No. 22A___

In the Supreme Court of the United States

JEFFREY LAYDON ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED.,

Petitioner,

v.

COOPERATIEVE RABOBANK U.A., ET AL.,

Respondents.

APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI FROM MAY 25, 2023 TO JULY 24, 2023

To the Honorable Sonia Sotomayor, as Circuit Justice for the Second Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Jeffrey Laydon respectfully requests that the time to file a petition for a writ of *certiorari* be extended 60 days from May 25, 2023, to and including July 24, 2023. The Second Circuit issued its initial opinion on October 17, 2022. App. A, at 1. In response to a timely filed petition for rehearing, the court amended its decision on December 8, 2022. *Ibid*. The court denied a timely petition for rehearing en banc on February 24, 2023. App. B. Absent an extension, the petition would be due on May 25, 2023. This application is being filed 9 days before that date. *See* Sup. Ct. R. 13.5.[1] This Court will have jurisdiction to review the petition under 28 U.S.C. § 1254.

[1] Petitioner originally filed this application electronically on May 12, 2023, thirteen days before the petition was due. However, counsel inadvertently failed to serve the application on respondents

1. This case presents important questions regarding the presumption against extraterritoriality generally and its application to the Commodity Exchange Act (CEA), 7 U.S.C. § 1 *et seq*., in particular. Specifically, the case raises the question whether the CEA applies to manipulation of a U.S. commodities market when much of the manipulative conduct occurred abroad. The Second Circuit held that it does not, applying a conduct-based test this Court rejected in the materially identical context of the Securities Exchange Act in *Morrison v. National Australian Bank Ltd.*, 561 U.S. 535 (2010).

Respondents include banks that participated in setting two benchmark rates known as Yen-LIBOR and Euroyen TIBOR. Euroyen TIBOR futures contracts—for which Euroyen TIBOR is the underlying commodity—trade on U.S. commodity exchanges. App. A, at 6. The United States Commodity Futures Trading Commission (CFTC) considers both Euroyen TIBOR and Yen LIBOR to be commodities in interstate commerce. *See* Brief of Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Reh'g, Doc. 383, at 2 (citing 7 U.S.C. § 1a(9)).

The benchmarks are calculated on the basis of submissions from participating banks representing the interest rate at which the submitters could borrow offshore Yen. App. A., at 5-6.

This case arises from respondents' participation in a conspiracy to fraudulently manipulate both benchmark rates through false submissions to a rate-setting board. The respondent banks did so in order to boost their own position in financial

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or file hard copies with the Court. This application is being refiled the same day the error was discovered, along with proper service, at the advice of the Clerk's office.

derivatives directly tied to the benchmark rates, at the expense of other investors (the other respondents are brokers who received commissions for facilitating the transactions). App. A, at 6-8. The scheme was eventually uncovered and the conspirators were subjected to criminal charges and civil suits by regulators around the world, including the United States Department of Justice and the CFTC. Third Am. Compl. (Complaint) ¶ 758.[2] To date, regulators have collected $7 billion in fines and penalties from the conspirators. *Id*. ¶ 164. The United States obtained deferred prosecution agreements with substantial fines from many of the defendants in this case. *Id*. ¶¶ 3-14.

Petitioner Laydon brought this proposed class action on behalf of investors who suffered losses from Euroyen TIBOR futures transactions on U.S. exchanges. App. A, at 2. Among other things, he alleged violations of Commodity Exchange Act, which prohibits "manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce." 7 U.S.C. § 13(a)(2). Respondents moved for judgment on the pleadings, arguing among other things that petitioner's claims required an impermissibly extraterritorial application of the statute because the bulk of the manipulative conduct took place overseas. App. A, at 10.

2. In *Morrison v. National Australian Bank Ltd.*, 561 U.S. 535 (2010), this Court considered a similar extraterritoriality objection to an application of the Securities Exchange Act. The Court explained that in determining whether a plaintiff seeks a domestic application of a statute, courts must decide whether the domestic conduct

[2] The Complaint is reproduced at pages 1463-1751 of the Second Circuit Excerpt of Records.

the complaint identifies "was the 'focus' of congressional concern." *Id*. at 266 (citation omitted). In the case of the Securities Exchange Act, the Court concluded, the "focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Ibid*. Accordingly, the Court held, the Exchange Act applies domestically when the fraud involves "transactions in securities listed on domestic exchanges" or "domestic transactions in other securities." *Id*. at 267.

