No. 24-960

In the
Supreme Court of the United States

COINMARKETCAP OPCO, LLC AND
BAM TRADING SERVICES, INC.,

Petitioners,

v.

RYAN COX,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondent Ryan Cox respectfully requests that the Court deny Petitioners' request for certiorari.

STATEMENT

This petition concerns a slowly-percolating circuit split over statutory interpretation that has developed over 35 years, with the disagreement arising most commonly under Section 12 of the Clayton Act of 1914 (the "Clayton Act," 15 U.S.C. §§ 12, *et seq.*), not the Commodities Exchange Act (the "CEA", 7 U.S.C. §§ 25(c), *et seq.*) at issue here. While Petitioners warn of "far-reaching consequences" and violations of "principles of constitutional due process," (Pet. 2) this disagreement has lasted for decades, with half the Circuits having not yet decided this issue and the six that have decided evenly split between following the approach first applied by United States Court of Appeals for the Ninth Circuit and that first raised by United States Court of Appeals for the Second Circuit. There is no need to decide this issue now and, even if this was the time, this case—which is under the CEA—is not the case to do so.

And, indeed, the CEA's legislative history—enacted well after the Clayton Act and the venue provision specifically amended well after the Ninth Circuit adapted this approach (see infra at 17) necessitates a different review from what would be required for the Clayton Act.

To finally decide this long-existing disagreement between Circuits as to what is primarily an issue of the language of the Clayton Act in the context of the CEA is far from ideal. If the Court decides narrowly and only decides on the language of the CEA, this creates substantial uncertainty as to the interpretation of similar language in the Clayton Act. If the Court decides broadly and decides for all statutes with similar language, then it must decide substantial issues that are not relevant to this case at all. Indeed, nearly all cases that Petitioners cite for this issue concern the Clayton Act, and none concern the CEA.

This disagreement is long-running, going back 35 years, when the Ninth Circuit in *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989), declined to follow the Second Circuit's interpretation of Section 12 of the Clayton Act set forth in *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961). Other Circuits gradually decided on the issue, with the most recent being the Seventh Circuit in 2013 in *KM Enterprises, Inc. v. Global Traffic Technologies, Inc.*, 725 F.3d 718 (7th Cir. 2013). In all, three Circuits (Third, Fifth, and Ninth) follow the approach originally set forth by the Ninth Circuit allowing nationwide service; three follow the narrower reading first set forth by the Second Circuit (D.C., Second, and Seventh); and the remaining six (First, Fourth, Sixth, Eighth, Tenth, and Eleventh) appear to have yet not reached the issue.

Thus, there is no urgency here to rule on this issue as it continues to percolate through the Circuits, and particularly no urgency to decide such an issue under a different statute than where the dispute mostly arises. If this Court is to review this issue, it is best done for a case under the Clayton Act.

Nor is this a pressing matter where a misguided court of appeals has ignored the law and risks dangerous consequences. The Ninth Circuit's approach is based on thoughtful interpretation of the statutory text and legislative intent and has since been followed by the Third and Fifth circuits.

The Court should respectfully deny the petition.

REASONS FOR DENYING THE PETITION

A. This Case is a Poor Vehicle as it Concerns the Commodities Exchange Act, not the Widely-Litigated Clayton Act

This case is a poor vehicle to resolve this issue because it overwhelmingly arises in disputes over the Clayton Act—and less commonly the Securities Act or Securities Exchange Act—and only rarely under the CEA. While it may be true that private plaintiffs file "thousands of actions each year under federal commodities, securities, and antitrust laws," (Pet. 21) few of those appear to turn on this issue under the CEA. In fact, this seems to be the first time that this issue has arisen under the CEA in the Ninth

Circuit, despite a disagreement amongst the Circuits existing for decades. If the Court is to visit this issue, it is best done in the context of the Clayton Act, where most of the disputes arise.

