No. 18-1566

In the Supreme Court of the United States

CHARLES D. SCOVILLE, PETITIONER,

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF SECURITIES LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are scholars who have written on the scope and interpretation of the U.S. securities laws.[1] They have participated as *amici* in numerous cases before this Court or the lower federal courts that implicate important policy concerns in the area of securities regulation.[2] *Amici* believe that, if allowed to stand, the Tenth Circuit's decision below would create substantial uncertainty about the scope of the antifraud provisions under U.S. securities law, unduly interfere with foreign sovereigns' ability to regulate their own securities markets, and create uncertainty as to how to interpret securities laws that are otherwise clear from their text.

Further, as scholars who have written in the field of statutory interpretation, *amici* believe it more broadly important that statutory text be interpreted to mean what Congress says and what the President has signed. It is not for the courts to re-interpret clear statutory text, even if some legislative history suggests that the text does not reflect the intent of certain members of Congress.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed any money to fund its preparation or submission. *Amici* provided timely notice of their intent to file this brief, and the parties have consented to this filing.

[2] The names and backgrounds of *amici* are set forth in the attached appendix.

Amici therefore have a substantial interest in this Court's proper resolution of the issues presented in the petition.

SUMMARY OF ARGUMENT

I. Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") added parallel provisions to the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") stating that "[t]he district courts of the United States . . . shall have jurisdiction of an action or proceeding brought or instituted by the [Securities and Exchange] Commission or the United States" that alleges a violation of Section 17(a) of the Securities Act or the antifraud provisions of the Exchange Act, and that involves either "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." Pub. L. No. 111-203, 124 Stat. 1376, 1864–65 (2010) (codified at 15 U.S.C. §§ 77v(c) & 78aa(b)). In *Morrison* v. *National Australia Bank*—issued prior to Section 929P(b)'s enactment—however, this Court made clear that the extraterritorial scope of the Securities Act and the Exchange Act is not an issue of subject-matter *jurisdiction*, but rather of the language of the relevant *substantive statutory provision*. This Court then proceeded to hold that the statutory

scope of Section 10(b) of the Exchange Act applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." 561 U.S. 247, 267 (2010).

Despite Section 929P(b)'s clear text and this Court's decision in *Morrison*, the Tenth Circuit nevertheless held that Section 929P(b) constituted an extension of the scope of Sections 10(b) and 17(a). In doing so, the Tenth Circuit committed reversible error.

II. Because the statutory text of Section 929P(b) is clear, the Tenth Circuit erred in looking to legislative history to determine that Section 929P(b) extended the scope of Sections 10(b) and 17(a). But even if it were appropriate for the Tenth Circuit to conduct an analysis of Section 929P(b)'s legislative history, the panel decision gave undue weight to the isolated statements of two legislators and improperly imputed their intent to the whole of Congress. A careful analysis of the context surrounding the passage of Dodd-Frank shows that it is impossible to discern any unified legislative intent behind the passage of Section 929P(b)—a single passage in a bill spanning nearly 850 pages and addressing myriad issues, ranging from regulation of the banking and financial services industries to coal mining and foreign aid—particularly because certain members of Congress likely knew that Section 929P(b)'s clear text would not achieve the effect of extending the extraterritorial reach of the U.S. securities laws according to statutory interpretation principles set forth in this Court's then-recent decisions.

III. Finally, two key canons of construction—the presumption against extraterritoriality and the rule of lenity—provide additional reasons why the Tenth Circuit should have refused to look to legislative history to create ambiguity in Section 929P(b) where none existed. The Tenth Circuit should not have applied U.S. securities laws to wholly foreign conduct without a clear indication that Congress intended those provisions to have extraterritorial effect. Likewise, because the Tenth Circuit's decision has the effect of extending the reach of criminal provisions of the U.S. securities laws, it should not have reached that conclusion unless the intent of Congress to expand criminal liability was clear.

