No. 23-___

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.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has "repeatedly and explicitly held" that to decide whether a case involves a domestic application of a statute—as opposed to an impermissibly extraterritorial one—"courts must identify the statute's focus and ask whether the conduct relevant to that focus occurred in United States territory." *Abitron Austria GmbH v. Hetronit Intn'l, Inc.*, No. 21-1043, slip op. at 4 (June 29, 2023) (cleaned up). "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application of the statute, even if other conduct occurred abroad." *Id*. at 5 (cleaned up). The Second Circuit has read this precedent to establish a *necessary*, but not a *sufficient,* condition for domestic application of a law. In applying federal securities and commodities laws, the Circuit has held that even if the conduct relevant to the statute's focus occurred in the U.S., a claim may still be extraterritorial if other conduct occurred abroad and a court decides that, all things considered, the claim is "predominantly foreign." Other circuits read this Court's focus test as establishing a necessary and sufficient condition for a domestic application. And the First and Ninth Circuit—along with the SEC, the Commodity Futures Trading Commission, and the Solicitor General—have rejected the "predominantly foreign" test in particular as inconsistent with this Court's precedents. The question presented is:

Whether, to decide if a claim involves a domestic application of a statute, courts may consider factors other than whether the conduct relevant to the statute's focus occurred in the United States.

PARTIES TO THE PROCEEDING

1. Petitioner Jeffrey Laydon was the plaintiff in the district court and the appellant below.

2. Respondents Coöperative Rabobank U.A., Barclays Bank PLC, Société Générale S.A., The Royal Bank of Scotland Group PLC, UBS AG, Lloyds Banking Group PLC, UBS Securities Japan Co., Ltd., The Royal Bank of Scotland PLC, and RBS Securities Japan Limited, were defendants in the district court and appellees below.

3. Barclays Bank PLC, Citibank Japan Ltd., Citibank N.A., Citigroup Global Markets Japan, Inc., Citigroup Inc., Deutsche Bank AG, HSBC Bank PLC, HSBC Holdings PLC, J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, National Association, J.P. Morgan Securities PLC, Martin Brokers (UK) Ltd., Mitsubishi UFJ Trust and Banking Co., Ltd., Mizuho Corporate Bank, Ltd., R.P. Martin Holdings Limited, Credit Agricole CIB, Chuo Mitsui Trust & Banking Co. Ltd., ICAP plc, ICAP Europe Limited, Tullett Prebon PLC, Resona Bank Ltd., Shinkin Central Bank, Sumitomo Mitsui Banking Corporation, Sumitomo Mitsui Trust Bank, Ltd., The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Bank of Yokohama, Ltd., The Norinchukin Bank, The Shoko Chukin Bank, Ltd., and The Sumitomo Trust and Banking Co., Ltd. were defendants in the district court, but were not parties to the appeal.

4. Oklahoma Police Pension & Retirement System and Stephen Sullivan were plaintiffs to the proposed Third Amended Class Action Complaint, which the district court did not permit plaintiffs to file.

California State Teachers Retirement System sought leave to intervene as a plaintiff in the district court, which was denied.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

1. *Laydon v. Coöperative Rabobank U.A.,* Nos. 20-3626, 20-3775, 55 F. 4th 86 (2d Cir. decided Oct. 18, 2022, amended Dec. 8, 2022), *reh'g denied*, Order at 1 (2d Cir. Feb. 24, 2023).

2. *Laydon v. Mizuho Bank, Ltd.*, No. 12-CV-3419, 2020 WL 5077186 (S.D.N.Y. Aug. 27, 2020) (order granting motion for judgment on the pleadings).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey Laydon respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a–26a) is reported at 55 F.4th 86. An initial panel decision (Pet. App. 27a-54a) was originally reported at 51 F.4th 476, but later withdrawn. The district court's 2020 order (Pet. App. 55a-61a) is unreported but available at 2020 WL 5077186. The district court's 2015 order (Pet. App. 62a-78a) is unreported but available at 2015 WL 1515487. The district court's 2014 order (Pet. App. 79a-110a) is unreported but available at 2014 WL 1280464.

JURISDICTION

The Second Circuit issued its initial opinion on October 17, 2022. Pet. App. 27a. In response to a timely filed petition for rehearing, the court amended its decision on December 8, 2022. *Id*. 1a. The court denied a timely petition for rehearing en banc on February 24, 2023. *Id*. 111a. On May 18, 2023, Justice Sotomayor extended the deadline for filing this petition through July 24, 2023. 22A1003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant provisions of the Commodity Exchange Act and Securities Exchange Act of 1934 are reproduced in Appendix F to this petition (Pet. App. 113a-126a).

INTRODUCTION

Most statutes apply only domestically, but many violations of those statutes include at least some foreign activity. A defendant may, for example, defraud U.S. investors through false emails or telephone calls originated abroad. The question thus commonly arises whether the foreign aspects of a case make otherwise illegal conduct immune from challenge under U.S. law.

This Court confronted this kind of question in *Morrison v. National Australia Bank, Ltd*., 561 U.S. 247 (2010), a case under the Securities Exchange Act (SEA), 15 U.S.C. § 78a *et seq*. To decide whether the plaintiffs in that case sought a domestic application of the statute, the Court looked to the "focus" of the Act, which it concluded was "not upon the place where the deception originated, but upon purchases and sales of securities in the United States." 561 U.S. at 266. In light of that focus, the Court adopted a "transactional test" for the SEA that asks, "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id*. at 269-70.

This Court has since used *Morrison*'s approach as a universal framework. As the Court explained last term, to decide whether a case seeks a domestic application of federal law, "courts must identify the statute's focus and ask whether the conduct relevant to that focus occurred in United States territory." *Abitron Austria GmbH v. Hetronic Int'l, Inc.*, No. 21-1043, slip op. 4 (June 29, 2023) (cleaned up).