Indeed, nearly every single case that Petitioners rely on for interpretation of the language at issue concerns the Clayton Act. *See Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174, 1177 (9th Cir. 2004) (Section 22 of Clayton Act); *Daniel*, 428 F.3d at 422 (same); *Go-Video,* 885 F.2d 1406 at 1411 (same); *GTE New Media Servs. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000) (same); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 290 (3d Cir. 2004); *KM Enters., Inc.*, 725 F.3d at 723 (same). The only exception is a pair of Ninth Circuit cases analyzing, respectively, the Securities Act and the Exchange Act. *SEC v. Ross*, 504 F.3d 1130, 1139 (9th Cir. 2007) (Securities Act); *Sec. Inv'r Prot. Corp. v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985) (Exchange Act).

This is not a minor quibble. The Second Circuit in *Daniel* specifically cautioned against analyzing the venue provisions of the Clayton Act and the Exchange Act as interchangeable, because despite their similar language, "'analysis of special venue provisions must be specific to the statute' because Congress's intent may be permissive in some circumstances and restrictive in others." *Daniel*, 428 F.3d 408, 426 (2d Cir. 2005) (quoting *Cortez Byrd Chips, Inc.*, 529 U.S. at 204). Indeed, in addition to

potential differences in Congressional intent, the Second Circuit in *Daniel* recognized that subtle differences between the language in the Clayton Act and Exchange Act could necessitate a different outcome. *See id.* As the Second Circuit noted, the Exchange Act (which language the CEA tracks in relevant part) allows venue where "any act or transaction constituting the violation occurred," but the Clayton Act does not—it only allows venue where the defendant is "an inhabitant," "may be found," or "transacts business." *See Daniel*, 428 F.3d at 426 (quoting 15 U.S.C. § 78aa; 15 U.S.C. § 22); *see also* 7 U.S.C. § 25(c).

Specifically, the Clayton Act reads in relevant part:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an *inhabitant*, but also in any district wherein it may be *found or transacts business*; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

15 U.S.C. § 22 (emphasis added). But the Exchange Act additionally allows for venue where "any act of transaction constituting the violation occurred":

> Any criminal proceeding may be brought in the district wherein any act

> or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, *may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business*, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

15 U.S.C. § 78aa (emphasis added).

The CEA more closely tracks the language of the Exchange Act, allowing venue where "any act of transaction constituting the violation occurs":

> Any action brought under subsection (a) of this section may be brought in any judicial district wherein the defendant is found, resides, or transacts business, *or in the judicial district wherein any act or transaction constituting the violation occurs*. Process in such action may be served in any judicial district of which the defendant is an inhabitant or wherever the defendant may be found.

7 U.S.C. § 25(c).

While the Ninth Circuit found here that those distinctions were not relevant to applications of its existing precedent on the facts of this case—as the final clause of each section is the same—it does mean that deciding this issue under the CEA as a proxy for the more commonly-litigated Clayton Act introduces potential complexities even based on simply the statutory text. And, even aside from the language, the distinct policy differences between antitrust law and commodities law could come into play, as well as different amendment history.

Thus, to resolve this split under the CEA—rather than the Clayton Act where the split actually exists—the Court would have to walk a narrow line. If it rules narrowly to only apply to the CEA itself, then this would risk significantly more confusion than currently exists, as litigants and lower courts would be uncertain what rule would properly apply. On the other hand, if the Court were to decide broadly and rule on the language as it applies to the Clayton Act and Exchange Act, it would do so based on a case that does not involve any specific issues unique to either of those statutes. That difference specifically militates against review of a CEA case, as this issue rarely arises under the CEA, but does so significantly more commonly under the Clayton Act; this was an issue of first impression before the Ninth Circuit despite the rule being in place for more than three decades. Far better, even if this is the time to decide the issue—rather than at least wait for some of the remaining Circuits to take a position—to wait

for one of the more numerous Clayton Act cases to be ripe for such review.