ARGUMENT

I. THE TENTH CIRCUIT ERRED IN HOLDING THAT SECTION 929P(b) OF THE DODD-FRANK ACT ALTERED THE EXTRATERRITORIAL SCOPE OF SECTIONS 10(b) AND 17(a).

A. Under *Morrison*, the Extraterritorial Reach of a Statute Is a Merits Question.

In *Morrison*, this Court held that the Second Circuit erred when it "considered the extraterritorial reach of § 10(b) to raise a question of subject-matter jurisdiction." *Id.* at 253. This Court noted that federal courts have jurisdiction to hear cases arising under Section 10(b) pursuant to another provision of the Exchange Act, 15 U.S.C.

§ 78aa. It concluded that the question of subject-matter jurisdiction "presents an issue quite separate from" the issue of Section 10(b)'s extraterritorial scope, which is "a merits question." *Id.* at 254.

Morrison was not setting out a new legal principle when it held that the scope of a statute's substantive reach is a merits question rather than a question of subject-matter jurisdiction. Indeed, as explained in the Petition for a Writ of Certiorari in this matter ("Petition") (at 15–17), the distinction between limitations on a statute's substantive scope and a court's subject-matter jurisdiction had been spelled out in cases dating as far back as 1946. And in its 2006 decision in *Arbaugh* v. *Y&H Corp.*, this Court made clear that it would enforce a "readily administrable bright line" rule—one that looks to the statutory text—for determining whether limitations in the statute restrict a provision's scope or, conversely, speak to the courts' jurisdiction. 546 U.S. 500, 515–16 (2006) ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." (citations and footnotes omitted)).[3]

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[3] Although the Tenth Circuit's opinion dismissed *Arbaugh* as dealing with the "completely different context" of a Title VII

B. *Morrison* Made Clear That Section 10(b) Does Not Apply Extraterritorially.

With the extraterritoriality question properly framed as one of scope and not jurisdiction, *Morrison* went on to analyze the text and surrounding statutory context of Section 10(b) of the Exchange Act to discern Congress' intent.

Before looking to the statutory language and context, however, this Court acknowledged the "'longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison*, 561 U.S. at 255 (quoting *Arabian Am.,* 499 U.S. at 248). Under this canon of construction, the courts presume that Congressional legislation "is primarily concerned with domestic conditions" unless "there is the affirmative intention of the Congress clearly expressed" to give the statute extraterritorial effect. *Arabian Am.*, 499 U.S. at 248 (internal citations and quotation marks omitted). "When a statute gives no clear indication

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employment case, *S.E.C.* v. *Scoville*, 913 F.3d 1204, 1216 (10th Cir. 2019), *Arbaugh* makes clear that the subject-matter jurisdiction/merits distinction applies with equal force to questions of a statute's extraterritorial application. *See* 546 U.S. at 511–13 (noting that this Court had been "less than meticulous" in distinguishing between merits and subject-matter jurisdiction issues in *E.E.O.C.* v. *Arabian American Oil Co.*, 499 U.S. 244 (1991), and that the dismissal in that case should have been based on the plaintiff's failure to state a claim rather than the absence of subject-matter jurisdiction).

of an extraterritorial application, it has none." *Morrison*, 499 U.S. at 255.

Applying the presumption against extraterritoriality, this Court held that nothing in the Exchange Act clearly expressed Congress' intention that the provision should apply extraterritorially. 561 U.S. at 262–65. Thus, this Court found that Section 10(b) applies only to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[4] This conclusion was bolstered by the fact that another provision of the Exchange Act, Section 30(a), does contain "a clear statement of extraterritorial effect." *Id.* at 265 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.") This Court did not consider the effect of the jurisdictional provision of the Exchange Act—15 U.S.C. § 78aa—in resolving this issue, except to note that this provision provided the courts with subject-matter jurisdiction over extraterritorial claims. 561 U.S. at 254.