The circuits are intractably divided over whether meeting this test is a sufficient, or merely necessary,

condition for domestic application of federal law. The Second Circuit holds that an SEA claim can be impermissibly extraterritorial even if it arises out of a transaction on a domestic security exchange. Pet. App. 6a. An application is still extraterritorial, the circuit holds, if other aspects of the case render the claims "predominantly foreign." *Ibid*. Applying this rule, the Second Circuit holds that federal securities laws provide no remedy for frauds involving transactions on U.S. securities markets when the fraudulent conduct principally took place overseas. *Id*. 17a. Other circuits treat the focus test as necessary and sufficient, with the First and Ninth Circuits rejecting Second Circuit precedent and the "predominantly foreign" test by name.

In a prior case, the Solicitor General told this Court that the Second Circuit's approach is inconsistent with *Morrison*, but recommended denying certiorari to review that precedent in the hopes that the Second Circuit would change its law on its own. *See* Br. U.S. as Amicus 14-15, 19-20, *Toshiba Corp. v. Automotive Indus. Pension Tr. Fund*, No. 18-486. In this case, the Commodity Futures Trading Commission filed an amicus brief urging the Second Circuit to grant rehearing en banc to do just that. *See* CTFC Amicus Br. 2, *available at* 2023 WL 370994 (arguing that the "panel decision should be reheard en banc because it relied on the . . . 'predominantly foreign' test which is inconsistent with Supreme Court precedent and deepens a circuit split"). But the Second Circuit denied the petition.

Accordingly, it is now clear that despite the Government's earlier hopes, nothing short of this

Court's intervention will resolve the circuit conflict over the basic framework for deciding when a statute applies domestically or the disagreement over the Second Circuit's "predominantly foreign" test in securities cases. The Court should take this opportunity to clarify its extraterritoriality rules and restore uniformity to the law.

STATEMENT OF THE CASE

I. Legal Background

1. "Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335 (2019). As noted, this Court considered the proper test for whether a statute is being applied domestically in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010). The Court began by forcefully rejecting the Second Circuit's "conduct and effects" test, under which courts decided whether plaintiffs sought an extraterritorial application of the SEA by considering "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.

Instead, the Court held that whether a plaintiff seeks a domestic application of a statute turns on the relationship between the facts of the case and "the 'focus' of congressional concern." *Id.* at 266 (citation omitted). The focus of a statute can be "conduct,

parties, or interests that Congress sought to protect or regulate." *Abitron*, *supra*, at 11 (cleaned up). Thus, the focus need not be the defendant's conduct. *See, e.g.*, *RJR Nabisco*, 579 U.S. at 346 (focus of private RICO claim is the plaintiff's injury, which must be domestic); *United States v. Harris*, 991 F.3d 552, 559 (4th Cir. 2021) (focus of 18 U.S.C. § 2422(b) is protecting children from sexual exploitation). In *Morrison*, the Court held that 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." *Id*. at 266. Accordingly, the SEA applies domestically when the fraud involves "transactions in securities listed on domestic exchanges" or "domestic transactions in other securities." *Id*. at 267.

In later cases, the Court adopted *Morrison*'s focus-based approach as the general test for whether a claim requires extraterritorial application of federal law and made clear that so long as conduct relevant to the statute's focus occurred in the United States, the application is domestic. *See Abitron*, *supra*, at 5 ("If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application of the statute, even if other conduct occurred abroad.") (cleaned up); *RJR Nabisco*, 579 U.S. at 325 (same); *see also WesternGeco LLC v. Ion Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (courts ask "whether the conduct relevant to [the statute's] focus occurred in United States territory. If it did, then the case involves a permissible domestic application of the statute.") (citations omitted).

2. Remarkably, in the years since *Morrison* the Second Circuit has not only persisted in applying a version of its "conduct and effects" test in cases under the SEA but has extended that approach to other indistinguishable provisions of federal law as well.

a. In *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014), the Second Circuit acknowledged that it was "of course bound by *Morrison*," but concluded that while "a domestic securities transaction" is "necessary to a properly domestic invocation" of the SEA, "such a transaction is not alone sufficient." *Id*. at 214-15. Instead, the court held that the defendant's conduct must also not be "so predominantly foreign as to be impermissibly extraterritorial." *Id*. at 216. And even though *Morrison* insisted that the location of the deceptive conduct was not the focus of the SEA, the Second Circuit held that the case before it was impermissibly extraterritorial in significant part because the "complaints concern statements made primarily in Germany." *Ibid*.

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 statute] 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*.

b. The Ninth Circuit subsequently rejected *Parkcentral*'s "predominantly foreign" standard as inconsistent with *Morrison*. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933, 950 (9th Cir. 2018). When the defendant in *Toshiba* petitioned for certiorari, 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* and "replicat[ed] 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, noting that the case was interlocutory and that the Second Circuit might reconsider its position in light of the Court's intervening extraterritoriality decisions in *RJR Nabisco* and *WesternGeco*. *Id*. at 18-20. The Court denied the petition. 139 S. Ct. 2766 (2019).

c. Since the denial in *Toshiba*, 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 (CEA), 7 U.S.C. § 1 *et seq*.

Like the SEA, the CEA "broadly prohibits fraudulent and manipulative conduct" with regard to a domestic security, here "commodity futures." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 836 (1986)*; see, e.g.*, 7 U.S.C. § 6 (establishing regulatory regime for U.S. futures exchanges); *id*. § 6b(a) (prohibiting fraud in the sale of futures

contracts on U.S. exchanges); *id*. § 6c(a) (prohibiting false or "wash sales" to manipulate prices); *id*. § 13(a) (prohibiting manipulation of prices on U.S. futures exchange). Section 22 of the CEA provides an express private right of action against "[a]ny person . . . who violates" the Act or "who willfully aids, abets, counsels, induces, or procedures the commission of a violation." 7 U.S.C. § 25(a)(1).

In *Prime International Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019), the Second Circuit recognized that like the SEA, the "focus of congressional concern" in the CEA's private right of action "is clearly transactional, given its emphasis on domestic conduct and domestic transactions." *Id*. at 104 (cleaned up). Finding no relevant distinction between the two statutes, the court held that "*Parkcentral*'s rule carries over to the CEA," and therefore required, in addition to a domestic transaction, 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).