Lastly, this case is not final, but just at the start, giving yet another reason to not review now: the Ninth Circuit remanded for proceedings on the merits of Petitioners' Federal Rule of Civil Procedure 12(b)(6) motion. (Pet. App. 3a.) *See Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction.") (Scalia, J., concurring). This case is a poor vehicle for review.

B. The Disagreement Between the Circuits is Still Percolating, with a 3-to-3 Split and Six Circuits Still Silent

The Ninth Circuit's decision here was not novel, but followed the Circuit's 35-year precedent, which even then explicitly rejected a contrary reading from the Second Circuit in *Goldlawr, Inc. v. Heiman* of 28-years earlier still. *See Go-Video, Inc.*, 885 F.2d at 1411 ("we see no conflict between our holding today and that of the Second Circuit some twenty-eight years ago") (citing *Goldlawr, Inc. v. Heiman,* 288 F.2d 579, 581 (2d Cir. 1961)); *see Goldlawr, Inc.,* 288 F.2d at 581 (under Clayton Act Section 12, "if a corporation is not an inhabitant of, is not found in, and does not transact business in, the district, suit may not be so brought"), *rev'd on other grounds*, 369 U.S. 463 (1962). The Fifth Circuit later adopted the Ninth Circuit's reasoning in 1999, holding that when "jurisdiction is invoked under the

Clayton Act, the court examines the defendant's contacts with the United States as a whole to determine whether the requirements of due process have been met." *Access Telecomms., Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 718 (5th Cir. 1999) (citing *Go-Video, Inc.*, 885 F.2d at 1406); *see In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d at 297 (recognizing Fifth Circuit rule as in accord with Ninth Circuit interpretation; "At least two sister Circuits have held that when personal jurisdiction is invoked under the Clayton Act, jurisdiction is based on the defendants' contacts with the United States as a whole.").

The D.C. Circuit first held a differing view in 2000; while the Ninth and Second Circuits both recognized that the language in *Goldlawr* was dicta, the D.C. Circuit found *Goldlawr* persuasive and expressly "disagree[d]" with the Ninth Circuit's interpretation of Section 12 of the Clayton Act. *GTE New Media Servs.*, 199 F.3d at 1351; *see Daniel*, 428 F.3d at 423 (recognizing *Goldlawr*'s "observation" as "dictum" but holding that Section 12 of the Clayton Act "indicates that its service of process provision applies (and, therefore, establishes personal jurisdiction) only in cases in which its venue provision is satisfied"); *Go-Video, Inc.*, 885 F.2d at 1411 (recognizing *Goldlawr* language as dicta). Five years later, the Second Circuit "b[rought] the process full circle" after more than 40 years, adopting the D.C. Circuit rule that had relied on its dicta in *Goldlawr*, in *Daniel v. American Board of Emergency*

Medicine. 428 F.3d at 423.

The Third Circuit ruled on the issue in 2004. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 297. While Petitioners interpret the Third Circuit's rule as an approach distinct from that followed by other Circuits, this interpretation is based on a footnote explaining further why the Third Circuit found the Ninth Circuit's approach in *Go-Video* "convincing and well reasoned." *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 297 & n.10. Not only does *In re Automotive Refinishing Paint Antitrust Litigation* not give any clear indication that the Third Circuit sought to break from the Ninth Circuit, but the Second Circuit has also interpreted the Third Circuit's rule as being the same as that of the Ninth Circuit. *See Daniel*, 428 F.3d 408 at 423 ("Our sister circuits are split over the proper interpretation of the venue and process provisions of Section 12. The Third and Ninth Circuits hold that Section 12's service of process provision is 'independent of and does not require satisfaction of' the section's venue provision.") (quoting *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 297; citing *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1179-80 (9th Cir. 2004)).

The most recent Circuit to rule on this issue was the Seventh Circuit, in 2012, in *KM Enterprises, Inc. v. Glob. Traffic Technologies, Inc.*, 725 F.3d 718 (7th Cir. 2013). The First, Fourth, Sixth, Eighth,

Tenth, and Eleventh Circuits appear to have not yet reached this issue.