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[4] This Court also noted that "[t]he same focus on domestic transactions is evident in the Securities Act of 1933, 48 Stat. 74, enacted by the same Congress as the Exchange Act, and forming part of the same comprehensive regulation of securities trading." 561 U.S. at 268. A growing consensus of district courts in the Southern District of New York has applied *Morrison* to claims under Section 17(a) of the Securities Act. *See, e.g.*, *S.E.C.* v. *Goldman Sachs & Co.*, 790 F. Supp. 2d 147, 164 (S.D.N.Y. 2011); *In re Vivendi Universal, S.A., Sec. Litig.*, 2012 WL 12950047, at *5 (S.D.N.Y. Feb. 1, 2012).

It follows from this Court's decisions in *Morrison* and *Arbaugh* that any amendment to the jurisdictional provisions of the Securities Act and/or the Exchange Act would be ineffective to extend the extraterritorial reach of Sections 10(b) and 17(a). But the panel decision came to the opposite conclusion; it is therefore erroneous and should be reversed.

II. THE TENTH CIRCUIT IMPROPERLY JETTISONED *MORRISON* AND THE PLAIN LANGUAGE OF SECTION 929P(b) BY RELYING ON SCANT AND UNCLEAR LEGISLATIVE HISTORY.

A. In Light of the Clear Language of Section 929P(b), There Was No Basis for the Tenth Circuit to Look to Legislative History.

In issuing its opinion, the Tenth Circuit acknowledged that Dodd-Frank "did not make any explicit revisions to the substantive antifraud provisions themselves" and "amended only the jurisdictional sections of the securities laws." 913 F.3d at 1218. The panel nevertheless justified its disregard of the unambiguous language of Section 929P(b) by stating that "the context and historical background surrounding Congress' enactment of" this provision show "that Congress undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied." *Id.*

As explained more fully in the Petition (at 18–20), the Tenth Circuit's consideration of the

legislative history of the Dodd-Frank Act to alter the plain meaning of Section 929P(b) contravenes well-established rules of statutory construction. The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997); *see also United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989) ("Our starting point, as in all cases involving statutory interpretation, must be the language employed by Congress.") (internal citations and quotation marks omitted). As a corollary to this "cardinal canon" of statutory construction, *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992), a court's "inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson*, 519 U.S. at 340. This remains true even where "legislative history points to a different result." *Conn. Nat'l Bank*, 503 U.S. at 254; *see also Unexcelled Chem. Corp.* v. *United States*, 345 U.S. 59, 64 (1953) ("It is not for us . . . to try to avoid the conclusion that that Congress did not mean what it said.").

These rules of statutory construction serve an important purpose in allowing both the legislative and judiciary branches to "adhere to [their] respected, and respective, constitutional roles." *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to

provide for what we might think . . . is the preferred result.'" (quoting *United States* v. *Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring))). The proper course for the judiciary in these circumstances is to "determine intent from the statute before [it]." *Id.* But here, the Tenth Circuit went further and effectively rewrote Section 929P(b) to achieve the effect that the panel (wrongly) believed Congress intended. Because the Tenth Circuit panel exceeded its constitutional bounds, this Court's review is necessary to restore the proper balance of power between the branches of government.

From a policy perspective, it is also important for *amici*—as scholars and securities practitioners—and others to be able to rely on the clear statutory text of the securities laws without fear that a court will look to legislative history to invoke an interpretation that is contrary to the statute's plain text. The potential liability for violations of the federal securities laws can be quite severe. *See* Adam C. Pritchard, Stoneridge Investment Partners v. Scientific-Atlanta*: The Political Economy of Securities Class Action Reform*, CATO SUP. CT. REV. 2007-2008, 255 (2008) (noting that for publicly traded companies, "the potential recoverable damages in securities class actions can be a substantial percentage of the corporation's total capitalization, easily reaching hundreds of millions of dollars, and sometimes billions"); *see also* 15 U.S.C. § 78ff(a) (2012) (the maximum criminal penalty for a willful violation of Section 10(b) by an individual is a $5,000,000 fine and up to 20 years of imprisonment, and the

maximum criminal penalty for a violation by an entity is $25,000,000). In view of these high stakes, securities scholars and practitioners should not have to investigate the legislative history of statutes that are clear on their face and guess as to how a court would interpret that legislative history.

