No. 23-80

IN THE

Supreme Court of the United States

JEFFREY LAYDON, INDIVIDUALLY AND ON BEHALF OF 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

BRIEF IN OPPOSITION

ERIC J. STOCK
JEFFERSON E. BELL
KATIE SALVAGGIO
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, NY 10166
(212) 351-4000

THOMAS G. HUNGAR
Counsel of Record
RUSSELL B. BALIKIAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 955-8500
thungar@gibsondunn.com

STEPHEN J. HAMMER
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Ave., Suite 2100
Dallas, TX 75201
(214) 698-3100

Counsel for Respondents UBS AG and UBS Securities Japan Co., Ltd.
(additional counsel listed on inside cover)

DAVID R. GELFAND
TAWFIQ S. RANGWALA
MILBANK LLP
55 Hudson Yards
New York, NY 10001
(212) 530-5000
dgelfand@milbank.com

MARK D. VILLAVERDE
MILBANK LLP
2029 Century Park East
33rd Floor
Los Angeles, CA 90067
(424) 386-4000

Counsel for Respondent Coöperatieve Rabobank U.A. (f/k/a Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.)

DAVID LESSER
JAMIE DYCUS
KING & SPALDING LLP
1185 6th Ave.
New York, NY 10036
(212) 556-2100
dlesser@kslaw.com

PATRICK MONTGOMERY
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Suite 900
Washington, DC 20006
(202) 737-0500
pmontgomery@kslaw.com

Counsel for Respondents The Royal Bank of Scotland, plc, The Royal Bank of Scotland Group plc, and RBS Securities Japan Ltd.

MARC J. GOTTRIDGE
LISA J. FRIED
HERBERT SMITH FREEHILLS
NEW YORK LLP
450 Lexington Ave.
New York, NY 10017
(917) 542-7600
marc.gottridge@hsf.com

BENJAMIN A. FLEMING
HOGAN LOVELLS US LLP
390 Madison Ave.
New York, NY 10017
(212) 918-3000

Counsel for Respondent Lloyds Banking Group plc

NICOLE A. SAHARSKY
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3052
nsaharsky@mayerbrown.com

STEVEN WOLOWITZ
ANDREW CALICA
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2000

Counsel for Respondent Société Générale

QUESTIONS PRESENTED

1. Whether petitioner lacks Article III standing to challenge conduct that—if it affected him at all—would only have benefited him.

2. Whether a private transaction with a non-party on a U.S. exchange, standing alone, is insufficient to state a domestic claim under the Commodity Exchange Act against foreign defendants, where virtually all of the allegedly wrongful conduct was committed by foreign employees of the foreign defendants in foreign locations and targeted a foreign interest-rate benchmark for a foreign currency, with no direct or necessary effect on the underlying transaction.

RULE 29.6 STATEMENT

Respondent Coöperatieve Rabobank U.A. ("Rabobank") has no parent corporation and no publicly held corporation owns 10% or more of Rabobank.

Respondent Lloyds Banking Group plc is a publicly held corporation, and no publicly held company owns 10% or more of Lloyds Banking Group plc's stock.

Respondent The Royal Bank of Scotland Group plc (now known as NatWest Group plc) ("RBS Group") is a public limited company organized under the laws of the United Kingdom. RBS Group has no parent company and no publicly held company owns 10% or more of its stock. Respondent RBS Securities Japan Limited (now known as NatWest Markets Securities Japan Limited) is a wholly owned subsidiary of Respondent The Royal Bank of Scotland plc (now known as NatWest Markets Plc), which, in turn, is a wholly owned subsidiary of RBS Group.

Respondent Société Générale has no parent company, and no publicly held corporation holds 10% or more of its stock.

Respondent UBS Securities Japan Co., Ltd. is a wholly owned subsidiary of Respondent UBS AG. UBS AG is wholly owned by UBS Group AG, a publicly traded corporation, and no publicly held corporation holds 10% or more of UBS Group AG stock. UBS Group AG is a publicly owned corporation and does not have a parent company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT... ii

TABLE OF AUTHORITIES.......................................v

INTRODUCTION..1

STATEMENT 4

A. Yen LIBOR and Euroyen TIBOR are distinct foreign benchmark interest rates for borrowing offshore Japanese yen. 4

B. Petitioner traded Euroyen TIBOR futures contracts before settlement—and thus at prices not determined by the Euroyen TIBOR benchmark rate. 5

C. Petitioner lost money "shorting" Euroyen TIBOR futures even though Euroyen TIBOR rates rose. 7

D. Petitioner's claims were dismissed on extraterritoriality grounds and for lack of causation. 8

REASONS FOR DENYING THE PETITION..........11

I. The Decision Below Does Not Conflict with the Decision of Any Other Circuit. 12

A. No other circuit has considered the domestic scope of a claim under Section 22—much less disagreed with the Second Circuit. 14

B. Even in the Exchange Act context, there is no conflict with *Parkcentral*. 19

TABLE OF CONTENTS
(*continued*)

Page

II. The Decision Below Is Correct and Does Not Conflict with Any Decision of This Court. 20

III. This Case Is a Poor Vehicle Because Petitioner's Now-Undisputed Failure to Allege Loss Causation Raises Substantial Questions as to Article III Standing. 26

IV. There Is No Other Compelling Reason for Review. 31

V. There Is No Sound Reason to Call for the Views of the Solicitor General or Grant, Vacate, and Remand. 33

CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

CASES

Abitron Austria GmbH v. Hetronic Int'l, Inc.,
No. 21-1043 (June 29, 2023)................3, 20, 23, 24

Allen v. Wright,
468 U.S. 737 (1984)...31

Atl. Trading USA, LLC v. BP plc,
141 S. Ct. 113 (2020).....................................14, 31

CFTC v. Monex Credit Co.,
931 F.3d 966 (9th Cir. 2019)...............................17

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991)..33

Ganino v. Citizens Utils. Co.,
228 F.3d 154 (2d Cir. 2000) 28

Harry v. Total Gas & Power N. Am., Inc.,
889 F.3d 104 (2d Cir. 2018) 27

Jennings v. Rodriguez,
138 S. Ct. 830 (2018)..25

Lawrence ex rel. Lawrence v. Chater,
516 U.S. 163 (1996)..34

In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430 (S.D.N.Y. 2018)..........7

In re LIBOR-Based Fin. Instruments Antitrust Litig., 935 F. Supp. 2d 666 (S.D.N.Y. 2013)......6, 8

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992)...26

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Microsoft Corp. v. AT&T Corp.,
550 U.S. 437 (2007) 24

Morrison v. Nat'l Austl. Bank Ltd.,
561 U.S. 247 (2010) 1, 15, 17, 22, 24

Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE,
763 F.3d 198 (2d Cir. 2014) ... 13, 14, 15, 20, 23, 24

Parker Drilling Mgmt. Servs., Ltd. v. Newton,
139 S. Ct. 1881 (2019) 25

Prime Int'l Trading, Ltd. v. BP plc,
937 F.3d 94 (2d Cir. 2019) 2, 10, 11, 15, 16, 17, 18, 21, 22, 23, 24, 25

RJR Nabisco, Inc. v. Eur. Cmty.,
579 U.S. 325 (2016) 20, 22, 23, 32

Rotkiske v. Klemm,
140 S. Ct. 355 (2019) 26

SEC v. Morrone,
997 F.3d 52 (1st Cir. 2021) 14, 20

Simon v. E. Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 26

Sonterra Cap. Master Fund, Ltd. v. Barclays Bank plc,
366 F. Supp. 3d 516 (S.D.N.Y. 2018) 30

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 27

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Stoyas v. Toshiba Corp.,
896 F.3d 933 (9th Cir. 2018) 14, 19