Thus, three circuits—the Third, Fifth, and Ninth Circuits—read the relevant language broadly to allow for nationwide service; three—the D.C., Second, and Seventh—read it narrowly; and six—the First, Fourth, Sixth, Eighth, and Eleventh—had not yet reached the issue. To summarize the timeline of cases addressing the relevant language in the context of Section 12 of the Clayton Act:

Year	**Case**	**Summary**
1961	*Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961)	Addressing issue in dicta
1989	*Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1411 (9th Cir. 1989)	First court of appeals to rule on issue, disagreeing with *Goldlawr* dicta, suggesting future split
1999	*Access Telecomms., Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 718 (5th Cir. 1999)	Second court of appeals to rule on issue—adopting Ninth Circuit interpretation

2000	*GTE New Media Servs. Inc. v. Bellsouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000)	Third court of appeals to rule on issue—adopting *Goldlawr* dicta, formally creating 2-1 split
2004	*In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 297 (3d Cir. 2004)	Fourth court of appeals to rule on issue, adopting Ninth Circuit interpretation, bringing split to 3-1
2005	*Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 422 (2d Cir. 2005)	Fifth court of appeals to rule on issue, adopting same holding as *Goldlawr* dicta 40 years prior, bringing split to 3-2
2013	*KM Enterprises, Inc. v. Glob. Traffic Technologies, Inc.*, 725 F.3d 718 (7th Cir. 2013)	Sixth court of appeals to rule on issue, adopting *Goldlawr* interpretation,

		bringing split to 3-3

In other words, even to the extent this dispute concerns Section 12 of the Clayton Act, this has been a slowly percolating disagreement with the different circuits, in turn, finding one approach or another persuasive, and it now sits at an even split as to the six Circuits that have decided, with the remaining six Circuits still silent.

This is not a situation where the Ninth Circuit has stubbornly followed an interpretation that is unaccepted and risks serious harm. Instead, a disagreement between at least the Second and Ninth Circuits has existed for 35 years, with each view having proven persuasive to another two Circuits each. Nor has there been a flood of CEA cases seeking to forum shop. While other cases have addressed the similar language under other statutes, the interpretation of this provision of the CEA appears to be an issue of first impression before any Circuit; when this issue was before the United States District Court for the District of Arizona, it relied on a footnote in a case from the Southern District of New York as the other persuasive authority on the statute that had been presented. (Pet. App. 38(a).) *See Fire & Police Pension Ass'n of Colo. v. Bank of Montreal*, 368 F. Supp. 3d 681, 695 n.11 (S.D.N.Y 2019). There

is no pressing need to review this issue, which has not meaningfully changed in more than decade.

C. On the Merits, the Ninth Circuit's Interpretation is Correct and Based on a Careful Reading of the Text and the CEA's Legislative History

Despite Petitioners' arguments that the Ninth Circuit's interpretation of the relevant language is not properly based on the statutory text, it is in fact based on both a careful reading of the text and relevant statutory history and purpose.

First, while Petitioners insist without argument that the relevant language is "plain," that is not only contradicted by the substantial and ongoing dispute, but by the Third Circuit, in the same footnote that Petitioners invoke to seek to portray its view as distinct from that of the Ninth Circuit. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288 at 296 ("because *we do not find the language of Section 12 to be clear and unambiguous*, we are not persuaded by the 'plain' or 'unadorned' reading of the statutory language by the *GTE* court") (emphasis added). While in part that opens a dispute on the statutory purpose—which, again, may differ between the Clayton Act's enforcement of antitrust prohibitions and the CEA's policing of commodities manipulation—it also necessitates parsing the ambiguous language in the statute, particularly what "in such action" means.

