

B. There Is No Basis for Finding Proper Service of Process on TFL.

Doubling down on the Second Circuit's error in an effort to evade this Court's review, the government deliberately avoids the question of how the court could gain personal jurisdiction over TFL without effective service, which depends entirely on corporate tag principles. The government tries to leapfrog the issue so that it can proceed straight to defending the Second Circuit's specific jurisdiction analysis. Even if that analysis might be defensible had there been effective service, the government ignores that such an analysis can only proceed if there has been effective service of process. Without authority to effect service on a corporation through personal service on a corporate

officer, service on TFL was ineffective, so there is no jurisdiction over TFL.

1. The Government Does Not Dispute That the Second Circuit Relied on Irrelevant, Outdated Case Law to Conclude Service Was Effective.

A critical issue with the Second Circuit's rationale for deeming service on Kwon effective service on TFL was its reliance on *In re Grand Jury Subpoenas Issued to Thirteen Corps.*, 775 F.2d 43 (2d Cir. 1985) as the "precedent [that] makes clear that the SEC could serve the corporate entity Terraform through Kwon, the company's chief executive and authorized agent." Pet. 9-12 (citing App. 5a). But that decision is totally inapposite because the court interpreted the Federal Rules of Civil Procedure, which are not at issue here. App. 5a. Based on the this irrelevant, outdated, and inapposite case law, the Second Circuit *assumed* serving Kwon personally meant TFL also was properly served. But it had no authority for that assumption, and that assumption presumes corporate tag jurisdiction is constitutional, which is the precise issue the Petition presents. The government ignores this huge gap in the Second Circuit's analysis entirely.

2. The SEC Rules of Practice Do Not Allow Service on a Corporate Officer to Be Effective Service on a Corporation Itself.

In bulldozing through the threshold issue of service, the Second Circuit also ignored basic canons of statutory construction. Pet. 12-14. Rather than address this glaring issue, the government just asserts that TFL could be served though personal

service on Kwon because that is "consistent with the plain text" of the relevant SEC regulation. Br. in Opp. 11. Except it's not.

Under 17 C.F.R. § 201.150(d)(1),[1] the SEC Rules allow personal service by "handing a copy to the person required to be served." The government claims this provision "plainly" endorses the practice of corporate tag jurisdiction, but the government provides no viable support for what could only be considered an expansive power grab.[2] Simply asserting that ten words in Rule 150(d)(1) authorize personal service on a corporate officer to be effective for the corporation itself does not make it so. See, e.g., Br. in Opp. 11 ("[h]iring a third-party process server to deliver a subpoena directly to a corporation's CEO is consistent with the plain text of those provisions"). Reading an authorization of corporate tag jurisdiction principles into a provision that mentions neither corporate officers nor corporations would unquestionably qualify as finding an elephant in a mousehole, which this Court disfavors. *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

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[1] 17 C.F.R. § 201.150(d)(3), which the government claims is relevant here, is not relevant. It authorizes personal service through mail, but the government does not contend it ever used mail service.

[2] Given the "sweeping and consequential" power the government is claiming here, it is unlikely Congress would grant the SEC that authority, or that the SEC could take such authority for itself by rule, "in so cryptic a fashion," *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022), especially given the judicial suspicion of corporate tag jurisdiction.

Moreover, despite endorsing corporate tag jurisdiction here, the government argued just last year that the doctrine is unconstitutional. See Brief for the United States as Amicus Curiae Supporting Respondent at 29-31, *Mallory v. Norfolk So. Ry. Co.*, No. 21-1168 (2022). In relevant part, the government argued that tag jurisdiction "does not comfortably carry over to a corporation . . . . A corporation's officers, agents, and shareholders can travel from State to State, but the corporation itself has no physical location." *Id.* at 30. The government offers no explanation for this apparent reversal in position.

a. The government complains that "Petitioners identify no authority for their contrary position," Br. in Opp. 11, but Petitioners rely on those decisions invalidating corporate tag jurisdiction and application of basic canons of statutory construction to the text of Rule 150(d). Rule 150(d) does not speak to whether a corporate officer is deemed authorized to accept service of investigative process for the corporation itself. Pet. 13. One of the fundamental canons provides that "a matter not covered is to be treated as *not covered*." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93 (2012) (emphasis added). Rule 150(d) says nothing about corporate tag jurisdiction; it cannot be read to *authorize* corporate tag jurisdiction.

Canons require adoption of "[t]he plain, obvious, and rational meaning of a statute," not "any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *King v.*

Burwell, 576 U.S. 473, 500 (2015) (Scalia, J., dissenting) (citing *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)). The government is arguing for a "hidden sense," reading into a few words—"handing a copy to the person required to be served"—and the heading of a rule, a broad authorization for serving a transiting corporate officer with an administrative subpoena for the corporation itself,[3] even a foreign one. 17 C.F.R. § 201.150(d)(1). But, "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Scalia & Garner, *supra* at 56. What the text does not cover *is not covered*. *Id.* at 93 (emphasis added); see also *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) (heading has no power to give what the text of the statute takes away).

b. Rule 150(d)'s text cannot be read as an express authorization of personal service on a transiting corporate officer to be effective for the corporation itself. Nor does a "fair understanding of the legislative plan," *King*, 576 U.S. at 498, provide any support for a "hidden meaning" of Rule 150(d) as authorizing corporate tag jurisdiction principles. See also *West Virginia*, 142 S. Ct. at 2607-08 (inquiry "must be shaped" by "whether Congress in fact meant to confer the power the agency has asserted").

