No. 23-80

In the Supreme Court of the United States

JEFFREY LAYDON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

COOPERATIVE 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 OF ANDREA CORCORAN, FORMER DIRECTOR OF THE CFTC'S DIVISION OF TRADING AND MARKETS AND OFFICE OF INTERNATIONAL AFFAIRS, AS AMICUS CURIAE SUPPORTING PETITIONERS

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STATEMENT OF INTEREST[1]

Amicus **Andrea Maharam Corcoran** founded her consulting firm Align International in 2008 following a long career in the public sector. Nationally, she served as the Director of two Divisions of the U.S. Commodity Futures

[1] Both Petitioners and Respondents received 10-days' notice that this brief would be filed and have consented to its filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

Trading Commission (CFTC)—the Division of Trading and Markets and the inaugural Office of International Affairs. Internationally, she served as the Chair of the International Organization of Securities Commissions' (IOSCO) Task Force on Implementation of the Objectives and Principles of Securities Regulation, which principles are used internationally to benchmark compliance by standards assessors. She also led multiple projects related to setting standards for the oversight of listed derivatives contracts based on globally traded physical commodities. Ms. Corcoran sat by invitation as an observer on the Market Participants Advisory Committee of the Committee on European Securities Regulators (CESR), a forum which preceded the creation of the European Securities and Markets Authority (ESMA) and has undertaken various advisory missions on behalf of international financial institutions such as the International Monetary Fund and the World Bank.

The global nature of Ms. Corcoran's work as a director of the CFTC regulatory and international team, participant in the President's Working Group on Financial Markets, and consultant has brought her into close contact with the cross-border world of financial market regulation and policy formation. Ms. Corcoran was the architect of the CFTC's original regulations for cross-border access to U.S. derivatives markets. And she directed policy responses to some of the largest international commodity futures manipulation and malfeasance cases in the Commission's history: the Hunt silver manipulation, the Barings collapse and the Sumitomo manipulation of the cash forward market at the London Metals Exchange. Ms. Corcoran is an expert on the maintenance of market infrastructure integrity, crisis management, protection of customer

funds, international standards, bankruptcy, self-regulation, and U.S. futures law. She provides advice and second opinions on regulatory design and oversight to both government and private clients on five continents.

Ms. Corcoran has devoted substantial portions of her professional career to the CFTC, which plays a central role in ensuring the transparency, stability, and integrity of the domestic derivative markets. She writes to explain the focus of congressional concern in the Commodities Exchange Act (CEA) on the integrity of those markets, and the critical need to ensure that the jurisdiction of the CFTC to enforce its anti-manipulation provisions affecting U.S. contracts based on foreign reference cash prices is not undermined. Regardless of whether the Petitioners' claims in this case have factual merit—and amicus takes no position about whether they do—she hopes to demonstrate the importance of this case to ensuring the effective enforcement of the commodities manipulation laws to prevent manipulation in linked foreign cash markets. That capacity is vital not only to pricing in such U.S. futures markets but to the ability to use U.S. futures markets to protect transactions to mitigate risk in the real economy of physical transactions and on the integrity of dollar pricing regimes in global cash markets, which are critical to national security, carbon-emission reduction, and other important policy ends.

These policy concerns underpin the need for U.S. commodities laws to extend to the prevention of intentionally wrongful acts that manipulate prices on U.S. CFTC-regulated markets from the proper reach of the CEA—and the CFTC—if performed offshore. Mrs. Corcoran therefore believes it is critical for the Court to understand the dangers to our markets from foreign manipulation linked to

domestic futures and the need for sufficient enforcement powers. Ms. Corcoran requests the Court to solicit the CFTC's views on these matters, and ultimately grant review in this case to resolve the conflicts among the circuits on these issues and to prevent any unexpected adverse consequences from the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the core of every commodity futures transaction—whether it concerns oil, wheat, natural gas, carbon emissions, jet fuel, or sugar—is confidence in the integrity of commodity futures prices and the related markets in which those prices are determined. That confidence is what makes it prudent for buyers and sellers to use futures prices to "mitigate price risk" directly through the use of "futures" contracts, or in pricing real economy transactions. A future is a type of financial transaction in which parties agree to "buy or sell a commodity or financial instrument at a later date" to lock in an advantageous price as specified in (normally standardized) contract terms. Nat'l Futures Assn., *Opportunity and Risk: An Educational Guide to Trading Futures and Options on Futures* 4, 14 (2006). Each contract is based on terms and conditions relating to the reference cash product or price which terms and conditions form rules of the contract market in which the future is traded. Confidence in the proper regulation and oversight of these markets also allows commercial parties and sophisticated traders to engage in derivative transactions, where futures are bundled and traded in myriad "highly complex" ways, confident that their projections will not be undermined by hidden manipulations or frauds. Robert O'Harrow, *A primer on financial derivatives*, Wash. Post, Apr. 21, 2010, at A13.