This Court has endorsed the need for clarity and predictability in the securities law in several of its prior decisions. *See, e.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 162–64 (2008) (refusing to recognize an expansion of liability under Section 10(b) not supported by the statutory text because "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies," and expansion "would expose a new class of defendants to these risks"); *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) ("[O]ur cases considering the scope of conduct prohibited by § 10(b) in private suits have emphasized adherence to the statutory language, '[t]he starting point in every case involving construction of a statute.'" (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976))); *id.* at 189 (noting that uncertainty in the scope of the securities laws can lead to "excessive litigation," and that these "litigation and settlement costs under 10b–5 may be passed on to . . . the company's investors, the intended beneficiaries of the statute"); *Pinter* v. *Dahl*, 486 U.S. 622, 652 (1988) (noting that securities regulation is "an area that demands certainty and predictability").

The Tenth Circuit's approach to statutory construction ignores this Court's insistence on adhering to the clear statutory text in the interpretation of the securities laws. If the Tenth Circuit's approach is adopted by other courts and applied to other provisions of the securities laws, the resulting uncertainty could have significant negative effects on domestic and foreign securities markets. This Court should review the panel decision to correct the Tenth Circuit's error and ensure clarity and predictability.

B. In Any Event, the Legislative History Does Not Give Cause to Ignore the Plain Language of Section 929P(b).

Even assuming for the sake of argument that it was appropriate for the Tenth Circuit panel to consider legislative history to determine Congress' intent in enacting Section 929P(b), that history does not show that Congress intended to expand Sections 10(b) and 17(a) extraterritorially.

1. Congress Was Aware Long Before *Morrison* That Extraterritoriality Is a Merits Question.

As described in the Petition (at 15–17), this Court had endeavored for more than a decade before *Morrison* was decided to clarify the distinction between statutory restrictions that speak to the courts' subject-matter jurisdiction and restrictions that affect the substantive scope of a statute, including in its *Arbaugh* opinion. *See also*

supra Part I.A. Because Congress is presumed to be familiar with this Court's precedents, *see Porter* v. *Nussle*, 534 U.S. 516, 528 (2002), the drafters of Section 929P(b) should have been aware of the Court's insistence on clarity when it comes to distinguishing between subject-matter jurisdiction and merits issues.

Even if the drafters of Section 929P(b) were unaware of the importance of distinguishing between subject-matter jurisdiction and substantive scope from this Court's earlier opinions, they certainly should have been aware that this issue was being considered in *Morrison*. In *amicus curiae* briefs submitted at both the petition and merits stages in *Morrison* (in October 2009 and February 2010, respectively), the U.S. Solicitor General took the position that the extraterritorial scope of a statute is a merits issue, not a question of subject-matter jurisdiction; both briefs also discussed this Court's opinion in *Arbaugh* at length. *See* U.S. Br., *Morrison*, 2009 WL 3460235, at *9–10 (Oct. 27, 2009); U.S. Br., *Morrison*, 2010 WL 719337, at *10–11 (Feb. 26, 2010) ("The determination whether the defendant's conduct is governed by the law on which the plaintiff bases his claim for relief is generally a merits-related decision . . . , rather than a determination about whether the federal courts have subject-matter jurisdiction." (internal citations and quotation marks omitted)). Both the petitioners and the respondents in *Morrison* agreed with the United States' position. *See* Pet'r's Br., *Morrison*, 2010 WL 265632, at *18 (Jan. 19, 2010);

Resp't's Br., *Morrison*, 2010 WL 665167, at *21–22 (Feb. 19, 2010).