In reaching this conclusion, the Court forcefully rejected the Second Circuit's "conduct and effects" test, under which the circuit considered "whether the wrongful conduct occurred in the United States" and whether that conduct "had a substantial effect in the United States." *Id*. at 257 (citations omitted). This Court explained that the test was untethered from the text of the statute, was indeterminate and difficult to apply, and led to "unpredictable and inconsistent" results. *Id*. at 258-60. "There is no more damning indictment of the 'conduct' and 'effects' tests," this Court observed, "than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases." *Id*. at 258-59.

Remarkably, in the aftermath of *Morrison*, the Second Circuit has not only persisted in applying a version of its conduct-and-effects test in cases under the Securities Exchange Act but has extended that approach to the Commodity Exchange Act as well. In *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014), the Second Circuit acknowledged that it was "of course bound by *Morrison*," but believed it should "proceed cautiously in applying teachings the

Morrison Court developed" in a "case involving conventional purchases and sales of stock to derivative securities." *Id*. at 214. The court ultimately concluded that while "a domestic securities transaction" is "necessary to a properly domestic invocation" of the Securities Act, "such a transaction is not alone sufficient." *Id*. at 215. Instead, the court held that the defendant's conduct must also not be "so predominantly foreign as to be impermissibly extraterritorial." *Id*. at 216. Despite *Morrison*'s criticism of the indeterminacy of the conduct-and-effects test, the Second Circuit openly acknowledged that its "predominantly foreign" standard was not "a test that will reliably determine whether a particular invocation of [the Act] will be deemed appropriately domestic or impermissibly extraterritorial." *Id*. at 217. Rather, the Second Circuit "believe[d] courts must carefully make their way with careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases, so as eventually to develop a reasonable and consistent governing body of law on this elusive question." *Ibid*.

The Ninth Circuit subsequently rejected *Parkcentral*'s "predominantly foreign" test as inconsistent with this Court's rejection of the conduct-and-effects test in *Morrison*. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018). When the defendant in *Toshiba* petitioned for certiorari on the basis of that circuit conflict, this Court called for the views of the Solicitor General. 139 S. Ct. 935 (2019). In its invitation brief, the United States agreed that the Second Circuit's test defied this Court's teaching in *Morrison*, "replicating several principal defects that this Court identified in earlier Second Circuit law." U.S. Br. 15. The Solicitor General nonetheless recommended the Court deny the petition, however, noting that the case

was interlocutory and believing that the Second Circuit might reconsider its position in light of intervening extraterritoriality decisions from this Court. *Id*. at 18-20. The Court denied the petition. 139 S. Ct. 2766 (2019).

In the years since, the Second Circuit has not only refused to reconsider *Parkcentral* but has extended its rule to the materially identical context of the Commodity Exchange Act. In *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019), the Second Circuit recognized that, like the Securities Exchange Act, the "focus of congressional concern" in the Commodity Exchange Act's private right of action "is clearly transactional, given its emphasis on domestic conduct and domestic transactions." *Id*. at 104 (cleaned up). But finding no relevant distinction between the Securities and Commodity Exchange Acts' private rights of action, the court held that "*Parkcentral*'s rule carries over to the CEA," and therefore required that the allegedly illegal conduct "must not be 'so predominately foreign as to be impermissibly extraterritorial.'" *Id*. at 105, 106 (quoting *Parkcentral*, 763 F.3d at 216).

2. Applying that precedent to this case, the district court found that petitioner's complaint sought an impermissibly extraterritorial application of the CEA because most of the manipulative conduct took place overseas. App. A, at 10.