Congress did not grant the SEC plenary administrative authority over foreign corporations;

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[3] The government even suggests that a corporation's *mailroom attendant* would be an appropriate person to serve on behalf of the corporation. Br. in Opp. 11.

indeed, the SEC's authority specifically excludes service of administrative subpoenas outside the United States. 15 U.S.C. § 77s(c). The legislative plan therefore indicates that Congress intended to exclude from the SEC's administrative authority foreign corporations *not* doing business in the United States. For such corporations, the SEC must seek voluntary cooperation. This is precisely what happened with TFL, Pet. 3 (the SEC "contacted TFL and Kwon and sought their voluntary cooperation"), and the attempted service necessarily depends on tag jurisdiction (as the Second Circuit conceded).

The government's expansive reading of Rule 150(d) is the opposite of what Congress intended and not a fair understanding of the legislative plan. Under the government's reading, the SEC could readily circumvent the limits that Congress placed on the SEC's authority over foreign corporations and effectuate service of a subpoena outside the United States simply by serving an officer of a foreign corporation personally once such an individual was found in the United States for any reason. Br. in Opp. 11. In other words, both sides agree that Congress did not grant the SEC authority to serve administrative subpoenas on foreign corporations as a general matter, but the government attempts to interpret SEC Rules to effectively authorize that result by endorsing corporate tag jurisdiction. That reading exceeds Congress's intended limit on the SEC's authority and again squarely presents the constitutionality of corporate tag jurisdiction.

Neither Congress nor the SEC have authorized corporate tag jurisdiction, certainly not explicitly, and Congress "does not . . . hide elephants in mouseholes." *Whitman*, 531 U.S. at 468. Instead, "[w]hen Congress enacts an imprecise statute," the clear solution is to enact "further, more precise legislation," *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring), because "[i]t is beyond [this Court's] province" to fix poor statutory drafting. *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (internal quotation marks and citation omitted). This Court should neither tacitly approve nor expressly write-in authorization for a method of service that Congress has not expressly authorized and the SEC has not even included in its own rules through formal rulemaking.

* * *

At bottom, the government fails to refute TFL's assertion that there is no statutory or regulatory basis for finding proper service of process on TFL. Rule 150(d) fails to plausibly authorize service on a corporation by personal service on a corporate officer, and no statute provides such authority. Even if there were such authority, it would remain subject to TFL's constitutional challenge.

The Second Circuit lacked a basis for finding proper service on TFL, and this Court should grant certiorari to address the question of corporate tag jurisdiction.

II. There Are No Vehicle Problems in This Case to Prevent the Court from Resolving the Circuit Split.

a. The split on corporate tag jurisdiction has been recognized by members of the Court. See *Ford Motor Co.*, 141 S. Ct. at 1038 n.4 (Gorsuch, J., concurring) (citing *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16. 20-21 (2d Cir. 1998) and *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1067-69 (9th Cir. 2014)). In the Second and Ninth Circuit cases, the issue was whether personal service on a corporate officer was sufficient to effect service on the corporation itself. Here, the SEC served Kwon as a means of effecting service on TFL. This served as the initial and necessarily requisite basis for the court to assert any type of personal jurisdiction over TFL. Pet. 9-13. There is no vehicle problem that would prevent the Court from resolving the admitted circuit split. See also Pet. 23-24.

b. This Court is of course a "court of review, not of first view." *Johnson v. Arteaga-Martinez*, 142 S. Ct. 1827, 1835 (2022). TFL is asking this Court to review what the Second Circuit actually decided here—that service on a transiting corporate officer is sufficient to effect service on the corporation. Because that issue was briefed below, Pet. 4-5, the government's argument that TFL forfeited the issue by not "rais[ing] it below," Br. in Opp. 9-10, is wrong.

The district court recognized that personal jurisdiction is the "real issue," App. 18a, and TFL specifically argued 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," App. 27a. Issues of personal jurisdiction were undeniably in dispute, including *precisely* the same question TFL is now asking this Court to review.[4] The district court and Second Circuit knew this issue had been raised, the government responded to the issue, and nothing further is required.

The government's forfeiture argument ignores that the preservation requirement "does not demand the incantation of particular words; rather, it requires that the lower court be fairly *put on notice* as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) (emphasis added).

TFL squarely raised its "claim" in both lower courts. See *Yee*, 503 U.S. at 533-34 (holding that even *separate arguments* in support of a *single claim* can satisfy the notice requirements). Parties also "are not limited to the precise arguments they made below." *Id.*; see also *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008). Thus, TFL properly preserved the corporate tag jurisdiction issue.

CONCLUSION

The petition for writ of certiorari should be granted.

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[4] Once raised and presented, petitioner may "frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

Respectfully submitted,

Stephen R. McAllister
Counsel of record
Douglas W. Henkin
Michael E. Harriss
Parker B. Bednasek
Dentons US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2400
stephen.mcallister@dentons.com

Counsel for Petitioners Terraform Labs Pte, Ltd. and Do Kwon

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