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 28

Toshiba Corp. v. Auto. Indus. Pension Tr. Fund,
139 S. Ct. 2766 (2019) 19, 31

WesternGeco LLC v. ION Geophysical Corp.,
138 S. Ct. 2129 (2018) 16, 17, 21, 22

STATUTES

7 U.S.C. § 1 *et seq*. 8

7 U.S.C. § 2 .... 24, 25

7 U.S.C. § 6b 18

7 U.S.C. § 6c 18

7 U.S.C. § 13 18

7 U.S.C. § 25 .... 10, 15, 27

15 U.S.C. § 1 *et seq*. 8

15 U.S.C. § 78j 16

18 U.S.C. § 1962 8

18 U.S.C. § 1964 8

RULE

Sup. Ct. R. 14.1(a) 26

TABLE OF AUTHORITIES
(*continued*)

Page(s)

OTHER AUTHORITIES

Bank of Japan Review, *Review of JPY LIBOR Transition and Future Initiatives* (May 2022)....33

Black's Law Dictionary (11th ed. 2019)......................5

JBA Euroyen TIBOR, JBA TIBOR Admin.........28, 30

JBA TIBOR Reform, JBA TIBOR Admin. (updated Aug. 1, 2023)..33

BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

Petitioner asserts that the foreign conduct of foreign actors to manipulate foreign benchmark interest rates related to a foreign currency caused him to lose money on a domestic trade with a non-party. Given that virtually every aspect of the alleged misconduct occurred abroad, the Second Circuit held, in a straightforward application of *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), that petitioner's claims under the Commodity Exchange Act ("CEA") were impermissibly extraterritorial. In affirming the dismissal of petitioner's antitrust claim, the court also held that petitioner "failed to plead any injury" traceable to respondents because he alleges loss even though he "would have benefited" from the alleged manipulative conduct, and because his theory of damages is "highly speculative" and "attenuated." Pet. App. 22a-23a.

Certiorari is unwarranted. Neither this Court nor any circuit other than the Second has ever considered the application of *Morrison* to private CEA claims. And while petitioner contends that the decision below flouts this Court's precedent (citing only cases arising under other statutes), he fails to grapple with the Second Circuit's rigorous application of *Morrison* in the unique context of the CEA.

Petitioner acknowledges (at 20) that the Second Circuit is the only court of appeals to have ever addressed the domestic scope of a claim brought under the CEA's private right of action, Section 22. The

purported "conflict" petitioner identifies involves an entirely different statute, with its own distinct text and structure: Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). The two statutes differ in critical respects, and petitioner offers no reason to impute the purported conflict over Section 10(b) to claims under Section 22 of the CEA. Regardless, the purported conflict is illusory even in the Exchange Act context. The other circuits issuing the allegedly conflicting decisions acknowledged that their cases involved outcome-determinative factual distinctions from the Second Circuit's leading Exchange Act decision.

Petitioner maintains that the Second Circuit misapplied *Morrison* by holding that a domestic transaction is not itself sufficient to state a permissibly domestic CEA claim. But *Morrison* held only that a domestic transaction was *necessary* to state a domestic violation of *Section 10(b)*. It never held that a domestic transaction was always *sufficient* to state a domestic violation of *any* statute. And regardless of the proper rule in the Section 10(b) context, the Second Circuit has rigorously applied the logic of *Morrison* to the distinct context of the CEA by asking whether the private plaintiff pleaded "domestic—not extraterritorial—*conduct* by Defendants that is violative of a *substantive provision* of the CEA." *Prime Int'l Trading, Ltd. v. BP plc*, 937 F.3d 94, 105 (2d Cir. 2019) (second emphasis added), *cert. denied sub nom. Atl. Trading USA, LLC v. BP plc*, 141 S. Ct. 113 (2020); *accord* Pet. App. 15a-16a. That analysis was exactly right under this Court's precedents.

This case is also an exceptionally poor vehicle for addressing the scope of the CEA's domestic application. Petitioner chose not to challenge the Second

Circuit's holdings that he "failed to plead any injury" traceable to respondents' actions, and that his chain of causation is "highly speculative" and "attenuated." Pet. App. 22a-23a. As a result, this case presents a substantial threshold question of Article III standing and a clear alternative ground for affirmance. Petitioner's purported injury is based on trading losses supposedly caused by instances of manipulation, yet his own allegations definitively—and now, undisputedly—refute his theory that respondents' alleged actions caused his losses.

Petitioner's insistence that the decision below carries severe ramifications for U.S. investors blinks reality. The Second Circuit expressly limited its analysis to the CEA's *private* right of action. And in any event, foreign regulators can, should, and do take the lead in policing predominantly foreign conduct like that alleged here.

Petitioner finally requests that the Court call for the views of the Solicitor General or grant, vacate, and remand in light of *Abitron Austria GmbH v. Hetronic International, Inc.*, No. 21-1043 (June 29, 2023). But he offers no sound reason for either action. The Court did not seek the Solicitor General's input before denying certiorari in *Prime*, and it has no reason to do so here given petitioner's established lack of injury and the conceded absence of any circuit conflict involving the CEA. And *Abitron* only confirms the soundness of the decision below. Certiorari should be denied.

STATEMENT

A. Yen LIBOR and Euroyen TIBOR are distinct foreign benchmark interest rates for borrowing offshore Japanese yen.

Petitioner's allegations involve the manipulation of Yen LIBOR and Euroyen TIBOR—two different "benchmark rates" regarding the lending of Japanese yen outside Japan that were calculated independently of each other overseas. Pet. App. 6a. "Euroyen" is a moniker for offshore yen. *Id.* at 6a n.1.

During the pertinent time period, Yen LIBOR and Euroyen TIBOR differed in key respects. *First*, they were published by different foreign entities, in different foreign countries, using different methodologies and different inputs from different banks. Yen LIBOR was published by the London-based British Bankers' Association based on submissions from a panel of mostly European banks. The banks submitted the interest rates at which they believed they could borrow offshore yen for different loan-maturity lengths, and the British Bankers' Association discarded the highest and lowest 25% of submissions for each maturity and determined the average of the remainder. C.A. App. 1370. Euroyen TIBOR was set by the Tokyo-based Japanese Bankers Association, which accepted submissions regarding prevailing interest rates from a panel of banks headquartered primarily in Japan. The Japanese Bankers Association calculated the average rate by discarding the two highest and two lowest submissions and averaging the remainder. *Id.*

Second, the two benchmark rates were calculated at different times; Euroyen TIBOR was calculated eight hours after Yen LIBOR each day. C.A. App. 1370.

Both Yen LIBOR and Euroyen TIBOR were calculated separately for different loan-maturity lengths. Each Yen LIBOR panel bank submitted rates for 15 different maturity lengths, from overnight to 12 months. C.A. App. 1370. And each Euroyen TIBOR panel bank submitted rates for 13 different maturity lengths, from one week to 12 months. *Id.*

B. Petitioner traded Euroyen TIBOR futures contracts before settlement—and thus at prices not determined by the Euroyen TIBOR benchmark rate.

Petitioner traded in three-month Euroyen TIBOR futures contracts on the Chicago Mercantile Exchange. C.A. App. 1371. A futures contract is an "agreement to buy or sell a standardized asset (such as a commodity, stock, or foreign currency) at a fixed price at a future time." *Black's Law Dictionary* 819 (11th ed. 2019). The asset underlying these contracts was a Euroyen "time deposit" with a three-month maturity. C.A. App. 1371. (A time deposit is an interest-paying bank account with a maturity date. *See* Pet. App. 8a n.2.) The interest rate for the time deposit determined the "price" of this asset.