II. Factual And Procedural History

1. This case arises from a scheme to manipulate the price of futures contracts tied to two privately published benchmarks known as Yen-LIBOR and Euroyen TIBOR. Pet. App. 5a. The benchmarks are calculated on the basis of submissions from participating banks reporting the interest rate at which the submitters could borrow Yen outside of Japan. *Id*. 6a-7a. Euroyen-Tibor is calculated by the Japanese Bankers Association at 11am Tokyo time

each weekday based on submission from banks headquartered primarily in Japan. *Id.* 7a. Yen-LIBOR is set by the British Bankers' Association using submissions from its members (some of which also participate in setting Euroyen-Tibor) later in the day, at 11 a.m. London time. *Ibid*.

The market for financial instruments priced based on Yen-LIBOR and Euroyen TIBOR "is one of the largest and most active markets for such products in the world" with active trading by U.S. investors, including on the Chicago Mercantile Exchange (CME). *See* US Department of Justice Statement of Facts ¶ 21, C.A. J.A. 1766. During the relevant period, trillions of dollars' worth of financial instruments priced on Yen-LIBOR and Euroyen TIBOR were traded by U.S. investors, including futures on the CME. *See id*. ¶ 1; *In the Matter of UBS AG and UBS Securities Japan Co., Ltd.* at 6, 8, CFTC Docket No. 13-09 (Dec. 19, 2012) (C.A. J.A. 1816, 1818).

Respondents include banks that participated in setting these benchmark rates even while they and the respondent brokers also traded derivatives whose prices were directly tied to those rates. *Id.* at 8a. In many instances the same bank employees were responsible for rate submissions to the benchmark-setting bodies and for making trades whose profitability depended on the benchmark rates eventually set. *Id.* at 9a.

Starting in 2012, regulators from around the world, including the United States Department of Justice and the Commodity Futures Trading Commission (CFTC), discovered that respondents and

others were engaged in a conspiracy to manipulate these benchmarks to unlawfully profit in their trading operations. Third Am. Compl. (Complaint) ¶¶ 1-25.[1] Respondents would coordinate false submissions to the rate-setting boards and then cash in on the manipulation, including through trades of Euroyen-TIBOR futures contracts on U.S. futures exchanges. *Id*. ¶¶ 158-163. To date, regulators have collected $7 billion in fines and penalties from the conspirators. *Id*. ¶ 164. The U.S. Government brought a variety of criminal and administrative actions against the participants and obtained deferred prosecution agreements with substantial fines from many of the defendants in this case. *Id*. ¶¶ 3-14, 758.

2. Petitioner brought this proposed class action on behalf of investors who suffered losses from Euroyen TIBOR futures transactions on U.S. exchanges due to the conspiracy. Pet. App. 2a. He alleged violations of CEA and federal antitrust laws. *Ibid*.

Respondents moved to dismiss the CEA claims. Among other things, they argued that the manipulated benchmarks did not constitute "commodities" under the statute and that the Complaint failed to adequately allege causation. Pet. App. 88a. The district court denied the motion. It noted that the "CFTC has repeatedly found that Yen-LIBOR and Euroyen TIBOR each are a 'commodity'

[1] The Complaint is reproduced at pages 1309-1751 of the Second Circuit Excerpt of Records.

within the meaning of the CEA." *Ibid.*[2] The court further found that the "allegations in the Complaint are sufficient to show" that the alleged manipulation of "Yen-LIBOR significantly impacted Euroyen TIBOR" and therefore proximately caused petitioner's alleged injuries. *Id.* 90a.[3]

Six years later, after the Second Circuit extended its "predominantly foreign" test to the CEA in *Prime*, respondents moved for judgment on the pleadings, arguing that petitioner's CEA claims required an impermissibly extraterritorial application of the statute because the bulk of the manipulative conduct took place overseas. *Id.* 57a. The district court agreed and dismissed. *Id.* 59a-60a.

3. The Second Circuit affirmed. The panel acknowledged that "the focus of the statute is transactional" and that *Morrison* therefore controlled. Pet. App. 15a. The court further accepted for purposes of the appeal that petitioner's injuries arose from domestic transactions. Pet. App. 16a. But applying *Prime*, the court held that "[s]imply pleading a domestic transaction" was "not enough." *Id.* 15a. The

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[2] Although the word "commodity" most immediately conjures up images of wheat or pork bellies, Congress defined the term more broadly in order to protect investors participating in the full breadth of modern futures markets. *See* 7 U.S.C. § 1a(9) ("commodity" defined to include "all services, rights and interests . . . in which contracts for future delivery are presently or in the future dealt with").

[3] The court dismissed petitioner's antitrust claims on the belief that "he would not be an 'efficient enforcer' of the alleged antitrust violation." Pet. App. 3a. In 2015, the court denied leave to amend to add racketeering claims. *Ibid.*

panel then concluded that petitioner's "CEA claims are impermissibly extraterritorial because the conduct he alleges is 'predominantly foreign.'" *Id*. 16a.

The court acknowledged petitioner's argument that "his claims must be domestic because they involve both core domestic transactions (*i.e.*, transactions on a domestic exchange) and manipulation of a domestic commodity market" (*i.e.*, manipulation of indices traded on a domestic exchange). *Id*. 17a (cleaned up). The court did not dispute either premise but decided that *Prime* nonetheless precludes any remedy for manipulation of a commodity trading on a U.S. exchange so long as the manipulative conduct took place outside U.S. borders. *Id*. 17a-19a.[4]

4. Laydon filed a petition for rehearing en banc, supported by an amicus brief from the CFTC. In addition to explaining that the "predominantly foreign" test conflicts with this Court's

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[4] Originally, the panel held that benchmark indices are not "commodities" under the CEA. Pet. App. 44a-45a. But after the CFTC filed an amicus brief in support of rehearing, explaining that the panel decision "overlooked the operative text" and created a circuit conflict "on an issue of major national importance," the panel amended its opinion to delete the relevant passage. Br. Amicus Curiae U.S. CFTC Supp. Reh'g. 2, *Laydon v. Cooperative Rabobank U.A.*, No. 20-3626 (Nov. 29, 2022) (Second Cir. Docket No. 383). As explained below, and demonstrated by the fact that the CFTC filed a subsequent amicus brief requesting rehearing of the amended opinion as well, the revision did not resolve the conflict between the "predominantly foreign" test and the law of other circuits and this Court.

extraterritoriality precedents, the Commission argued that "Congress specifically intended the CEA to regulate U.S. futures contracts based on foreign commodities" and that "manipulation frequently involves conduct *off* of an exchange that profits the perpetrator by distorting prices *on* an exchange." CFTC Amicus Br. 8. Shielding such manipulation of a commodity on a U.S. exchange, the Commission argued, undermines the statute's central purpose, which "is to protect the integrity of prices in U.S. markets." *Id*. 7-8.