There is very good reason to believe that the drafters of Section 929P(b) were aware of the position taken by the United States in *Morrison*, because the lawyers who drafted the United States' *amicus curiae* briefs in *Morrison* were also "substantially involved" in advising members of Congress regarding the effect of the extraterritoriality provisions at issue. *See* Richard Painter, et al., *When Courts and Congress Don't Say What They Mean: Initial Reactions to* Morrison v. National Australia Bank *and to the Extraterritorial Jurisdiction Provisions of the Dodd-Frank Act*, 20 MINN. J. INT'L L. 1, 22 n.89 (2011) ("[W]e spoke with the attorneys in the SEC Office of the General Counsel who, along with the Solicitor General's Office, drafted the Government's *Morrison* amicus briefs (both at the certiorari and merits stage). They explained to us that throughout the legislative process they were substantially involved in providing technical assistance to members of Congress that included, among other things, explaining the provisions' intended effect of codifying the courts of appeals' approach to extraterritoriality with respect to SEC and DOJ enforcement actions.") Accordingly, members of Congress and their advisors would have known that if Congress desired to expand the extraterritorial reach of Sections 10(b) and 17(a), the text of Section 929P(b) would not actually achieve that result under this Court's bright-line rule in *Arbaugh*.

Given that some members of Congress likely knew that the amendments in Section 929P(b) would not have any effect on this Court's holding in *Morrison*, it is entirely possible that some legislators voted to pass the Dodd-Frank Act even though they would *not* have voted to pass it if Section 929P(b) was worded in a way that would actually give Sections 10(b) and 17(a) extraterritorial effect. This inference is no less likely than the opposite inference in light of the evidence that at least some members of Congress knew how Section 929P(b) would fare under the interpretive approaches in this Court's then-recent decisions.

2. Scattered Statements in the Legislative Record Regarding Section 929P(b) Cannot Be Imputed to Congress.

Although there are two isolated statements in the legislative record suggesting an intent to overrule *Morrison*'s impact on securities enforcement actions brought by the SEC or the United States,[5] these purported intentions should

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[5] The Congressional record contains two statements by legislators—one before each chamber—on the supposed purpose of Section 929P(b). When the final version of Dodd-Frank was presented to the House for approval, Representative Paul Kanjorski stated:

> This bill's provisions concerning extraterritoriality . . . are intended to rebut th[e] presumption [against extraterritoriality] by clearly indicating that Congress intends extraterritorial application in cases brought by

not be imputed to the entire Congress, for at least two reasons.

First, given Dodd-Frank's sheer size and scope, it would be exceedingly difficult to distill a singular legislative intent from the mere fact of its passage. Dodd-Frank includes sixteen different titles, and comprises almost 850 pages of text. *See* Pub. L. No. 111-203, 124 Stat. 1376, 1376–2223 (spanning 848 pages in the official federal session laws from 2010). It also contains provisions covering an enormous

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> the SEC or the Justice Department. Thus, the purpose of the language of section 929P(b) of the bill is to make clear that in actions and proceedings brought by the SEC or the Justice Department, the specified provisions of the Securities Act, the Exchange Act and the Investment Advisers Act may have extraterritorial application, and that extraterritorial application is appropriate, irrespective of whether the securities are traded on a domestic exchange or the transactions occur in the United States . . . .

156 CONG. REC. H5237 (daily ed. June 30, 2010). And when the final version of the bill was presented to the Senate, Senator Jack Reed noted that the bill contained

> extraterritoriality language that clarifies that in actions brought by the SEC or the Department of Justice, specified provisions in the securities laws apply if the conduct within the United States is significant, or the external U.S. conduct has a foreseeable substantial effect within our country, whether or not the securities are traded on a domestic exchange or the transactions occur in the United States.

156 CONG. REC. S5915–16 (daily ed. July 15, 2010).

breadth of subject matters. For example, Dodd-Frank includes a Congressional condemnation of the exploitation of conflict minerals and requires the S.E.C. to promulgate regulations governing reporting requirements for conflict minerals originating in the Democratic Republic of the Congo. *Id.* at 2213–15 (codified at 15 U.S.C. § 78m(p)). In another section, Dodd-Frank requires issuers to file periodic reports on the health and safety standards of its coal mines. *Id.* at 2218–20 (codified as amended in scattered sections of 30 U.S.C.). Dodd-Frank also contains a provision requiring the U.S. Executive Director at the International Monetary Fund to evaluate the likelihood of repayment for certain loan proposals to foreign countries, and to report to Congress on the status of approved loans that the Executive Director had determined to be unlikely to be repaid in full. *Id.* at 2212–13 (codified at 22 U.S.C. § 286tt). Given the broad scope of the legislation, it is impossible to say why legislators may have voted to approve it. *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 392 (2012) ("[C]ollective intent is pure fiction because dozens if not hundreds of legislators have their own subjective views on the minutiae of bills they are voting on – or perhaps no views at all because they are wholly unaware of the minutiae.").