The futures contracts here essentially allowed traders to bet until a final, specified "settlement" date on whether interest rates for three-month Euroyen time deposits would increase or decrease. At settlement, the price for the contracts was set as 100 minus the three-month Euroyen TIBOR rate published on the settlement date. Thus, if the three-month Euroyen TIBOR rate at settlement was 5.50%, the settlement price for the futures would be 94.50, and traders who held open positions at settlement would receive cash payments based on the difference between the final settlement price and the price at

which they opened their positions. C.A. App. 1372-73. A price differential of 0.01 therefore corresponded to a one-basis-point interest-rate change (0.01%). And the futures were structured so that each basis point in turn corresponded to an interest payment of 2,500 yen. Traders who held positions to settlement therefore made or lost money based on whether they accurately predicted if Euroyen interest rates would increase or decrease at final settlement.

Only on the settlement date did the Euroyen TIBOR rate for a given day determine the price of a Euroyen TIBOR futures contract for the corresponding maturity. C.A. App. 1369, 1373. And most traders—including petitioner—did not hold their futures positions to settlement; instead, they "close[d] out of their positions" long before settlement by "entering into offsetting contracts." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 682 (S.D.N.Y. 2013), *vacated and remanded in part on other grounds sub nom. Gelboim v. Bank of Am. Corp.*, 823 F.3d 759 (2d Cir. 2016); *see* C.A. App. 1374.

The profit or loss from these *pre-settlement* trades was determined by the difference in price between the trader's opening and closing transactions—*i.e.*, by the shift in market predictions about Euroyen TIBOR over the time the position was open. *Trading* prices were never set by *contemporaneously published* benchmark interest rates, such as Yen LIBOR or Euroyen TIBOR. Rather, they were determined by traders' speculation about *future* interest rates, which could be influenced by fluid market forces, macroeconomic trends, trading strategies, and innumerable other considerations. For these reasons, trading prices "fluctuate[d] significantly within a trading day," moment-by-moment, and could and did "move in

inconsistent directions" from the static benchmark rates published that same day. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 554 (S.D.N.Y. 2018). Once-a-day benchmark rates are especially unlikely to affect trading prices months or years before settlement; after all, the three-month Euroyen rate today has virtually no bearing on what the rate will be far in the future. And benchmark rates for maturities other than the one being traded (*e.g.*, one-week versus three-month) are even further afield. The profit or loss from pre-settlement trades was thus determined by market sentiment about future interest rates, not by contemporaneously published benchmark rates.

C. Petitioner lost money "shorting" Euroyen TIBOR futures even though Euroyen TIBOR rates rose.

Petitioner allegedly made two pre-settlement trades: once to open a "short" position in three-month Euroyen TIBOR futures on July 13, 2006, and once to close that position on August 30, 2006. C.A. App. 1724. He therefore closed his position long before the December 18, 2006 settlement date for his contracts. *Id.* Petitioner purportedly lost about $2,150 on these trades, *id.*, and neither knows nor alleges the identity of the persons on the other side of these exchange-based transactions.

Petitioner's pre-settlement $2,150 loss was not caused by contemporaneous Euroyen TIBOR rates. At final settlement, a short position in three-month Euroyen TIBOR futures will "profit from an increase in Euroyen TIBOR rates," which push the settlement price lower. C.A. App. 1372. But petitioner allegedly lost money despite three-month Euroyen TIBOR rates

increasing while his pre-settlement position was open. *See infra*, at 30.

Years later, reports began to emerge that LIBOR for a variety of currencies had allegedly been subject to instances of attempted manipulation to benefit certain financial positions. *LIBOR*, 935 F. Supp. 2d at 700. Nearly a dozen regulators around the world investigated, including the U.S. Department of Justice and the Commodity Futures Trading Commission ("CFTC"). *See* C.A. App. 1319-23 (Table of Exhibits). Together these U.S. agencies collected more than $5.5 billion relating to bank employees' conduct concerning benchmarks for various currencies, including the U.S. dollar, Swiss franc, British pound sterling, and Japanese yen; other regulators collected roughly $5 billion.

D. Petitioner's claims were dismissed on extraterritoriality grounds and for lack of causation.

Petitioner filed this suit in April 2012. Alleging a $2,150 loss from twice trading three-month Euroyen TIBOR futures contracts in 2006, petitioner purported to represent a class of "[a]ll persons or entities that engaged in a U.S. based transaction in a Euroyen TIBOR futures contract" from January 2006 through December 2010. Pet. App. 11a; C.A. App. 461. He named as defendants more than 35 banking entities and brokers from around the world, and—across a 337-page second amended complaint, 346-page proposed third amended complaint, and 428-page third amended complaint—asserted claims under the CEA, 7 U.S.C. § 1 *et seq.*, the Sherman Act, 15 U.S.C. § 1 *et seq.*, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962, 1964(c).

The gravamen of petitioner's claims is that the defendants engaged in a sweeping international conspiracy to manipulate Yen LIBOR and Euroyen TIBOR to benefit their own derivatives positions, which in turn purportedly affected his pre-settlement futures trading on U.S. exchanges. *See* Pet. App. 7a, 9a. As relevant here, the vast majority of the allegedly unlawful conduct in petitioner's kitchen-sink pleadings focused on Yen LIBOR, not Euroyen TIBOR, and virtually all of it was committed by foreign employees of foreign banks from foreign locations and interacting with foreign colleagues and counterparts. As the Second Circuit observed, the allegations of domestic conduct are limited to "a handful of communications sent from Defendants' foreign-based employees through or to servers located in the United States," or while in Las Vegas on a weekend trip. *Id.* at 10a & n.6, 17a-18a.

In orders issued in March 2014, 2015, and 2017, the district court dismissed petitioner's antitrust claim for lack of antitrust standing, denied leave to file RICO claims for lack of proximate causation, denied leave to expand the proposed class period, and dismissed several defendants for lack of personal jurisdiction. Pet. App. 11a-12a. No class was certified.

In 2020, the district court dismissed petitioner's CEA claims as impermissibly extraterritorial and entered judgment on the pleadings in respondents' favor. *See* Pet. App. 12a. Applying *Prime*, it concluded that alleged manipulation "by foreign financial institutions, on foreign soil" was impermissibly extraterritorial. *Id.* at 60a. Further, petitioner could "not point to any direct, traceable ways in which [the] alleged manipulation of Yen LIBOR caused a loss to him on futures contracts associated with an entirely different benchmark"—*i.e.*, Euroyen TIBOR. *Id.*

A Second Circuit panel unanimously affirmed. It concluded that petitioner could not establish antitrust standing because he "failed to plead any injury," "failed to allege that his injury was proximately caused by" respondents, and relied on an "attenuated chain of causation that would complicate if not render impossible any damages calculation." Pet. App. 20a, 22a-23a. Petitioner's proposed RICO claims failed for the same reasons. *Id.* at 25a-26a. Petitioner does not challenge these rulings.

As to the CEA, the court applied *Morrison*'s two-step framework. Pet. App. 14a-15a. It first held that the CEA's private right of action, Section 22 of the CEA, 7 U.S.C. § 25(a)(1), does not apply extraterritorially and has a transactional focus, meaning that private CEA claims "must be based on transactions occurring" in the United States. Pet. App. 15a (quoting *Prime*, 937 F.3d at 103). But that conclusion did not and could not end the analysis for a CEA claim. As *Prime* explained, Section 22 of the CEA is merely "a general provision affording a cause of action to private litigants" for "'a violation of this chapter.'" *Id.* (quoting 7 U.S.C. § 25(a)(1)); *see Prime*, 937 F.3d at 105. To state a permissibly domestic claim under Section 22, a CEA plaintiff must *also* invoke a "substantive provision" of the CEA and show "sufficiently domestic conduct" relevant to the focus of *that* provision. Pet. App. 15a-16a (citing *Prime*, 937 F.3d at 105).