The court denied the petition for rehearing, Pet. App. 111a, and this petition followed.

REASONS FOR GRANTING THE PETITION

As recently as last June, this Court emphasized that it has "repeatedly and explicitly held" to decide whether a case presents a domestic application of a federal law, "courts must identify the statute's focus and ask whether the conduct relevant to that focus occurred in United States territory." *Abitron*, No. 21-1043 at 4 (cleaned up). The Second Circuit insists that the Court's repeated description of the test is incomplete and that even when the conduct relevant to a statute's focus occurs in the United States, the fact that *other* conduct related to the case occurred overseas can render the claims "predominantly foreign" and therefore impermissibly extraterritorial.

Four years ago, this Court seriously considered granting certiorari to decide whether the Second Circuit is correct, calling for the views of the United States on a petition arising from the Ninth Circuit's rejection of the Second Circuit's standard. The

Solicitor General told the Court that the question was important, that the Ninth Circuit's decision was correct, and that the Second Circuit appeared to have adopted "a repackaged version of the conduct-and-effects test that the *Morrison* Court had rejected." U.S. *Toshiba* Br. 8-9. But the Government recommended that the Court deny review because the case was interlocutory, there was some uncertainty as to what the Second Circuit's position was, and there was a prospect that the Second Circuit might change its views in light of this Court's intervening decisions in *RJR Nabisco* and *WesternGeco*. U.S. *Toshiba* Br. 8-9.

Since then, the Second Circuit has made clear that it meant what it said in *Parkcentral*. And it has maintained its position despite the Government repeatedly pointing out the conflict between its rule and *RJR Nabisco* and *WesternGeco*. Meanwhile, the First Circuit has joined the Ninth Circuit in directly rejecting the "predominantly foreign" test as inconsistent with *Morrison* and this Court's extraterritoriality framework. It is time for the Court to intervene.

This case provides an ideal vehicle for doing so. The Second Circuit accepted that the conduct relevant to the focus of the CEA claims occurred in the United States, and dismissed solely because it believed this fact was insufficient to establish a domestic application of federal law. That this case arises under the *Commodity* Exchange Act rather than the *Securities* Exchange Act is no impediment to review. The Second Circuit applies the same test to both statutes because there is no difference between them

material to the extraterritoriality analysis. But more importantly, the question presented and the circuit conflict are not limited to the application of a particular statute, but address a profound disagreement about this Court's general framework for deciding when a claim involves a domestic application of federal law. Deciding whether it is sufficient that conduct relevant to a statute's focus occurred in the United States will resolve the circuit conflict over the doctrine and also ensure uniform application of both the SEA and the CEA throughout the nation.

I. The Circuits Are Divided.

The circuits are intractably divided over the basic framework for deciding when a claim involves a domestic application of federal law and over the validity of the "predominantly foreign" test in particular.

1. The Second Circuit's position is no longer in doubt. In *Cavello Bay Reinsurance Ltd. v. Shubin Stein*, 986 F.3d 161 (2d Cir. 2021), for example, the court emphasized under circuit precedent, "the presence of a domestic transaction alone cannot satisfy the statute's geographic requirements; claims must not be 'so predominantly foreign as to be impermissibly extraterritorial.'" *Id*. at 165 (quoting *Parkcentral*, 763 F.3d at 216); *see also id*. at 266 ("*Morrison*'s 'domestic transaction' rule operates as a threshold requirement, and as such may be underinclusive.") (citation omitted). In both *Prime* and in this case, the Second Circuit assumed petitioners' claims involved domestic transactions but

nonetheless held them extraterritorial solely because it found the defendants' manipulative conduct was "predominantly foreign." *See Prime*, 937 F.3d at 105; Pet. App. 16a.[5]

Moreover, the Second Circuit has applied this rule despite parties—including the Solicitor General in *Toshiba* and the CFTC in this case and in *Prime*—pointing out the Court's intervening decisions in *RJR Nabisco* and *Western-Geco*. *See, e.g.*, U.S. *Toshiba* Br. 12; CFTC *Laydon* Amicus Br. 4; CFTC *Prime* Amicus Br. 19; *see also Cavello Bay*, 986 F.3d at 166 (citing *RJR Nabisco*); *Prime*, 937 F.3d at 102, 105 (citing *RJR Nabisco* and *WesternGeco*); Pet. App. 14a-15a (same).

2. At the same time, multiple circuits have rejected the Second Circuit's "predominantly foreign" test and the underlying premise that domesticity can turn on factors beyond where the conduct that is the focus of the statute occurred.

In *Toshiba*, the Ninth Circuit correctly perceived that the Second Circuit views *Morrison*'s domestic-transaction test as "necessary but not sufficient" and explained that this "turns *Morrison* and Section 10(b) on their heads." *Toshiba*, 896 F.3d at 949. In particular, the Ninth Circuit rejected the premise that

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[5] The Second Circuit also has not limited its rule to any special category of securities. *Compare* U.S. *Toshiba* Amicus Br. 20 (holding out that Second Circuit might limit rule to the "distinctive context" of "a security-based swap agreement") *with* Pet. App. 17a (applying rule to case involving standard futures contracts), *and Prime*, 937 F.3d at 98 (futures and derivatives), *and Cavello Bay*, 986 F.3d at 163 (standard equity shares).

domesticity depends on anything other than where the conduct relevant to the focus of the statute occurred: "because we are to examine the location of the transaction, it does not matter that a foreign entity was not engaged in the transaction." *Ibid*.