The Ninth Circuit specifically engaged in this careful textual analysis 35 years ago in *Go-Video*. 885 F.2d at 1412. There, it found explicitly that "such" in the second sentence of the relevant language referred to any antitrust action brought under the statute, based on the standard grammatical rule that "when used to modify a noun, 'such' is always presumed to refer back to that noun as it appeared previously in the text; 'such' does not modify other clauses or nouns." *Go-Video, Inc*, 885 F.2d at 1412. The Ninth Circuit below expanded upon this, quoting a guide to statutory interpretation, which went on to note that "such," when used in this context, "refers to a particular antecedent noun and any dependent adjective or adjectival clauses modifying that noun, but *not to any other part of the preceding clause or sentence*." (Pet. App. 15a (citing 2A Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 47:33 n.1 (7th ed. 2023 update) (emphasis added).)

Put another way, both sentences refer to "[an] action brought" under the statute—there is no textual reason to necessarily read the second sentence to refer specifically to an action brought only in a judicial district referred in the preceding sentence:

> *Any action brought under subsection (a) of this section* may be brought in any judicial district wherein the defendant is found, resides, or transacts business,

> or in the judicial district wherein any act or transaction constituting the violation occurs. *Process in such action* may be served in any judicial district of which the defendant is an inhabitant or wherever the defendant may be found.

7 U.S.C. § 25(c) (emphasis added).

Petitioners read this use of "such action" as narrower, to mean "the action qualifying for venue in the immediately preceding sentence," but rely only on a definition from *Webster's Third New International Dictionary (Unabridged)* 2283 (1986), indicating that "such" means "'character, quality, or extent' of 'the sort or degree previously indicated.'" (Pet. 18). But that fails to address the key textual finding of the *Go-Video* court, that "such" is presumed to refer to the previous *noun*, not the entire previous phrase. *Go-Video, Inc*, 885 F.2d at 1412. The Ninth Circuit rule—as followed by the Third and Fifth Circuits—does deeply engage with the text of the statute.

Beyond the statutory interpretation, the CEA's legislative history also indicates, as the Ninth Circuit recognized, that Congress specifically intended it to convey nationwide jurisdiction—and such intent may not necessarily apply to the Clayton Act or other statutes. Congress affirmatively amended the CEA's service and venue processions in 1992 in response to a decision from this Court finding

that nationwide service of process "was not implicit" in the Act. (Pet. App. 16a (quoting *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987)). Importantly, 1992 was only three years after the Ninth Circuit had interpreted similar language broadly in *Go-Video,* and Congress indicated that its purpose in amendment was to provide for expanded "'nationwide service of process *and* expanded venue provisions' . . . not for nationwide service only if venue is first established." (Pet. App. 17a (emphasis in original) (quoting H.R. Rep. No. 102-6, at 23 (Mar. 1, 1991))). And even if the statement is read as ambiguous, it was contained in a report by the House of Representatives Committee on *Agriculture*—thus creating an issue of Congressional intent distinct from any that is likely to arise in interpretation of the Clayton Act of Exchange Act.

Lastly, nothing in the Venue Clarification Act of 2011 (the "VCA," Pub. L. No. 112-63, 125 Stat. 758) contradicts the rule followed by the Third, Fifth, and Ninth Circuits. The Ninth Circuit correctly rejected this argument below: even if the Venue Clarification Act modified the venue provision of the CEA and other statutes, Defendants-Appellees have "pointed to nothing" that "would impact [the] interpretation of the service of process" or jurisdiction provisions of the statute. (Pet. App. 19a.) To the extent that Petitioners have clarified their argument here, it still begs the question: they argue that the VCA was "'intended to avoid the possibility of an overly broad assertion of venue," and the Ninth Circuit's approach

"does exactly that—allows plaintiffs to bypass the actual language of the statute." (Pet. 21 (citing H.R. Rep. No. 112-10, at 20 (2011).) But the textual analysis requires more than asserting one interpretation is correct when three Circuits have reached the contrary conclusion.

The Ninth Circuit correctly found that the CEA conveys nationwide jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: May 29, 2025

Respectfully submitted,

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