Following *Prime*'s analysis of the interaction between the CEA's cause-of-action provision (Section 22) and its substantive provisions, the decision below thus explained that a CEA plaintiff must plead "not only a domestic *transaction*, but also sufficiently domestic

conduct by the defendant." Pet. App. 16a (emphases added). Section 22's cause of action cannot be "divorce[d]" from "the requirement of a domestic violation of a substantive provision of the CEA." *Id.* at 15a-16a (quoting *Prime*, 937 F.3d at 105).

Applying that standard, the court easily rejected petitioner's claims as impermissibly extraterritorial. Petitioner "traded a derivative that is tied to the value of a foreign asset," and the alleged manipulative conduct at the center of the case "occurred almost entirely abroad" on "foreign trade desks" in "foreign offices" and was directed toward "an index tied to a foreign market" that itself was "set by foreign entities" in "foreign countries." Pet. App. 16a-19a.

Petitioner sought rehearing en banc, but the Second Circuit summarily denied that request, with no noted dissent. Pet. App. 112a.[1]

REASONS FOR DENYING THE PETITION

Petitioner admits, as he must, that no circuit other than the Second has applied *Morrison*'s two-step framework to the CEA. His attempts to nevertheless manufacture a conflict with circuit or Supreme Court authority fail. Petitioner mischaracterizes the decision below and the cases it relies upon while glossing

---

[1] In its original opinion, the Second Circuit also rejected petitioner's assumption that benchmark interest rates are *themselves* "commodities" under the CEA. Pet. App. 44a-45a. After petitioner sought rehearing en banc, the court issued an amended opinion removing this analysis, but contrary to petitioner's suggestion (at 12), the court did not thereby accept the erroneous premise that benchmark interest rates (which cannot be traded) are commodities "traded on a domestic exchange." The opinion made clear that the relevant commodities here are Euroyen time deposits. Pet. App. 16a.

over the utterly foreign nature of the allegedly unlawful conduct here. Moreover, there is a substantial question as to petitioner's Article III standing. The Second Circuit, in affirming the dismissal of petitioner's antitrust claim, held that petitioner failed to plead an injury caused by respondents. Petitioner has not challenged that holding in his petition, foreclosing him from doing so in this Court. That unchallenged holding also ensures the question presented will not affect the outcome of this case.

The Court should deny the petition for the following reasons: (i) the purported circuit conflict is illusory, especially on petitioner's framing of the question presented; (ii) the decision below correctly applies this Court's precedents; (iii) the Court has often and recently denied petitions raising this same purported conflict; (iv) this case is a poor vehicle because petitioner elected not to challenge the Second Circuit's holding that he failed to plead an injury caused by respondents; and (v) the benchmark interest rates at issue either have been or will soon be discontinued, reducing the continuing significance of the holding below. As in *Prime*, calling for the views of the Solicitor General is unnecessary here given the conceded lack of a CEA circuit conflict and equally clear vehicle issues. And petitioner's last-ditch request for a remand in light of *Abitron* is difficult to fathom—*Abitron* only confirms the decision below.

I. The Decision Below Does Not Conflict with the Decision of Any Other Circuit.

Petitioner asks the Court to resolve whether courts deciding extraterritoriality questions "may consider factors other than whether the conduct relevant to the statute's focus occurred in the United States." Pet. i. But that question is not presented here,

because the Second Circuit did no such thing. The decision below carefully applied *Morrison*'s two-step framework, expressly asking whether "the conduct relevant to the statute's focus occurred in the United States," and explaining that "[i]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." Pet. App. 15a. The Second Circuit then analyzed whether petitioner had alleged sufficiently "domestic conduct by the defendant" relevant to the statute's focus. *Id.* at 16a. Petitioner may disagree with the Second Circuit's conclusion, but he cannot plausibly deny that the decision below applied the proper framework—just like the parade of decisions he cites (at 16-19) addressing such disparate statutes as the Exchange Act, the Copyright Act, the Alien Tort Statute, the Trafficking Victims Protection Reauthorization Act, and federal laws prohibiting wire fraud and child pornography. There is undeniably no conflict over the question presented as petitioner frames it. That is reason enough to deny the petition.

Further, petitioner concedes that the Second Circuit is the only court of appeals to have ever addressed whether a private CEA claim is impermissibly extraterritorial under *Morrison*—"other circuits have yet to reject the Second Circuit's interpretation of *Morrison* in the specific context of a CEA claim." Pet. 20. Attempting to create the semblance of a conflict, petitioner argues that the Ninth and First Circuits have disagreed with the Second Circuit's 2014 decision in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014) (per curiam). But those cases involved a different statute with a different structure and different language. The conceded

lack of any conflict over the domestic scope of CEA claims warrants denial.

A. No other circuit has considered the domestic scope of a claim under Section 22—much less disagreed with the Second Circuit.

The decision below is a straightforward application of the Second Circuit's decision in *Prime*, and it is ultimately that case to which petitioner objects. *See* Pet. App. 18a ("Our precedent [*Prime*] mandates dismissal of Plaintiff's CEA claims."); Pet. 11-12. But no other circuit has addressed, let alone disagreed with, *Prime*'s interpretation of the domestic scope of a claim under Section 22, and this Court denied certiorari in *Prime* itself under the caption *Atlantic Trading*, 141 S. Ct. at 113. What was true then remains true now: "Neither this Court nor any other court of appeals has applied *Morrison* to the CEA." Br. in Opp. at 2, *Atl. Trading*, 141 S. Ct. 113 (No. 19-1141).

Brushing past the acknowledged lack of conflict over the CEA, petitioner purports to find a conflict in the Ninth and First Circuits' asserted disagreement with *Parkcentral*. *See Stoyas v. Toshiba Corp.*, 896 F.3d 933, 950 (9th Cir. 2018), *cert. denied sub nom. Toshiba Corp. v. Auto. Indus. Pension Tr. Fund*, 139 S. Ct. 2766 (2019); *SEC v. Morrone*, 997 F.3d 52, 60 (1st Cir. 2021). But those three cases dealt with a different statute: Section 10(b) of the Exchange Act. They did not address the very different text and structure of the CEA, and thus say nothing about *Prime* or the decision below.

Parkcentral addressed the domestic scope of Section 10(b), 763 F.3d at 215, which applies only to transactions in securities listed on domestic exchanges and to "domestic transactions" in other

securities, *Morrison*, 561 U.S. at 267. *Morrison* had held that a domestic transaction was necessary to state a domestic Section 10(b) claim, but that did not resolve the question in *Parkcentral*: whether a domestic transaction in synthetic securities referencing foreign securities was *itself* sufficient to establish a permissibly domestic application of Section 10(b), even where the vast majority of the allegedly wrongful conduct took place abroad. 763 F.3d at 215. After considering the holding and reasoning of *Morrison*, *Parkcentral* held that pleading a domestic transaction in these securities was necessary, but not sufficient, to allege a domestic application of Section 10(b) under *Morrison*. *Id.*

Whether or not *Parkcentral* was correct, the Second Circuit did not reflexively extend its holding to the CEA, as petitioner suggests. To the contrary, *Prime* engaged directly with the CEA's language and this Court's extraterritoriality precedents. To be sure, the holding in *Prime*—that a domestic transaction is necessary, but not sufficient, to state a claim under Section 22 of the CEA—is analogous to the bottom-line result in *Parkcentral*, which is why *Prime* looked to *Parkcentral* when applying the law to "the facts," 937 F.3d at 106-07. But *Prime* reached its necessary-not-sufficient holding for entirely different reasons: it was "required by the text and structure of Section 22" of the CEA. *Id.* at 105.