After the Court denied certiorari in *Toshiba*, the First Circuit reached the same conclusion. In *SEC v. Marrone*, 997 F.3d 52 (1st Cir. 2021), the First Circuit declared that "[l]ike the Ninth Circuit, we reject *Parkcentral* as inconsistent with *Morrison*." *Id*. at 60. This Court, the First Circuit observed, "explicitly said that, if a transaction is domestic, § 10(b) applies." *Ibid*. The court of appeals agreed with the SEC that the "existence of a domestic transaction suffices to apply the federal securities laws under *Morrison*. No further inquiry is required." *Ibid*.

Other circuits, while not rejecting Second Circuit precedent by name, likewise hold that a claim is domestic if conduct relevant to the statute's focus occurred in the United States, without any further inquiry or requirements. For example, the Eleventh Circuit has held that "*Morrison* deliberately established a bright-line test based *exclusively* on the location of the purchase or sale." *See Quail Cruise Ship Mgmt. Ltd. v. Agencia de Giagens CVS Tur Limitada*, 645 F.3d 1307, 1310-11 (11th Cir. 2011) (emphasis added).

Other circuits have adopted the same rule in the course of administering a range of other statutes. For example, in *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904 (D.C. Cir. 2018), the D.C. Circuit rejected a defendant's claim that it could not

be liable under U.S. copyright law because it had distributed its pirated copies of television shows over the internet from servers in Poland. *Id.* at 914. The court explained that the focus of the statute was infringing performances, which took place here. "Accordingly, because 'the conduct relevant to the statute's focus occurred in the United States,' this case 'involves a permissible domestic application' of the Copyright Act, 'even if other conduct occurred abroad.'" *Ibid* (quoting *RJR Nabisco*, 579 U.S. at 337).

Similarly, the Fourth Circuit has held that because the focus of the federal wire fraud statute is use of the wires, a fraudulent scheme conducted by defendants from Israel involved a domestic application because the scheme involved internet communications and phone calls to victims in Maryland. *United States v. Elbaz*, 52 F.4th 593, 604 (4th Cir. 2022); *see also United States. v. Hussain*, 972 F.3d 1138 (9th Cir. 2020) (same where violations "stemmed from phone or video conference calls among participants in the United Kingdom and California" and "press releases distributed from England to California").

The Fourth Circuit has likewise found a domestic application of a federal criminal statute whose focus is "the production of a visual depiction of a minor engaging in sexually explicit conduct" where "the conduct relevant to the statute's focus occurred in Virginia." *United States v. Skinner*, 70 F.4th 219, 225 (2023) The "fact that [the defendant] was in New Zealand when he participated in the video calls and made the recordings of [the minor] does not prevent his case from qualifying as a domestic application of" the statute, the court held, because "the statute is

primarily concerned with the production or transmission of the visual depiction." *Id*. at 227. Given this focus, "the domestic application analysis does not depend on the defendant's location in recording the depiction and receiving the transmission." *Ibid*.

In none of these decisions did the courts consider whether other aspects of the case, including the location of the defendant's conduct, would nonetheless render the statute's application extraterritorial. Instead, these courts and others have understood this Court's cases to mean what they plainly say: "Only conduct relevant to the statute's focus determines domestic application of the statute." *Adhikari v. Kellog, Brown & Root, Inc.*, 845 F.3d 184, 194 (5th Cir. 2017). That understanding is irreconcilable with the Second Circuit's interpretation of the focus-test as a mere necessary condition and with that circuit's invention of the additional requirement that the location of the defendant's conduct not render the claims "predominantly foreign."

* * *

The Second Circuit acknowledges much of this. It admits that the First and Ninth Circuits reject its "predominantly foreign" test "as 'inconsistent with *Morrison*.'" *In re Platinum and Palladium Antitrust Litig.*, 61 F.4th 242, 267 n.7 (2d Cir. 2023) (quoting *Marrone*, 997 F.3d at 60, and citing *Stoyas*, 896 F.3d at 950). And it has recognized that the Eleventh Circuit views *Morrison* as adopting a "bright-line test" that turns exclusively on the location of the transaction. *Absolute Activist Value Master Fund Ltd.*

v. Ficeto, 677 F.3d 60, 68 (2d Cir. 2012) (quoting *Quail*, 645 F.3d at 1310-11).

II. The Question Presented Is Important And The Continuing Division Intolerable.

The Court should not delay resolving the circuits' conflicting understandings of its extraterritoriality framework any longer.

1. The conflict will not resolve itself. Since *Toshiba*, the Second Circuit has repeatedly reaffirmed its rule in SEA cases and extended it to the materially identical CEA context. It has done so even while recognizing that other circuits reject its reading of *Morrison* and in the face of the Government's calls to revisit its precedent. *See supra* at 12-13.

Nor is there any prospect that any (much less all) of the circuits on the other side of the split will reverse course and adopt the Second Circuit's rule. The Ninth Circuit has rejected *Parkcentral*'s holding root and branch. *See* 896 F.3d at 949-950 (cataloging the ways in which *Parkcentral* is "contrary to Section 10(b) and *Morrison* itself"). "Like the Ninth Circuit," the First Circuit "reject[ed] *Parkcentral* as inconsistent with *Morrison*," making clear that it lacks the power to change its precedent without further intervention from this Court. *Morrone*, 997 F.3d at 60. And since the split developed, the Second Circuit has provided no meaningful response to the other circuits' criticisms that could cause those courts to change their views.