Prices for many commodities transactions are "generally quoted and disseminated throughout the United States" on domestic mercantile exchanges and are based on transactions occurring throughout the world. And the same confidence that enables people to trade in futures on these commodities enables many others throughout our Nation's economy to rely on listed commodity prices, even if they never enter the commodities markets themselves, as benchmarks to make economic projections and enter transactions. Pub. L. No. 67-331, sec. 3, 42 Stat. 998, 999 (the '22 Act).

As a result, a restauranteur can decide when it is best to make staples purchases and manage its supply chain. A farmer can know immediately how much seed it makes sense to buy. An airline can keep an eye on whether it is getting the best deal on jet fuel. And when all these actors—and many others—trade in and rely upon these established market prices, that improves the markets themselves, by making price projections more reliable, and making the markets themselves more efficient, transparent, liquid, and ultimately more stable, allowing markets to reflect the laws of economics more precisely, and the basic principles of supply and demand.

Yet the integrity of commodity futures prices is susceptible to manipulative misconduct and the usefulness and integrity of such markets and the prices that they report depends upon close oversight. Futures and derivatives markets may exist separately from "cash" or "physical" markets in which the assets themselves are bought and sold, but the prices of cash commodities and derivatives impact the futures price—and vice versa. And manipulation in any of those components has consequences

for the integrity and usefulness of markets for hedging and pricing purposes and the reliability of cash prices.

Because of these fundamental linkages, a wrongdoer could deliberately target commodity markets here in the United States from another part of the world. And the "methods and techniques of manipulation are limited only by the ingenuity of man." *CFTC* v. *Kraft Foods Grp., Inc.*, 195 F. Supp. 3d 996, 1005 (N.D. Ill. 2016). For instance, many domestic mortgages and other loans are keyed to the LIBOR rate. And that means the international manipulations on the LIBOR rate at issue in this case not only affected interests on U.S. hedging markets but also had direct effects on the money that individual borrowers had to pay on their mortgages in the real world.

Many such manipulations have engendered severe economic disruption throughout our Nation's history. The CEA's manifest objective is to prevent such manipulations from negatively impacting the price integrity on which commodities markets depend. Indeed, the CEA contains a statement of findings that "[t]he transactions subject to [this statute] are entered into regularly in interstate and international commerce" and "are affected with a national public interest," including in "liquid, fair, and financially secure trading facilities." 7 U.S.C. § 5. This national interest shall be protected by, among other things, "prevent[ing] price manipulation or any other disruptions to market integrity." *Id.*

Preventing such manipulative conduct from compromising prices used for multiple non-financial market purposes is a prime objective of the anti-manipulation provisions of the CEA. Those provisions aim to prevent manipulation of domestic market prices, regardless of where the

source of that manipulation might be located. This concern with the price integrity of American commodity futures transactions falls within the "object[]" of the CEA's "solicitude," *Morrison* v. *National Australia Bank, Ltd.*, 561 U.S. 247, 226 (2010) and the core of the statute's focus. The law of extraterritoriality has traditionally never been understood to inhibit the CEA from reaching intentional manipulations of domestic commodity prices simply because those manipulations occurred abroad. And the CFTC has long exercised its regulatory authority consistent with that legal understanding.

Yet the Second Circuit has departed from this settled understanding of the CEA's permissible scope, creating conflicts among the circuits that could affect the proper reach of the CEA, making it less effective against intentional attempts to manipulate American commodities' markets if the conduct causing the manipulation emanates from abroad, and potentially inhibiting the regulatory authority of the CFTC itself to combat those international threats, and even adversely affecting the U.S. pricing advantage for foreign based commodity dollar markets. Accordingly, the decision below could have disruptive implications for the legitimate scope of the CFTC's authority, compromise the effectiveness of CFTC enforcement actions, reduce the Commission's effectiveness in developing international cooperation on enforcement and ongoing market surveillance issues, and require changes in longstanding regulatory practices. That makes this an important case for the Court to consider and to seek the opinion to the U.S. CFTC.