Second, statements by a single Representative and a single Senator about their motivation for backing Section 929P(b) and their understanding of that Section's effect should not be imputed to the whole of Congress. Especially given the massive

scope of Dodd-Frank and its extensive legislative history,[6] these statements about a single provision among nearly 850 pages of text cannot meaningfully inform the courts about Congress' intent. *See United States* v. *O'Brien*, 391 U.S. 367, 384 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *see also Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 576–77 (2005) (Stevens, J. dissenting) (recognizing that "[t]o be sure, legislative history can be manipulated").

3. The Timing of Dodd-Frank's Enactment Does Nothing to Overcome Its Clear Language.

The Tenth Circuit apparently believed that it was appropriate to look beyond the plain language of the statute because Dodd-Frank was signed into law less than a month after *Morrison* was decided, and thus "*Morrison* was issued too late in the legislative process to reasonably permit Congress to react to it." 913 F.3d at 1218 (quoting 245 F. Supp.

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[6] The legislative history index for Dodd-Frank published by the Congressional Information Service references over 200 separate documents, including the records from 38 days of debate in both chambers of Congress and 14 House and Senate reports. *See* 111 CIS Legis. Hist. P.L. 203 (2010). The statements by Representative Kanjorski and Senator Reed concerning Section 929P(b), quoted in footnote 5, *supra*, span just a few paragraphs out of the thousands of pages of legislative history material relating to Dodd-Frank.

3d at 1291–92). But disregarding the clear language of a statutory provision based on the sequence of events surrounding its enactment is no more appropriate than relying on statements in the legislative history to create ambiguity where none exists. *Cf. Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000) ("The clear statement inquiry focuses on *what* Congress did enact, not *when* it did so. We will not infer ambiguity from the sequence in which a clear textual statement is added to a statute.").

If, as the courts below believed, Congress intended to expand the extraterritorial scope of Sections 10(b) and 17(a), it has had ample time to correct its mistake in the years since *Morrison* was decided. Indeed, Congress has passed legislation that amended other provisions of the Dodd-Frank Act. *See, e.g.*, Insurance Capital Standard Clarification Act of 2014, Pub. L. No. 113-279, 128 Stat. 3017 (2014) (amending Section 171 of the Dodd-Frank Act (codified at 12 U.S.C. § 5371)); Pub. L. No. 111-257, 124 Stat. 2646 (2010) (amending 15 U.S.C. §§ 78x, 80a-30, 80b-10, as amended by Section 929I of the Dodd-Frank Act). The amount of time that has passed since Dodd-Frank was enacted, coupled with Congress' subsequent amendments and clarifications to other provisions of Dodd-Frank during that period, negates any inference that Congress was unable to react to this Court's decision in *Morrison*.

III. IMPORTANT POLICY CONSIDERATIONS ALSO WEIGH AGAINST READING SECTION 929P(b) CONTRARY TO ITS PLAIN MEANING.

A. Presumption Against Extraterritoriality.

Assuming for the sake of argument that Section 929P(b) was ambiguous, the Tenth Circuit still should not have held that Section 929P(b) extended the scope of Sections 10(b) and 17(a) to apply to wholly foreign conduct because of the presumption against extraterritoriality. As discussed above, this canon of construction presumes that Congressional legislation "is primarily concerned with domestic conditions" unless "there is the affirmative intention of the Congress clearly expressed" to give the statute extraterritorial effect. *Arabian Am.*, 499 U.S. at 248; *see supra* Part I.B. In deciding whether the presumption against extraterritoriality has been rebutted, "[t]he question is not whether we think 'Congress would have wanted' a statute to apply to foreign conduct 'if it had thought of the situation before the court,' but whether Congress has affirmatively and unmistakably instructed that the statute will do so." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (quoting *Morrison*, 561 U.S. at 261). "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, 561 U.S. at 255.