2. To be sure, other circuits have yet to reject the Second Circuit's interpretation of *Morrison* in the specific context of a CEA claim. But that is no reason to allow the circuit conflict over the correct standard

for domestic application to persist. The circuits are avowedly in conflict over the basic question of whether this Court's extraterritoriality precedents permit an inquiry that extends beyond whether "the conduct relevant to the statute's focus occurred in the United States." *Abitron*, *supra*, at 4 (emphasis and citation omitted). That conflict would warrant review even if it had not spawned conflicting rulings on the scope of any particular statute. That the doctrinal dispute has led to an open conflict over how to apply the SEA provides added reason for the Court to intervene. But the dispute is not limited to—or even focused on—the meaning of that particular statute.

In any event, as the Second Circuit has explained, because there is no material difference between the SEA's and the CEA's "focus" (both are transactional), a circuit's rule for determining a domestic application of the SEA necessarily applies to the CEA as well. *See supra* at 8.[6] Accordingly, there is no genuine prospect that despite their avowed conflict in SEA cases, both the First and the Ninth Circuits will accept the "predominantly foreign" test in a future case under the

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[6] Other circuits have similarly acknowledged that the CEA was modeled on the SEA in relevant part. See *CFTC v. Monex Credit Co.*, 931 F.3d 966, 976 (9th Cir. 2019) ("We presume that by copying §10(b)'s language and pasting it in the CEA, Congress adopted §10(b)'s judicial interpretations as well." (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006)); *Greenwood v. Dittmer*, 776 F.2d 785, 789 n.4 (8th Cir. 1985) (similar); *CFTC v. Baragosh*, 278 F.3d 319, 333 n.5 (4th Cir. 2002) (cases interpreting SEA "are persuasive authority for interpreting" parallel provisions of CEA); *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 76 n.9 (3d Cir. 1993) (same).

CEA. Nor would any purpose be served by waiting for the inevitable CEA conflict to arise. Additional CEA decisions will not shed further light on the question presented, which turns on the meaning of this Court's extraterritoriality decisions, not on anything specific to the CEA. And in briefs filed by the Solicitor General, the SEC, and the CFTC, the Government has repeatedly made clear its view that, as applied to either statute, the "predominantly foreign" test is "inconsistent with Supreme Court precedent." CFTC Amicus Br. 1 (CEA case); *see also* CFTC *Prime* Amicus Br. 3 (same); SEC *Marrone* Amicus Br. 22 (arguing in SEA case that "*Parkcentral* has been expressly rejected by the Ninth Circuit as contrary to Section 10(b) and *Morrison* itself, has not been followed by another circuit, and should not be followed here.") (cleaned up).

Accordingly, this case presents the Court an opportunity to kill multiple birds with one stone, resolving a fundamental disagreement about the Court's basic extraterritoriality framework in a context that will align the circuits' application of both the SEA and the CEA.

3. At the same time, the cost of allowing the conflict to persist is significant.

As the Court clearly recognized in calling for the views of the Solicitor General in *Toshiba*, the proper application of the nation's securities laws is a matter of great national and international importance. Trillions of dollars pass through our nation's exchanges, due in significant part on their worldwide reputation as safe fora for investment and trading.

Futures markets in particular are integral to the overall U.S. financial market with the "main economic functions" of the futures market being "the stabilization of commodity prices, the provision of reliable pricing information, and the insurance against loss from price fluctuation." *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1173 (8th Cir. 1971). Allowing manipulation of those markets simply because the interference was conducted from abroad interferes with those important functions, threatens the international reputation of U.S. markets, and subjects U.S. investors to real injuries Congress intended to avoid.

At the same time, the question presented has significant implication for other nations as well, as illustrated by the outpouring of amicus briefs from international entities in *Toshiba*, urging the Court to settle the conflict over *Morrison*'s meaning. *See, e.g.*, U.S. *Toshiba* Br. 21 (addressing international briefs). In responding to the Court's calls for the views of the United States on the petition, the Solicitor General acknowledged that these "concerns are weighty" and it was important to get the balance right. *Ibid*.

The Second and Ninth Circuits' continued division on such a foundational question in the securities context is particularly intolerable. These two circuits decide the majority of federal securities claims and exert broad influence in the lower courts in the circuits that have yet to decide the question. *See* Cornerstone Research, *Securities Class Action Filings: 2022 Year in Review* ("The Second and Ninth Circuits made up 69%

of all core federal [securities] filings in 2022. . . .")[7]; TRAC Reports, *Securities and Commodities Exchange Litigation Reaches All-Time High in September 2020* (majority of SEA and CEA cases filed in district courts within Second and Ninth Circuits in 2020)[8]; *see also Morrison*, 561 U.S. at 260 (noting the Second Circuit's "preeminence in the field of securities law" and influence on other courts).

Finally, as discussed in greater detail below, the continued application of the Second Circuit's "predominantly foreign" test is also harmful for all the reasons that led this Court to reject the Circuit's predecessor "conduct and effects" test: it leaves litigants and lower courts at sea over whether U.S. securities laws apply to particular cases, leads to inconsistent and arbitrary results, and deprives Congress of "a stable background against which" it can "legislate with predictable effects." *Id*. at 258, 261.[9]

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[7] https://www.cornerstone.com/wp-content/uploads/2023/05/Securities-Class-Action-Filings-2022-Year-in-Review.pdf

[8] https://trac.syr.edu/tracreports/civil/632/.

[9] *Compare, e.g*., *Dennis v. JPMorgan Chase & Co*., 343 F. Supp. 3d 122, 182 (S.D.N.Y. 2018) (finding CEA claims were domestic even though the "[mis]conduct alleged here largely occurred in Australia"), *with In re London Silver Fixing, Ltd., Antitrust Litig*., 332 F. Supp. 3d 885, 917-18 (S.D.N.Y. 2018) (finding CEA claims arising from transactions on a domestic commodities exchange extraterritorial because they were based on "foreign bad acts").

III. The Decision Below Is Wrong.

Certiorari is also warranted because the Second Circuit has consistently defied this Court's extraterritoriality precedents in two distinct ways.