The petition should be granted.

ARGUMENT

I. U.S. commodities laws—and the CFTC's regulatory authority based on those laws—focus on preventing manipulation of U.S. commodity futures regardless of where the manipulation originates.

The focus of this country's commodities laws, including the anti-manipulation provisions of the CEA, have remained consistently fixed on preventing manipulation of domestic commodity prices, regardless of the geographic source of that manipulation.

a. When the CEA was originally enacted, Congress recognized a national public interest in protecting commodity prices, acknowledging that futures transactions in those commodities "are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control." '22 Act, § 3, 42 Stat. at 99. Even then, Congress discerned that preventing these abuses domestically might require acting internationally, in part because it recognized that "conditions * * * in this and other countries" had potential to "affect the markets" in the United States. '22 Act § 8, 42 Stat. at 1003 (emphasis added).[2]

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[2] The Court struck down the first legislation that would become the Commodities Exchange Act, Futures Trading Act of 1921, Pub. L. No. 67-66, 42 Stat. 187 ('21 Act), on constitutional grounds, *Hill* v. *Wallace*, 259 U.S. 44 (1922), but upheld the '22 Act, *Bd. of Trade of Chicago* v. *Olsen*, 262 U.S. 1 (1923).

By 1974, when Congress created the CFTC to bring "all futures trading * * * under a single regulatory umbrella," H.R. Rep. No. 93-975, at 41-42 (1973), Congress recognized that the international, interdependent world it had foreseen had arrived. Domestic exchanges had begun to offer futures on many overseas commodities, including coffee, sugar, and precious metals. *Id.* at 41, 62. Indeed today, the Chicago Mercantile Exchange (CME) offers contracts based on Black Sea Wheat, Malaysian Palm Oil, and Swiss Francs. NASDAQ Futures offers contracts based on German and Nordic electricity. And NYMEX offers contracts based on Brent Last Day Financial Australian coal, Saudi propane, Turkish scrap metal, and palladium deliverable in Zurich or London. And this country's leading position in these markets has been advantageous to American buyers and sellers, allowing them to transact in international commodities in dollars, thereby avoiding the costs and uncertainty of international currency exchange. Anshu Siripurapu and Noah Berman, Counsil on Foreign Relations, *The Dollar: The World's Reserve Currency* (July 19, 2023).

As Congress deliberated over the CFTC's creation, America was experiencing first-hand how trades in commodities and events abroad could influence commodity and commodity-derivative prices here. At that time, the so-called "Great Russian Grain Robbery" was beginning to unravel, in which Russia bought 10 million tons of foreign wheat, unwittingly subsidized by the United States, causing a worldwide supply shortage that almost wiped out international stockpiles, inducing sharp increases on the price of domestic grain, and initiating both a food price crisis and surging inflation. See John A. Schnittker, *The 1972-73 Food Price Spiral*, Brookings Institution (1973),

https://brook.gs/2ROyLu9; see also Joseph Albright, *The full story of how Amepuka got burned and the Russians got bread*, N.Y. Times, Nov. 25, 1973), https://nyti.ms/34KlTdx.

b. In this context , Congress determined that all commodities on US futures exchanges should be regulated equally, regardless of their geographic source, because whether the commodity "is produced in the United States or outside" of it matters little "to those in this country who buy, sell, * * * process," or use "the commodity, or to the U.S. consumers whose prices are affected by the futures market in that commodity." S. Rep. No. 93-1131, at 19 (1974). That too was prescient, because events would demonstrate that the Great Russian Grain Robbery was just an example of the potential impacts.

1979 saw the great "Hunt Silver Manipulation," in which Texas Billionaire brothers Bunker and Herbert Hunt cornered the world market for silver—often through purchases occurring abroad. The Hunts and their international allies succeeded in buying up 9 percent of all the silver in the world, and 77 percent of the silver in private hands, pushing domestic silver prices from $6 an ounce to $50 an ounce by 1980. See Kim Iskyan, Business Insider, *Here's the story of how the Hunt brothers tried to corner the silver market* (May 17, 2016), https://bit.ly/3etDPh6.