Section 22 of the CEA—which, as explained *infra*, has no direct parallel in the Exchange Act—creates no substantive legal obligations on its own. *Prime*, 937 F.3d at 105. By its terms, Section 22 creates a private right of action for the "commission of a violation" of one of the CEA's substantive provisions. *Id.* (quoting 7 U.S.C. § 25(a)(1)). Alleging a domestic transaction

under Section 22, then, is only the first necessary step to invoking that provision. A plaintiff must also allege a domestic violation of one of the CEA's *substantive* provisions meeting the requirements of Section 22. *Id.*

As *Prime* explained, that reading is compelled not only by the text of Section 22 but also by this Court's precedent. 937 F.3d at 105. A contrary holding would have "divorce[d] the private right afforded in Section 22 from the requirement of a domestic violation of a substantive provision of the CEA," *id.*, which would contravene this Court's teaching from *WesternGeco LLC v. ION Geophysical Corp.* that "[i]f the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions," *id.* (quoting 138 S. Ct. 2129, 2137 (2018)). This approach is fully consistent with *Morrison*, which did not purport to hold that a domestic transaction is *always* sufficient for a domestic application of *every* statute.

Forced to acknowledge the absence of a circuit conflict over the CEA's domestic application, petitioner insists (at 7, 20) that the "context" of the CEA is "materially identical" to that of the Exchange Act, such that the purported conflict over *Parkcentral* should be imputed to the CEA. *See also* Pet. 21 n.6 (arguing that the "CEA was modeled on the [Exchange Act] in relevant part"). But the two statutes differ in critical respects.

Most obviously, unlike Section 22 of the CEA, Section 10(b) of the Exchange Act *does* create substantive legal obligations on its own. It makes it unlawful to "use or employ . . . any manipulative or deceptive device" in connection with certain security purchases. 15 U.S.C. § 78j(b). This substantive prohibition—

which has been judicially construed to imply its own private right of action, *see Morrison*, 561 U.S. at 261 n.5—differs significantly from Section 22(a)(1), which *confers* an *express* right of action to enforce *other* statutory provisions. It certainly was not "cop[ied]" and "past[ed]" from Section 10(b), rendering inapt cases like *CFTC v. Monex Credit Co.*, 931 F.3d 966 (9th Cir. 2019). Pet. 21 n.6. Relatedly, Section 10(b) of the Exchange Act does not "wor[k] in tandem" with other provisions of the Exchange Act in the same way Section 22 of the CEA "works in tandem" with the substantive provisions it expressly references. *WesternGeco*, 138 S. Ct. at 2137.

These textual and structural differences make clear that any disagreement over *Parkcentral*'s interpretation of Section 10(b) of the Exchange Act cannot be imputed to Section 22 of the CEA. Whether or not *Parkcentral* correctly read a *single substantive provision* (Section 10(b)) to require *both* a domestic transaction *and* domestic conduct, that holding is not implicated by a decision, like *Prime*, that roots these two requirements *separately* in a cause-of-action provision (Section 22) and substantive statutory provisions.

Petitioner contends that the substantive provisions of the CEA are immaterial because the "sole basis for the Second Circuit's dismissal" here was an analysis of "Section 22 of the CEA." Pet. 31. That is plainly incorrect. Applying *Prime*, the decision below held that because "Section 22 is a general provision affording a cause of action to private litigants," a "private plaintiff pleading a CEA claim under Section 22 must thus invoke a *substantive provision of the CEA*" in addition to Section 22. Pet. App. 15a (citing *Prime*, 937 F.3d at 105) (emphasis added). The court *declined*

to "divorce the private right afforded in Section 22 from the requirement of a domestic violation of *a substantive provision of the CEA*." *Id.* at 16a (quoting *Prime*, 937 F.3d at 105) (emphasis added).

Petitioner does not contend that any court has ever disagreed with that approach to the CEA, nor does petitioner challenge it. *See* Pet. 31-32. Thus, resolving the extraterritoriality of petitioner's CEA claims would require this Court to prematurely wade into the permissibly domestic scope of the *substantive* provisions petitioner cites—Sections 4b(a), 4c(a), and 9(a) of the CEA (7 U.S.C. §§ 6b(a), 6c(a), and 13(a)). C.A. App. 1744; Pet. App. 14a. And as to that issue, petitioner did not preserve an objection to the Second Circuit's analysis. In *Prime*, the Second Circuit held that Section 9(a) requires a showing of a domestic violation by the defendant, 937 F.3d at 108, and the district court applied that holding to petitioner's claims here, Pet. App. 58a (requiring "domestic—not extraterritorial—*conduct* by Defendants that is violative of a substantive provision of the CEA") (quoting *Prime*, 937 F.3d at 105). Petitioner did not argue that a different approach was warranted for the substantive provisions here—he never even cited those provisions in his Second Circuit briefing—so respondents and the decision below likewise applied *Prime* to those provisions. *Id.* at 16a. Petitioner now asserts (in a footnote) that Section 4b(a) has a transactional focus just like Section 22, *see* Pet. 32 n.11, but he never raised that argument below and has therefore forfeited it.

In short, *Parkcentral* says nothing about the domestic applicability of Section 22. Because the Second Circuit is the only court of appeals to have considered the domestic scope of a CEA claim under Section 22, this case involves no circuit conflict.

B. Even in the Exchange Act context, there is no conflict with *Parkcentral*.

Because *Parkcentral* says nothing about Section 22 of the CEA, any disagreement with that decision is irrelevant to the question presented. But even in the Exchange Act context, there is no circuit conflict with *Parkcentral*. While *Toshiba* and *Morrone* disagreed with some of *Parkcentral*'s reasoning, they made clear that *Parkcentral*'s holding was inapplicable on its own terms due to factual differences in the cases. Because no circuit has ever departed from *Parkcentral* in a case where *Parkcentral*'s holding otherwise governed, the purported circuit conflict is illusory.

In *Toshiba*, the Ninth Circuit distinguished *Parkcentral* on four grounds: (1) *Parkcentral* involved "entirely private" securities-based swap agreements, which had important differences from the American Depository Receipts at issue in *Toshiba*; (2) the swap agreements were not traded on SEC-regulated platforms or exchanges; (3) the instruments in *Parkcentral* referenced foreign securities, implicating concerns that incompatible U.S. and foreign laws would regulate the same security; and (4) *Parkcentral* did not involve an allegation that the company whose shares the swap agreements referenced knew about or facilitated the agreements. 896 F.3d at 950. Only then did the Ninth Circuit take issue with *Parkcentral*'s reading of Section 10(b) and *Morrison*. *Id.* That dictum does not change the Ninth Circuit's insistence that *Toshiba* is fully consistent with *Parkcentral*. *See id.* As the United States explained in its brief opposing certiorari in *Toshiba*, no "square conflict" exists between the two cases. Br. for the United States as Amicus Curiae at 19, 139 S. Ct. 2766 (No. 18-486). This Court denied review. 139 S. Ct. 2766.

Likewise, the First Circuit's criticism of *Parkcentral* was immaterial to the outcome of the case before it. In *Morrone*, the First Circuit noted that there were "significantly more U.S. connections rendering the fraud domestic" than in *Parkcentral* and that the defendants at issue "conducted nearly all of their [fraudulent] activities" from the United States. 997 F.3d at 61. And the court emphasized *Parkcentral*'s admonition that its holding cannot be "perfunctorily applied to other cases based on the perceived similarity of a few facts." *Id.* (quoting 763 F.3d at 217). Thus, like the Ninth Circuit, the First Circuit's criticism of *Parkcentral* did not create a circuit conflict.

II. The Decision Below Is Correct and Does Not Conflict with Any Decision of This Court.

This Court has never applied *Morrison* to address the extraterritorial reach of the CEA. The decision below applying *Morrison* to the CEA thus does not conflict with any decision of this Court, and its analysis was correct—a conclusion that is strongly bolstered by the Court's recent decision in *Abitron Austria GmbH v. Hetronic International, Inc.*, No. 21-1043 (June 29, 2023).