First, the Second Circuit's conclusion that a domestic transaction is merely a necessary, but not a sufficient, condition for a domestic application of the SEA is contradicted by *Morrison* and its progeny. Perhaps the "predominantly foreign" test could be reconciled with *Morrison* if the SEA had a second focus the Court forgot to mention, one directed at the defendant's deceptive conduct. But *Morrison* expressly rejected that possibility, holding that "focus of the Exchange Act is *not* upon the place where the deception originated." 561 U.S. at 266 (emphasis added).

The only other possibility is that even though the location of the deception was not the *focus* of the statute, it is still an important—indeed, often determinative—factor in deciding whether an application of the statute is domestic. But if the Court believed *that*, it surely would have said so in *Morrison*. After all, one of the *Morrison* plaintiffs' central contentions was that their claims were domestic because the defendants engaged in deceptive conduct from within the United States. *Ibid*. This Court acknowledged that argument but rejected it on the ground that the location of that conduct was simply irrelevant because it was not the focus of the statute. *Ibid*.

If there were any doubt, later cases removed it. Whether an application of the statute is domestic, the

Court has summarized, is answered by identifying "the statute's focus and asking whether the conduct relevant to that focus occurred in United States territory." *WesternGeco*, 138 S. Ct. at 2137 (cleaned up). "If it did, then the case involves a permissible domestic application of the statute." *Ibid*. Full stop. End of analysis. In *RJR Nabisco*, the Court drove the point home: "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application *even if other conduct occurred abroad*." 579 U.S. at 337. (citing *Morrison*).

Just last Term, the Court emphasized again that the test turns exclusively on whether "the *conduct relevant to the statute's focus* occurred in the United States." *Abitron*, *supra*, at 4 (citing, *e.g.*, *Morrison*); *see also id*. at 5 (Sotomayor, J., concurring in the judgment) ("An application is domestic when the object of the statute's focus is found in, or occurs in, the United States.") (citing *Morrison*). "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application of the statute, even if other conduct occurred abroad.'" *Id*. at 4 (majority opinion) (cleaned up). And "if the relevant conduct occurred in another country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U. S. territory." *Ibid*. (cleaned up). It's that simple. There are no other factors.

The "predominantly foreign" test not only conflicts with what this Court has consistently *said* in these cases; it is irreconcilable with what the Court *did*. As

noted, *Morrison* held that the requested application of the SEA was extraterritorial despite the predominantly domestic nature of the deceptive conduct. Conversely, in *WesternGeco*, the Court found a domestic application of the Patent Act without giving any weight to the significant foreign conduct in that case. The Court identified the focus of the relevant provisions of the Patent Act as the "act of exporting components from the United States" to be used in creating a patent-infringing article abroad. 138 S. Ct. at 2138. Because the defendant had "suppl[ied] the components that infringed WesternGeco's patents" from the United States, the case involved a "domestic application of" the statute, even though the infringing product was assembled abroad and all of the plaintiff's damages arose from lost foreign sales. *Ibid*. The Court did not pause to consider whether these additional facts made the infringement "predominantly foreign." Instead, it held that these facts fell outside the statute's focus and, therefore, made no difference. *Id*. at 2138.

Second, even if the Court had left the door open to adding some further step to the analysis, it surely would not have contemplated the "predominantly foreign" standard the Second Circuit cribbed from its "conduct and effects" test. *Morrison*'s criticisms of that test were scathing and apply equally to the replacement standard. The Court denigrated the Second Circuit's prior handiwork as lacking a "textual or even extratextual basis," amounting to "judicial-speculation-made law," while being "not easy to administer" and "vague," leading to results that were "unpredictable and inconsistent." *Id*. at 258, 260.

Indeed, the Court wrote, there was "no more damning indictment of the 'conduct' and 'effects' tests 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 259 (citation omitted).

In creating the "predominantly foreign" standard, the Second Circuit likewise cited no textual (or atextual) source. *See Parkcentral*, 763 F.3d at 216. The test is equally indeterminate. Indeed, it is entirely question-begging, declaring that an application of the statute is impermissibly extraterritorial if the claims are "so predominantly foreign as to be impermissibly extraterritorial." *Ibid*. The court noted that the "potential for incompatibility between U.S. and foreign law" was a relevant factor but emphasized that this was "just one form of evidence" and not "the only relevant consideration." *Id*. at 216-17. The court did not identify any other relevant considerations or provide any guidance on how to weigh them. *Ibid*.

Indeed, despite *Morrison*'s "damning indictment" of the "conduct and effects" test for lacking any dispositive factors, the Second Circuit went out of its way to stress that the same is true of its "predominantly foreign" test. The *Parkcentral* court declared, "We do not purport to proffer a test that will reliably determine when a particular invocation of § 10(b) will be deemed appropriately domestic or impermissibly extraterritorial." 763 F.3d. at 217. Instead, "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." *Ibid*. In this way, the Second Circuit hoped, courts may "*eventually* . . . develop a reasonable and consistent governing body of law on this elusive question." *Ibid*. (emphasis added).

The Second Circuit's principal justification for all of this was that Congress would not have intended for the statute to apply when the illegal conduct took place principally overseas. *Parkcentral*, 763 F.3d at 215. But that is precisely the kind of "judicial-speculation-made-law" this Court displaced in favor of its focus test grounded in the language of the statute. *Morrison*, 561 U.S. at 261. Moreover, there is no conflict between *Morrison*'s transactional test and the Court's "insistence that § 10(b) has no extraterritorial application." *Parkcentral*, 763 F.3d at 215. The statute applies to foreign conduct that manipulates the price of a security traded on a U.S. exchange because "it is parties or prospective parties to those transactions that the statute seeks to protect." *Morrison*, 561 U.S. at 267 (cleaned up).

The Second Circuit's reliance on the supposed "potential for incompatibility between U.S. and foreign law" is also misplaced. *Parkcentral*, 763 F.3d at 216-17. The potential conflict the Court avoided in *Morrison* arose from on the assumption that "[l]ike the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within the territorial

jurisdiction." *Ibid*. *Morrison*'s transactional test is consistent with that international understanding.[10]

Indeed, it is far harder to understand how the Second Circuit's interpretation could be consistent with general congressional intent. Given the focus of the statutes, Congress surely did not intend that "defendants may deliberately manipulate the U.S. commodity and exchange markets by simply sitting in another country when they do so." *In re: London Silver Fixing, Ltd., Antitrust Litigation*, No. 1:14-MC-02573-VEC, slip op. 23 (S.D.N.Y May 22, 2023). But as a New York district court recently explained, that "is precisely . . . the rule established by *Prime* and *Laydon*." *Ibid*.