And in 1986, the impact of a financial scandal outside the US came to light with the revelation of the "Sumitomo Copper Manipulation." Over a ten-year period, Yasuo Hamanaka, a rogue Japanese employee of the Sumitomo Corporation, bought immense quantities of copper through an American broker and a Zambian copper producer on the London Metal Exchange, shaking the copper

markets worldwide, causing artificially high prices in cash and futures markets in copper (including those in the United States), and bringing both Congressional inquiry and CFTC enforcement action. Benjamin E. Kozinn, *Great Copper Caper: Is Market Manipulation Really a Problem in the Wake of the Sumitomo Debaucle*, 69 Fordham L. Rev. 243, 244, 270-276 (2000); *In re Sumitomo Corp.*, CFTC No 98-14, 1998 WL 236520 (CFTC May 11, 1998) (copper on the London Metals Exchange) (settlement).

And it was in 1982, in response to another case of financial misconduct, the "London Options Scandal," that Congress amended the CEA to grant CFTC authority to regulate foreign actors seeking to participate on American exchanges with the Futures Trading Act of 1982, 96 Stat. 2294, Pub. L. No. 97-444, sec. 101(a) (Jan. 11, 1983). See *British American Commodity Options Corp.* v. *Bagley*, 552 F.2d 482 (2d Cir. 1977) (discussing the London Options Scandal); see also Lower, *The Regulation of Commodity Options*, 1978 Duke L. J. 1095, 1111-1117 (1978) (same). Then, in 1997, the CFTC created the Office of International Affairs within the CFTC, and Congress encouraged the CTFC to participate more robustly in international standard setting bodies like International Organization of Securities Commissions (IOSCO), recognizing that "derivatives markets serving United States industry are increasingly global in scope—and that "strengthening of international cooperation for customer and market transactions" ought therefore to be encouraged. Commodity Futures Modernization Act of 2000, sec. 126 (a)(1), Pub. L. No. 106-554, 114 Stat. 2763. In 1996, the CFTC led a group of non-US jurisdictions in producing a multi-lateral agreement for the oversight and surveillance of futures markets

labelled the Boca Declaration, which was later in 1998 adopted and used by US futures exchanges and clearing organizations in qualifying members.

c. Today, Congress has retained in the CEA a statement of purpose to "deter and prevent price manipulation or any other disruptions to market integrity," regardless of the source of those manipulations. 7 U.S.C. § 5. It has retained broad prohibitions against all forms of manipulation, 7 U.S.C. §§ 6c, 9(a)(1), 13(a)(2), recognizing that such manipulations bring "transactions that are entered into regularly in interstate and international commerce" within the Act's regulatory ambit. *Id.* § 5(a). And Congress has deliberately included overseas commodities within the scope of the CEA, to ensure that foreign manipulations do not escape the CEA's reach—or that of the CFTC. *Id.* § 1a(9); S. Rep. No. 93-1131, at 19; H.R. Rep. No. 93-975, at 41, 62-63. An express purpose of the CEA is therefore to protect the national interest in fair trading facilities that are free of market manipulation. 7 U.S.C. § 5. The statute contains no exception for "predominantly foreign" conduct.

d. Since its inception in 1975, the CFTC has acted consistently with the understanding that the CEA's focus might be trained on manipulation in domestic commodities transactions, but that international action might be necessary to fulfill that mission. The CFTC has passed regulations to control foreign commodities investment in the United States and participated in international standard-setting bodies that have recognized that "the potential for market integrity concerns is compounded by the increasingly global nature of commodit[ies]," and "interlinkages among markets," which create the potential that "manip-

ulative or other abusive activities" *anywhere* could "damage the integrity and ultimately the liquidity of markets" *everywhere*. *Tokyo Communique On Supervision of Commodity Futures Markets* 4, 28 (Oct. 31, 1997); see also www.IOSCO.org/publicreports.

Since this Court's decision in *Morrison* v. *National Australia Bank*, 61 U.S. 247 (2010) and the changes it wrought on the law of extraterritoriality and the scope of the U.S. securities laws, the CFTC and DOJ have worked to ensure that the scope of the U.S. commodities laws remains fixed, and have continued to protect American commodities markets and investors against wrongdoing by overseas actors, through overseas actions, for behavior that affects U.S. markets and exchanges. See *United States* v. *Sindzingre*, No. 17-CR-0464 (JS), 2019 WL 2290494, at *1-3 (E.D.N.Y. May 29, 2019) (prosecution based on banks' overseas manipulation of the London Interbank Offered Rate, the benchmark interest rate for the British Bankers' Association); *CFTC* v. *Parnon Energy, Inc.*, 875 F. Supp. 2d 233, 238 (S.D.N.Y. 2012) (manipulators located in the U.K., Switzerland and Australia); *In re Statoil ASA*, CFTC No. 18-04, 2017 WL 5517034 (CFTC Nov. 14, 2017) (Far East propane) (settlement); *In re Barclays PLC*, CFTC No. 12-25, 2012 WL 2500330 (CFTC June 27, 2012) (LIBOR) (settlement).