Under this Court's two-step extraterritoriality framework, courts first determine whether "Congress has affirmatively and unmistakably instructed that" the relevant statutory provision should "apply to foreign conduct." *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 335-36 (2016). Petitioner does not dispute the Second Circuit's holding that the CEA's private right of action, Section 22, does not have extraterritorial effect. *See* Pet. App. 15a.

This case thus turns on applying *Morrison*'s second step to private CEA claims. The decision below did so

in a manner fully consistent with—indeed, mandated by—this Court's extraterritoriality jurisprudence.

The decision below was a straightforward application of the Second Circuit's previous decision in *Prime*. Pet. App. 18a (*Prime* "mandates dismissal"). *Prime* conducted exactly the mode of extraterritoriality analysis this Court has repeatedly endorsed, from *Morrison* to *Abitron*. In distinguishing permissible domestic claims under Section 22 of the CEA from impermissibly extraterritorial ones, *Prime* first confirmed that the "focus" of Section 22 is "transactional," a holding petitioner does not dispute. 937 F.3d at 104. Thus, alleging a domestic transaction is a necessary condition for invoking Section 22. *Id.*

Prime's key insight for CEA claims is that pleading a domestic transaction under Section 22 is not *sufficient* to state a permissibly domestic CEA claim because Section 22 expressly requires a "commission of a violation" of one of the CEA's *substantive* provisions. *Prime*, 937 F.3d at 105. Section 22 does not regulate any conduct; it is a private right of action that "works in tandem with other provisions." *Id.* (quoting *WesternGeco*, 138 S. Ct. at 2137). A plaintiff must thus "allege a domestic violation of one of the CEA's substantive provisions" before he can invoke Section 22. *Id.* Put differently, Section 22 must be "assessed in concert with those other provisions." *Id.* (quoting *WesternGeco*, 138 S. Ct. at 2137).

Therefore, to state a properly domestic claim under Section 22, a plaintiff "must allege not only a domestic transaction, but also domestic—not extraterritorial—*conduct* by Defendants that is violative of a substantive provision of the CEA, such as Section 6(c)(1) or Section 9(a)(2)." *Prime*, 937 F.3d at 105. For that proposition, *Prime* cited *WesternGeco*'s instruction

that courts must look at whether the "conduct . . . that is relevant to the statute's focus" occurred in the United States. *Id.* (quoting *WesternGeco*, 138 S. Ct. at 2138) (brackets omitted). *Prime* then carefully analyzed each substantive CEA provision at issue and held that their "focus" was on "rooting out manipulation and ensuring market integrity" and "preventing manipulation of the price of any commodity"—and that "[a]ll of the conduct relevant to *that* focus occurred abroad." *Id.* at 107-08.

The decision below applied this same analysis. It correctly stated that the relevant inquiry was "whether 'the conduct relevant to the statute's focus occurred in the United States,'" Pet. App. 15a (quoting *RJR Nabisco*, 579 U.S. at 337), explained that this analysis needed to be applied not just to Section 22 but also to the "substantive provision[s] of the CEA," *id.* (citing *Prime*, 937 F.3d at 105), and concluded that petitioner's "CEA claims are impermissibly extraterritorial because the conduct he alleges is 'predominantly foreign'" and, indeed, "occurred almost entirely abroad," *id.* at 16a-17a (quoting *Prime*, 937 F.3d at 106).

The petition does not engage with *Prime*'s analysis of the text of the CEA. Instead, it ignores the distinction between Section 22 and the CEA's substantive provisions and argues (at 25) that *Morrison* forecloses *Prime*'s requirement of more than just a domestic transaction. But *Morrison* is fully consistent with *Prime*'s approach. *Morrison* held that pleading a domestic transaction is a *necessary* component of pleading a domestic application of *Section 10(b)*. 561 U.S. at 267. So in *Morrison*, the plaintiff's claim was impermissibly extraterritorial because the transactions took place abroad, even though much of the allegedly wrongful conduct was domestic. *Id.* at 266, 273.

Morrison did not address the opposite situation—like the one presented here—where the *transaction* allegedly occurs in the United States, but virtually all the allegedly unlawful conduct occurs abroad. *See* Pet. App. 17a. *Morrison* thus had no occasion to consider whether pleading a domestic transaction is sufficient, or merely necessary, for stating a violation of Section 10(b)—much less the CEA.

For all of the reasons the Second Circuit has explained, the best reading of *Morrison* is that a domestic transaction is "necessary" but "not alone sufficient to state a properly domestic claim" under Section 10(b). *Parkcentral*, 763 F.3d at 215. But whatever the merit of that analysis in the Exchange Act context, it is even more compelling in the context of a private claim under the CEA, which *expressly requires* a commission of a substantive violation. *See Prime*, 937 F.3d at 105. The Second Circuit's rule—that pleading a properly domestic private CEA claim requires more than just a domestic transaction—does not conflict with *Morrison*.

All of this is confirmed by *Abitron*, which reaffirmed that the relevant question "is whether 'the *conduct* relevant to the statute's focus occurred in the United States.'" Slip op. at 10 (emphasis added). Here, the manipulative conduct at the center of this lawsuit occurred almost entirely abroad. Indeed, the thoroughly foreign nature of the conduct makes disputes over the particular focus of particular CEA provisions academic, as *Abitron* reiterated that "courts do 'not need to determine a statute's "focus"' when all conduct regarding the violations 'took place outside the United States.'" *Id.* at 11 (quoting *RJR Nabisco*, 579 U.S. at 337) (brackets omitted).

It is petitioner who seeks a holding at odds with this Court's precedents. Petitioner would have this Court adopt the following rule: entirely foreign conduct by foreign entities targeting a foreign benchmark falls within the CEA's domestic scope, so long as that foreign conduct allegedly has some indirect effect on the price of a financial instrument that was purchased on an exchange located in the United States. *That* is the rule the decision below rejected, Pet. App. 17a-18a, and correctly so. Petitioner's position is wrong under this Court's precedent and would fundamentally reshape extraterritoriality jurisprudence.

If foreign conduct fell within the CEA's private right of action anytime it indirectly affected a transaction on a U.S.-based exchange, virtually any significant economic conduct occurring abroad would count as domestic, and the presumption against extraterritoriality would be reduced to "a muzzled Chihuahua." *Abitron*, slip op. at 12. *Parkcentral* and *Prime* both recognized this "craven watchdog" problem in the context of the Exchange Act and CEA, respectively, warning that "apply[ing] the statute to wholly foreign activity clearly subject to regulation by foreign authorities" would "trample on *Morrison*," *Prime*, 937 F.3d at 106; *Parkcentral*, 763 F.3d at 215 (citing *Morrison*, 561 U.S. at 269). Petitioner's proposed rule would flout the basic principle that "foreign conduct is generally the domain of foreign law." *Prime*, 937 F.3d at 106 (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007)) (brackets omitted).

Petitioner's proposed rule would also conflict with Section 2(i), which makes clear that certain swap-related provisions of the CEA *do* apply extraterritorially—but only under limited circumstances. 7 U.S.C. § 2(i); *see Prime*, 937 F.3d at 103. Section 2(i) states:

> The provisions of this [Act] relating to swaps . . . shall not apply to activities outside the United States unless those activities—(1) have a direct and significant connection with activities in, or effect on, commerce of the United States; or (2) contravene [CFTC] rules or regulations . . . to prevent the evasion of any provision of this [Act].

7 U.S.C. § 2(i).

Petitioner's proposed rule would conflict with Section 2(i)'s clear statement that "activities outside the United States" generally are not subject to the CEA, except in limited and explicitly defined circumstances. 7 U.S.C. § 2(i); *see Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (express exception implies there are no others). Congress's decision *not* to apply the CEA extraterritorially outside these limited circumstances forecloses petitioner's view that foreign conduct can form the basis for his suit. *See Prime*, 937 F.3d at 103. In other words, Congress knows how to make the CEA apply to foreign conduct when it so wishes; it has not done so for Section 22.