The Second Circuit affirmed. App. A, at 16. The court acknowledged that petitioner's suit was "based on transactions occurring in the territory of the United States." *Id*. at 13; *see id*. at 16. But applying *Prime* and *Parkcentral*, the court held that this was insufficient; petitioner "must thus plead not only a domestic transaction, but also sufficiently domestic conduct by the defendant." *Id*. at 1. The

court then concluded that petitioner's "CEA claims are impermissibly extraterritorial because the conduct he alleges is 'predominantly foreign.'" *Ibid*. (quoting *Prime*, 937 F.3d at 106).

The court rejected petitioner's claims that it was sufficient that the transactions took place on a domestic exchange and involved "manipulation of a domestic commodity market." *Id*. at 15.[3] The same was true, the court believed, in *Prime*; yet in that case the court determined the CEA required the defendant have both manipulated a domestic commodity market and that it did so through conduct not predominantly occurring overseas. *Ibid*.

3. Petitioner filed a petition for rehearing en banc. The CFTC filed an amicus brief urging the full court to reconsider *Prime* and *Parkcentral*, noting that the decision in this case "is inconsistent with Supreme Court precedent and deepens a circuit split." Br. of Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Reh'g En Banc, Doc. 403, at 4.[4] The decision is also inconsistent with the basic purposes of the CEA, the Commission explained, which is "to protect the integrity of prices in U.S. markets." *Id*. at 8. Because "manipulation frequently involves conduct *off* an exchange that profits the perpetrator by distorting prices *on* an exchange," *id*. at 7, the Commission argued that "manipulation of a foreign

[3] In its initial opinion, the panel held that the benchmarks were not commodities within the meaning of the CEA, but reversed course in response to petitioner's initial petition for rehearing and the CFTC's amicus brief in support of that petition. *See* Br. of Amicus Curiae U.S. Commodity Futures Trading Comm'n in Support of Reh'g, Doc. 383, at 3-12. Accordingly, the final decision accepts that defendants are accused of manipulating a U.S. commodity on a U.S. commodity exchange, but nonetheless holds that the manipulation is beyond the reach of the statute's private right of action because the manipulative conduct was, in the court's view, "predominantly foreign." App. A, at 14.

[4] *Available at* 2023 WL 370994.

commodity is covered by the CEA if the manipulation targets prices on a U.S.-regulated exchange." *Id*. at 8. A contrary rule, the Commission argued, risks allowing blatant manipulation of prices on a U.S. exchange to go unredressed, as the countries in which the manipulative conduct occurred may decline to take action on the ground that the conduct "is not their business" because it targets a market outside that country's borders. *Id*. at 5.

On February 24, 2003, the Second Circuit denied rehearing. App. B.

Reasons For Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended for 60 days for the following reasons:

1. The forthcoming petition is likely to be granted. As the CFTC noted, the decision in this case further entrenches a growing circuit conflict over the meaning of this Court's decision in *Morrison*. *See, e.g., Stoyas*, 896 F.3d at 950 (rejecting *Parkcentral* as "contrary to . . . *Morrison*"); *SEC v. Morrone*, 997 F.3d 52, 60 (1st Cir. 2021) ("Like the Ninth Circuit, we reject *Parkcentral* as inconsistent with *Morrison*."). Although the Solicitor General recommended that the Court delay intervening in the conflict in 2019 in the hopes that the Second Circuit would correct course on its own, it is now clear that nothing short of this Court's intervention will resolve the conflict.

As the Commission also noted, the Second Circuit's decision dramatically undermines the effectiveness of the CEA, exposing U.S. investors to fraudulent manipulation of U.S. commodities markets without recourse so long as the fraudulent conduct can be viewed as "predominantly foreign" under the Second Circuit's amorphous standard.

2. The press of other matters before this and other courts makes the existing deadline on May 25, 2023, difficult to meet. Petitioners have recently retained additional Supreme Court counsel to assist in preparing this petition. Further time is required to allow counsel to study the voluminous record and prepare a concise petition for the Court's review. In addition to this case, counsel have several other briefs due in this Court in May and June, as well as a brief in the Ninth Circuit and multiple briefs, depositions, and hearings in the district courts, some requiring travel.

3. Whether or not the extension is granted, the petition will be considered—and, if the petition were granted, the case would be considered on the merits—in the next Term. The extension thus will not substantially delay the resolution of this case or prejudice any party.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended for 60 days to and including July 24, 2023.

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