e. And that understanding of the proper focus of the CEA rests on a firm statutory basis. The CEA focuses on "manipulation" of domestic transactions, whether through a "device," 7 U.S.C. § 9(a)(1), or more generally, *id.* § 13, thereby serving the CEA's general concern with protecting integrity in the price of those transactions and preventing manipulation of that price. But the statute is agnostic about where the conduct providing the mechanism

for the manipulation must occur, because that mischief is not regulated in the abstract. It is regulated only in "connection" with how it affects U.S. commodities transactions and U.S. commodities markets. 7 U.S.C. § 9(a)(1). It therefore makes no difference if those actions occurred overseas. They remain within the CEA's focus.

f. Petitioners here allege that they were parties to derivatives transactions that took place in the United States on a CFTC-registered futures exchange. Pet. at 10. Regardless of whether their claims have merit—and amicus takes no position about whether they do—those claims directly implicate the focus of congressional concern in the integrity of U.S. markets, and the CEA's concern that those markets remain free from manipulation and misconduct originating from abroad that impacts them.

II. This case has important implications for the CEA's barriers against manipulative conduct and could undermine the CFTC's proper regulatory authority to reach manipulation originating from abroad.

The question of whether the claims at issue in this case fall within the CEA's focus has important implications for the scope of the CEA's anti-manipulative conduct provisions and the CFTC's proper regulatory authority to reach manipulation occurring abroad.

a. 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).

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." *Parkcentral Global Hub LTD*. v. *Porche Automotive Holdings SE*, 763 F.3d 198 (2d Cir. 2014) (per curiam). Accordingly, in the Second Circuit, a claim that involves domestic conduct squarely within the statute's focus could nonetheless become impermissibly extraterritorial if the course of conduct challenged in the claim is "predominantly foreign." *Id*. at 215-216.

By contrast, other circuits read this Court's focus test as both the beginning and end of an extraterritoriality analysis, with the First and Ninth Circuits rejecting Second Circuit precedent and the "predominantly foreign" test by name. *SEC* v. *Marrone*, 997 F.3d 52, 60 (1st Cir. 2021); *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 950 (9th Cir. 2018).

The Second Circuit has applied its "predominantly foreign" test to constrict the application of the CEA's anti-manipulation provisions. While that court in the decision below and in *Prime International Trading* recognized that the domestic focus of the CEA's anti-manipulation provisions was focused on "manipulation in commodities markets" and "preventing manipulation of the price of any commodity," it has concluded that manipulation occurring

abroad can make a claim "predominantly foreign." 937 F.3d at 105; Pet. App. 29a.

b. The CFTC relies on these same anti-manipulation provisions, and thus, the Second Circuit's "predominantly foreign" test could affect the Commission's legitimate regulatory authority—despite the court's contention in the decision below that its decision reached only the statute's provisions for "private rights of action." Pet. App. 19a n.11. The application of that broad test could implicate the ability of the CFTC to pursue enforcement actions for manipulative conduct that occurred abroad—even if manipulative conduct whose intentional, harmful, tangible effects directly impacted linked American futures and related cash markets could be proved.

c. Amicus cannot speak for the Commission, however, and the Court deserves to hear from the Commission itself as to how the decision below could affect its enforcement regime and compromise the integrity of existing market structures to avoid any unintended and unexpected consequences inconsistent with the CEA and long-established regulatory practice.

Accordingly, the Court should solicit the CFTC's views on whether the Second Circuit's extraterritoriality rulings are correct and ask it to explain the impacts the Commission anticipates those rulings may have on the integrity of America's derivatives markets and the Commission's regulatory authority. That said, amicus believes, based on her years of experience at the CFTC and around the world, that this is an important case for the Court to hear the Commission's opinion, to ensure that the law takes a properly nuanced approach to the oversight of our financial markets—one that recognizes their particularities of

futures contracts and their existing scope and protects the integrity of our Nation's markets.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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