Petitioner's proposed rule would also render Section 2(i) superfluous by capturing claims with only an indirect and attenuated connection with the United States. That would negate Section 2(i)'s express limitation, defying the rule that "courts 'must give effect, if possible, to every clause and word of a statute.'" *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019).

III. This Case Is a Poor Vehicle Because Petitioner's Now-Undisputed Failure to Allege Loss Causation Raises Substantial Questions as to Article III Standing.

Even if the Court were inclined to take up the domestic scope of the CEA, this case would be a poor vehicle in which to do so. The decision below held that petitioner "failed to plead any injury" traceable to respondents' alleged actions because, if his allegations were true, petitioner "would have *benefited* from Defendants' conduct." Pet. App. 22a-23a (emphasis added). It further held that petitioner's theory of damages relies on a "highly speculative" and "attenuated chain of causation." *Id.* at 23a. The petition does not challenge these adverse causation holdings; as a result, petitioner cannot contest them before this Court. *See* Sup. Ct. R. 14.1(a); *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019). As this case comes to the Court, then, petitioner is bound by adverse holdings on an issue that is both necessary to establish Article III standing and an independent ground for affirming dismissal of his CEA claims. It is thus unlikely that the Court could reach the question presented at all, and even if it could, resolving that question would not affect the case's outcome.

Article III requires plaintiffs to plead and prove that they have suffered an "injury in fact" that is "fairly traceable to the challenged action of the defendant." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (alterations omitted). To satisfy these requirements, a plaintiff must adequately allege that there is "causal connection" between an "actual," "concrete" injury and "the conduct complained of." *Id.* Plaintiffs cannot rely on "[s]peculative inferences . . . to connect their injury to the challenged actions of [the defendants]." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S.

26, 45 (1976). Separately, CEA plaintiffs must plead and prove damages "caused by" a substantive CEA violation. 7 U.S.C. § 25(a)(1).

Here, petitioner's theory of injury and causation is that respondents' alleged manipulation caused him to lose money on a pre-settlement "short" position in three-month Euroyen TIBOR futures contracts. *See* C.A. App. 1724. A short position profits when contract prices fall and takes a loss when prices rise. *Id.* at 1372. Petitioner alleges that respondents' conduct caused him to initiate his short position "at an artificially lower price" and to liquidate his position "at an artificially higher price," causing his loss. *Id.* at 1725.

In the proceedings below, respondents challenged petitioner's causal chain in multiple respects, including two that are particularly relevant here.[2]

First, petitioner does not allege that any injurious manipulative conduct occurred on or around the dates he traded. Petitioner alleges that he initiated his short position on July 13, 2006 and closed it on August 30, 2006. C.A. App. 1724. But he does not allege *any* attempted manipulation of *any* Euroyen TIBOR maturity in July or August 2006. The first alleged

---

[2] With respect to the CEA, respondents challenged causation under the CEA's causation element (Resp. C.A. Br. 38-42), rather than Article III, because Second Circuit precedent states that implausible allegations of causation suffice for Article III standing even if they fail the CEA's causation requirement. *See Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 111 (2d Cir. 2018). Of course, this Court would not be bound by that precedent and is obligated to assure itself of its jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998). Regardless, petitioner has not challenged the Second Circuit's holding that he "failed to plead any injury" traceable to respondents' alleged actions, Pet. App. 22a, so as the case come to *this* Court, he lacks standing under any standard.

instance of Euroyen TIBOR manipulation occurred in December 2006—months *after* petitioner had liquidated his position. Dist. Ct. Dkt. 580-3, at Entry No. 45 (Feb. 29, 2016). Respondents' alleged conduct thus could not have harmed him.

Petitioner cannot avoid this problem by arguing that manipulation of Yen *LIBOR* affected the trading prices of three-month Euroyen *TIBOR* futures. The two benchmarks are set independently of each other, *supra*, at 4-5, and judicially noticeable documents confirm that Euroyen TIBOR rates did *not* move in lockstep with Yen LIBOR. From July 13 to August 30, 2006, three-month Yen LIBOR moved *down* from 0.41188 to 0.40125 while three-month Euroyen TIBOR moved *up* from 0.40600 to 0.43000.[3] Any asserted causal link between these benchmarks is thus not only speculative but counterfactual.

Even if alleged manipulation of Yen LIBOR rates had directly affected Euroyen TIBOR, that still would lend no support to petitioner's theory. Petitioner alleges only two attempts at manipulating three-month Yen LIBOR in all of July and August 2006. Pet. App. 23a; *see* C.A. App. 3759.[4] Both took place *after* he had

---

[3] *JBA Euroyen TIBOR*, JBA TIBOR Admin., at 7-8, https://www.jbatibor.or.jp/rate/pdf/EUROYEN2006.pdf (last visited Aug. 13, 2023); C.A. Dkt. 337 (May 18, 2022) (three-month Yen LIBOR rates). On a motion to dismiss, courts may consider "matters of which a court may take judicial notice," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), including these "well-publicized" rates, *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 166 n.8 (2d Cir. 2000).

[4] Yen LIBOR was calculated separately for each of 15 different maturity periods, meaning that alleged manipulation of one maturity had no effect on the calculation of other maturities (much less the prices of pre-settlement futures trades relating to these other maturities). *Supra*, at 5.

already opened his position and *at least a week* before he closed it. C.A. App. 3759. Thus, multiple three-month Yen LIBOR rates had already superseded the allegedly manipulated rate before petitioner closed his position, belying a causal effect on his trades.

Worse still, the two instances of alleged manipulation of three-month Yen LIBOR rates during the relevant period both attempted to *increase* rates. Pet. App. 23a; C.A. App. 3759. According to petitioner, his short position stood to "*profit* from an increase in Euroyen TIBOR rates" because that increase would *reduce* the price of the contracts at settlement. C.A. App. 1372 (emphasis added); *supra*, at 7. So—as the Second Circuit concluded in rejecting petitioner's antitrust claim—if the two instances of alleged manipulation during the relevant period had affected petitioner's trading prices, he "would have *benefited* from Defendants' conduct." Pet. App. 23a (emphasis added). That petitioner allegedly *lost* $2,150 from his transactions, C.A. App. 1724, shows that he "failed to plead any injury" traceable to any attempted manipulation, Pet. App. 22a.

Second, petitioner's own allegations break another necessary link in his causal chain—his theory that three-month Euroyen TIBOR (or Yen LIBOR) rates directly affected the trading prices of Euroyen TIBOR futures contracts before settlement.

While the final settlement price of Euroyen TIBOR futures contracts is tied to the Euroyen TIBOR rate *on the settlement date*, most futures traders (including petitioner) "close out of their positions" well before the settlement date. *Supra*, at 6. The dynamic market-based prices for these *pre-settlement* trades have "no direct relationship" with the static Euroyen TIBOR (much less Yen LIBOR) rates published on the trading

date—especially where, as here, settlement is months away. *Sonterra Cap. Master Fund, Ltd. v. Barclays Bank plc*, 366 F. Supp. 3d 516, 547 (S.D.N.Y. 2018) (Sterling LIBOR); *supra*, at 6-7.

Petitioner's three-month Euroyen TIBOR futures contracts had a December 2006 settlement date, C.A. App. 1724, but his trades occurred in July and August 2006. Unsurprisingly, the prices at which petitioner opened and closed his position differed significantly from the prices that would be expected if Euroyen TIBOR rates on July 13 and August 30 had materially affected his trading prices. He alleges that he closed his short position at a higher price than he opened it, which would imply a *decrease* in three-month Euroyen TIBOR rates if trading prices tracked benchmark rates. *Id.*; *see id.* at 1372 (explaining petitioner's theory of pricing). In reality, three-month Euroyen TIBOR rates on August 30 were *higher* than they were when he opened his short position on July 13, which means that, under his theory, futures prices should have been pushed *lower* by the increasing benchmark rate. *Id.* at 1372 ("if the Three-Month Euroyen TIBOR rate rises, the price of the Euroyen TIBOR futures contract would fall"); *see supra*, at 28 & n.3 (citing *JBA Euroyen TIBOR*, *supra*, at 7-8). The fact that he allegedly took a *loss* on a short position that should have "profit[ed] from an increase in Euroyen TIBOR rates," C.A. App. 1372, confirms the absence of a causal link between Euroyen TIBOR rates and pre-settlement futures prices for the trades at issue.