IV. This Case Provides An Ideal Vehicle.

This case is an ideal vehicle for resolving the conflict and clarifying the Court's extraterritoriality framework. The question was squarely presented below, and its resolution was outcome determinative—the only reason the Second Circuit gave for dismissing petitioner's CEA claims was their failure to satisfy the

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[10] Given this understanding, the CFTC explained below, the "predominantly foreign" test "creates a risk that some manipulation might not be subject to legal action in any jurisdiction." CFTC Amicus Br. 5. When "persons in a foreign country engage in manipulative conduct targeted specifically at a U.S. exchange," the Commission wrote, "courts in that country might conclude it is not their business—particularly if they find *Morrison* persuasive." *Ibid*. At the same time, under the Second Circuit test, that conduct would be unactionable in the United States because the manipulating conduct was "predominantly foreign." *Ibid.*

Circuit's "predominantly foreign test." *See* Pet. App. 16a. The Second Circuit further had the benefit of extensive briefing on the question by both the parties and the CFTC as amicus, including briefs at the petition-for-rehearing stage that directly focused on the propriety of that test.

At the same time, this case does not present any of the features that led the Court to deny certiorari on similar questions in prior cases. As discussed, the Court declined review in *Toshiba* after the Solicitor General questioned whether the Second Circuit really meant what it said in *Parkcentral*, an uncertainty that has since been resolved. Nor is this case in the interlocutory posture the United States viewed as a reason to deny review in *Toshiba*. U.S. *Toshiba* Br. 18.

The Court also denied certiorari in *Prime*. 141 S. Ct. 113 (2020). But that case was complicated by the Second Circuit's alternative holding that even if the focus of the CEA's private right of action was "clearly transactional," the underlying substantive provisions at issue in that particular case had a different focus. 937 F.3d at 104, 107; *see Prime* BIO 24-25. That complication does not arise here. The sole basis for the Second Circuit's dismissal of petitioner's CEA claim in this case was its application of its "predominantly foreign" test to Section 22 of the CEA, whose focus, the court affirmed, "is transactional." Pet. App. 15a-16a (quoting *Loginovskaya v. Batratchenko*, 764 F.3d 266, 272 (2d Cir. 2014) ("In § 22, the focus of congressional concern is clearly transactional.") (cleaned up)). This was no oversight. Petitioners rely on *different* substantive provisions in this case and respondents made no claim that those provisions lacked a

transactional focus. *Compare Prime*, 937 F.3d at 107 (discussing focus of Sections 6(c)(1) and 9(a)(2)) *with* C.A. J.A. 1744-45 (Third Amended Complaint, alleging violations of Sections 4b(a), 4c(a), and 9(a)), *and* Resp. C.A. Br. 23-38 (raising no extraterritoriality argument regarding the substantive provisions in this case).[11]

In *Prime* the respondent also argued that the case presented a poor vehicle because the Second Circuit had independently dismissed the CEA claims on alternative causation grounds. *Prime* BIO 27-28. No such alternative ground is present here: the district court rejected the defendant's causation arguments regarding the CEA claims, Pet. App. 88a, and the Second Circuit did not disturb that ruling on appeal, *see id*. 16a-19a.[12]

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[11] In *Prime*, the Second Circuit held that Section 6(c)(1) lacked a transactional focus because it "contains no mention of a 'national security exchange.'" 937 F.3d at 107. As the CFTC has explained, that conclusion was clearly wrong. CFTC Amicus Br. 9. But regardless, here petitioners found their claims on provisions like Section 4b(a), which prohibits willfully making "any false report or statement" in "connection with . . . any contract of sale of any commodity in interstate commerce or future delivery that is *made, on or subject to the rules of a designated market*," a reference to a regulated domestic futures market. 7 U.S.C. § 6b(a)(2)(B) (emphasis added); *see id*. § 7b-1(a) (defining "designated market").

[12] The Second Circuit did discuss causation in dismissing petitioners' antitrust claims. Pet. App. 20a-21a. However, in that context, the court applied the circuit's "so-called 'first step rule'" under which only "'injuries that happen at the first step following the harmful behavior are considered proximately

V. At The Very Least The Court Should Call For The Views Of The Solicitor General Or GVR In Light Of *Abitron*.

If the Court entertains any doubts as to whether the circuit conflict is real or warrants review, or whether this case presents an appropriate vehicle for resolving the split, it should call for the views of the Solicitor General, as it did in *Toshiba*. At the very least, the Court should grant the petition, vacate, and remand for reconsideration in light of last Term's decision in *Abitron*, which made unmistakably clear that a claim is domestic if the conduct relevant to the focus of the statute occurred in the United States. *See supra* at 26. To be sure, the Second Circuit has refused to change its precedent in light of similar statements in *RJR Nabisco* and *WesternGeco*. But the Second Circuit has never before been ordered by this Court to reconcile its rulings with those authorities. A GVR in light of *Abitron* may prompt the Second Circuit to finally acknowledge that reconciliation is impossible and cause it to correct its precedent.

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caused by that behavior." *Id*. 20a (quoting *Schwab Short-Term Bond Market Fund v. Lloyds Banking Group PLC*, 22 F.4th 103, 116 (2d Cir. 2021)). As respondents effectively acknowledged below, however, the stringent "first step rule" does not apply under the CEA. *See* Resp. C.A. Br. 38 (explaining that to established causation under the CEA, plaintiff need only plead "with sufficient detail (1) that the defendant 't[ook] an action that had an impact on the [plaintiff's position],' and (2) that the impact was 'negative.'") (quoting *Harry v. Total Gas & Power N.A., Inc.*, 889 F.3d 104, 112 (2d Cir. 2018)).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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