In holding that Section 10(b) did not apply extraterritorially, *Morrison* explained that "[t]he

probability of incompatibility with the applicable laws of other countries is so obvious that if Congress intended such foreign application 'it would have addressed the subject of conflicts with foreign laws and procedures.'" 561 U.S. at 269 (quoting *Arabian Am.*, 499 U.S. at 256). *Morrison* thus recognized that the broad application of U.S. securities laws to foreign conduct would produce interference with other nations' ability to "regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction," given the differences between U.S. and foreign securities laws. *Id.* These policy concerns apply equally to proceedings and actions brought by the SEC and Department of Justice, which are the subject of Section 929P(b) of the Dodd-Frank Act. Thus, the Tenth Circuit should not have held that Sections 10(b) and 17(a) apply extraterritorially absent a "clear indication" of Congress' intent to extend the scope of the antifraud provisions of the Securities Act and Exchange Act to foreign conduct. *See Morrison*, 561 U.S. at 255. No such clear indication was present here. As already discussed, the plain text of Section 929P(b) addresses only the federal courts' jurisdiction, not the substantive scope of the antifraud provisions, and the legislative history of Dodd-Frank sheds no further light. Lacking any clear indication that Congress intended for extraterritorial application, the Tenth Circuit should have adhered to *Morrison* and deferred to foreign sovereigns as to what constitutes improper activity in their own securities markets.

B. Rule of Lenity.

Even if Section 929P(b) were somehow ambiguous, there is still another reason that the Tenth Circuit should have found that this provision does not expand the extraterritorial scope of Sections 10(b) and 17(a): the rule of lenity. *See* Petition at 24–25. That rule dictates that where a criminal statute is ambiguous, "[t]he more lenient interpretation must prevail." *United States* v. *R.L.C.*, 503 U.S. 291, 308 (1992) (Scalia, J. concurring). In other words, if—after "considering text, structure, history, and purpose"—a court determines that "there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended," the rule requires that the ambiguity be resolved in favor of the more lenient interpretation. *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010) (internal citation and quotation marks omitted). "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before [a court] choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952)).

The rule of lenity applies here because Sections 10(b) and 17(a) can serve as the predicate for criminal liability for those who "willfully violate[]" those provisions. 15 U.S.C. §§ 77x, 78ff(a) (2012); *see also Whitman* v. *United States*, 135 S. Ct. 352, 353–54 (2014) (Scalia, J., concurring) ("[I]f

a law has both criminal and civil applications, the rule of lenity governs its interpretation in both settings." (citing *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004))). Indeed, the maximum penalties for violations of these provisions are quite severe.[7] Because the text of Section 929P(b) cannot be read to clearly and unambiguously extend the scope of Sections 10(b) and 17(a) to apply extraterritorially, and because there is no clear indication of Congressional intent to be found in the legislative record, the Tenth Circuit erred in expanding the substantive reach of the antifraud provisions in the Securities Act and Exchange Act. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348; *see also Whitman*, 135 S. Ct. at 354 (Scalia, J., concurring) ("[O]nly the legislature may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts . . . ."). The Tenth Circuit's decision is an unwarranted judicial expansion of the scope of criminal provisions under the U.S. securities laws, and the decision below should be reversed.

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[7] For violations of Section 10(b), the maximum criminal penalty for individuals is a $5,000,000 fine and up to 20 years of imprisonment, and the maximum criminal fine for an entity is $25,000,000. 15 U.S.C. § 78ff(a) (2012). For criminal violations of Section 17(a), individuals may be fined up to $10,000 and sentenced to up to five years in prison. *Id.* § 77x.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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APPENDIX

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