Ultimately, the Second Circuit agreed with respondents' arguments. It held that petitioner "failed to plead any injury" caused by respondents because if respondents "attempt[ed] to manipulate Yen-LIBOR upwards," and if "Euroyen TIBOR rates did increase"

as a result, petitioner "would have benefited from Defendants' conduct." Pet. App. 22a-23a. It further held that petitioner's theory of damages relies on a "highly speculative" and "attenuated chain of causation." *Id.* at 23a. While these holdings were the basis for rejecting petitioner's antitrust standing, *id.* at 22a, nothing about the Court's analysis was unique to the antitrust context or the "first step rule" (*contra* Pet. 32 n.12). Rather, they formed the basis for the Second Circuit's conclusion that petitioner's "asserted damages are speculative." Pet. App. 22a-23a. The logic of that holding applies with equal force to petitioner's CEA claims, and his failure to seek review forecloses any attempt to assert an injury traceable to respondents in this Court.

In sum, petitioner's own allegations and public records destroy his theory of injury and causation multiple times over, such that "[t]he links in the chain of causation . . . are far too weak for the chain as a whole to sustain [petitioner's] standing." *Allen v. Wright*, 468 U.S. 737, 759 (1984). At the very least, this case raises substantial standing issues that this Court would need to address before it could reach the question presented, and the Second Circuit's causation holding in any event provides an alternative ground for affirmance.

IV. There Is No Other Compelling Reason for Review.

The decision below is a clear-cut application of *Morrison* to the CEA that follows directly from the Second's Circuit's prior ruling in *Prime*. This Court denied certiorari on the same purported conflict in both *Prime* (*see Atl. Trading*, 141 S. Ct. 113) and *Toshiba* (139 S. Ct. 2766), and nothing counsels a different outcome this time around. Petitioner's

insistence (at 22-24) that the decision below carries grave consequences does not bear scrutiny.

Petitioner contends (at 23) that the decision "threatens the international reputation of U.S. markets, and subjects U.S. investors to real injuries." But the Second Circuit specifically refuted that argument. Over petitioner's assertion that affirmance would "fatally undermine the ability of U.S. law and U.S. regulators to protect domestic markets," the court explained that "[t]he extraterritorial reach of Section 22, which concerns private rights of action, has *nothing to do with government enforcement*." Pet. App. 19a n.11 (emphasis added).

Regardless, the possibility that the regulation of predominantly *foreign* conduct would be left to *foreign* regulators would hardly be earth-shattering. Petitioner warns that "the 'predominantly foreign' test 'creates a risk that some manipulation might not be subject to legal action in any jurisdiction.'" Pet. 30 n.10 (quoting CFTC C.A. Reh'g Amicus Br. 5). But this ignores the existence of foreign regulators, which have full authority to take action against conduct occurring in their own jurisdictions. Indeed, conflict with foreign regulation is among the main problems that the presumption against extraterritoriality is designed to address. *See RJR Nabisco*, 579 U.S. at 335.

Foreign enforcement agencies can and do regulate paradigmatically foreign conduct like that alleged here. The U.K. Financial Conduct Authority, European Commission, Swiss Financial Market Supervisory Authority, Swiss Competition Commission, Monetary Authority of Singapore, and Financial Services Agency of Japan have all investigated foreign conduct related to LIBOR benchmarks. C.A. App. 1319-23, 1633-36, 1643. And regulators—including

U.K. and Japanese regulators—have collected roughly $10.5 billion from panel banks relating to employee conduct concerning benchmarks for various currencies, including Yen LIBOR and Euroyen TIBOR. Resp. C.A. Br. 13. If petitioner believes U.S. regulators should regulate more foreign conduct, he may address his views to Congress, which is "able to calibrate [a statute's] provisions in a way [this Court] cannot." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 259 (1991).

Finally, the practical importance of the decision below is limited. Yen LIBOR was discontinued in December 2021.[5] Euroyen TIBOR is being eyed for discontinuance at the end of December 2024.[6] These decisions diminish the likelihood that the alleged conduct here will be repeated, reducing any need for review.

V. There Is No Sound Reason to Call for the Views of the Solicitor General or Grant, Vacate, and Remand.

Petitioner suggests (at 33) that this Court should call for the views of the Solicitor General or grant, vacate, and remand for reconsideration in light of *Abitron*. Neither action is warranted. Given the conceded lack of conflict over the application of *Morrison* to the CEA and the significant impediments to review presented by the petition, seeking the Solicitor General's views would serve no purpose. The Court

---

[5] *See* Bank of Japan Review, *Review of JPY LIBOR Transition and Future Initiatives* (May 2022), https://www.fsa.go.jp/en/policy/libor/rev22e04.pdf.

[6] *See JBA TIBOR Reform*, JBA TIBOR Admin. (updated Aug. 1, 2023), https://www.jbatibor.or.jp/english/reform/.

denied certiorari in *Prime* without calling on the Solicitor General.

A remand in light of *Abitron* would be inappropriate as well. Far from "reveal[ing] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996), *Abitron* strongly confirms the correctness of the decision below, *see supra* Part II.

CONCLUSION

The petition should be denied.

Respectfully submitted.

ERIC J. STOCK
JEFFERSON E. BELL
KATIE SALVAGGIO
GIBSON, DUNN & CRUTCHER LLP
200 Park Ave.
New York, NY 10166
(212) 351-4000

THOMAS G. HUNGAR
Counsel of Record
RUSSELL B. BALIKIAN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 955-8500
thungar@gibsondunn.com

STEPHEN J. HAMMER
GIBSON, DUNN & CRUTCHER LLP
2001 Ross Ave., Suite 2100
Dallas, TX 75201
(214) 698-3100

Counsel for Respondents UBS AG and UBS Securities Japan Co., Ltd.

DAVID R. GELFAND
TAWFIQ S. RANGWALA
MILBANK LLP
55 Hudson Yards
New York, NY 10001
(212) 530-5000
dgelfand@milbank.com

MARK D. VILLAVERDE
MILBANK LLP
2029 Century Park East
33rd Floor
Los Angeles, CA 90067
(424) 386-4000

Counsel for Respondent Coöperatieve Rabobank U.A. (f/k/a Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.)

DAVID LESSER
JAMIE DYCUS
KING & SPALDING LLP
1185 6th Ave.
New York, NY 10036
(212) 556-2100
dlesser@kslaw.com

PATRICK MONTGOMERY
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Suite 900
Washington, DC 20006
(202) 737-0500
pmontgomery@kslaw.com

Counsel for Respondents The Royal Bank of Scotland, plc, The Royal Bank of Scotland Group plc, and RBS Securities Japan Ltd.

MARC J. GOTTRIDGE
LISA J. FRIED
HERBERT SMITH FREEHILLS NEW YORK LLP
450 Lexington Ave.
New York, NY 10017
(917) 542-7600
marc.gottridge@hsf.com

BENJAMIN A. FLEMING
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017
(212) 918-3000

Counsel for Respondent Lloyds Banking Group plc

NICOLE A. SAHARSKY
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3052
nsaharsky@mayerbrown.com

STEVEN WOLOWITZ
ANDREW CALICA
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2000

Counsel for Respondent Société Générale

August 14, 2023