No. 19-1141

In the Supreme Court of the United States

ATLANTIC TRADING USA, LLC, ET AL., PETITIONERS

v.

BP P.L.C., ET AL., RESPONDENTS

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit correctly held that, under *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), petitioners failed to plead a domestic application of Sections 6(c)(1), 9(a)(2), and 22 of the Commodity Exchange Act because the complaint alleges no manipulative conduct in the United States but rather alleges only that respondents' purported overseas manipulation of the price of a physical commodity had "ripple effects" across global commodities markets and, at the end of a long and highly attenuated chain of causation, purportedly had an indirect effect on petitioners' futures trades in the United States.

PARTIES TO THE PROCEEDINGS

Petitioners are Atlantic Trading USA, LLC, John Devivo, Anthony Insinga, Xavier Laurens, Kevin McDonnell, Robert Michiels, Port 22, LLC, Prime International Trading, Ltd., Aaron Schindler, Neil Taylor, and White Oaks Fund LP.

Respondents are BP p.l.c., BP America Inc., BP Corporation North America Inc., Hess Energy Trading Company, LLC (now known as Hartree Partners, LP), Mercuria Energy Trading, Inc. (now known as Mercuria Energy America, LLC), Mercuria Energy Trading S.A., Morgan Stanley Capital Group Inc., Phibro Commodities Ltd. (now known as FP Westport Commodities Ltd.), Phibro Trading LLC (now known as FP Westport Trading LLC), Royal Dutch Shell, plc, Shell International Trading and Shipping Company Ltd., Shell Trading (US) Company, Statoil ASA (now known as Equinor ASA), Statoil U.S. Holding Co. (now known as Equinor US Holdings Inc.), Trafigura AG (now known as Trafigura Trading, LLC), Trafigura Beheer B.V., Vitol, Inc., and Vitol S.A.

CORPORATE DISCLOSURE STATEMENT

Respondent BP p.l.c. has no parent corporation, and no publicly held corporation owns ten percent or more of its stock. Respondents BP America Inc. and BP Corporation North America Inc. are indirectly wholly owned subsidiaries of BP p.l.c., a publicly held company.

Respondent Hess Energy Trading Company, LLC (now known as Hartree Partners, LP), a privately held limited partnership, has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Respondents Mercuria Energy America, LLC (successor by merger to Mercuria Energy Trading, Inc.; hereinafter, "MEA") and Mercuria Energy Trading S.A. ("METSA") are indirectly wholly owned subsidiaries of Mercuria Energy Group Ltd., a privately held company. No publicly held corporation owns ten percent or more of MEA's or METSA's stock.

Respondent Morgan Stanley Capital Group Inc. is an indirectly wholly owned subsidiary of Morgan Stanley, a publicly held company.

Respondents Phibro Trading LLC (now known as FP Westport Trading LLC) and Phibro Commodities Ltd. (now known as FP Westport Commodities Ltd.) are indirectly wholly owned subsidiaries of Occidental Petroleum Corp., a publicly held company.

Respondents Shell International Trading and Shipping Company Ltd. and Shell Trading (US) Company are indirectly wholly owned subsidiaries of Royal Dutch Shell, plc. Royal Dutch Shell, plc has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Respondent Statoil U.S. Holding Co. (now known as Equinor US Holdings Inc.) is an indirectly wholly owned subsidiary of Statoil ASA (now known as Equinor ASA). Statoil ASA (now known as Equinor ASA) has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Respondents Trafigura Beheer B.V.'s and Trafigura AG's (now known as Trafigura Trading, LLC) ultimate parent corporation is Farringford N.V. No publicly held entity owns ten percent or more of any of the listed entities.

Respondent Vitol, S.A. is a privately held corporation and is an indirectly wholly owned subsidiary of Vitol Holding B.V. No publicly held company owns ten percent or more of its stock. Respondent Vitol, Inc. is a privately held corporation and is an indirectly wholly owned subsidiary of Vitol Holding B.V. No publicly held company owns ten percent or more of its stock.

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INTRODUCTION

Petitioners commenced this litigation seven years ago based on reports of an investigation by the European Commission of allegedly manipulative transactions in Brent crude oil extracted from the North Sea in Europe. Although the European Commission's investigation concluded with no enforcement action against respondents, petitioners want this putative class action to continue. Petitioners allege that respondents—a diverse group of oil producers, refiners, distributors, and traders—violated Sections 6(c)(1) and 9(a)(2) of the Commodity Exchange Act ("CEA"), the CEA's anti-manipulation provisions.

As the Second Circuit observed, petitioners' theory of liability is a "falling row of dominoes commencing in the North Sea." Pet.App. 23a. Petitioners posit that: (i) respondents entered into manipulative transactions to buy or sell Brent crude oil at foreign ports in Europe; (ii) respondents reported those foreign transactions to a foreign price-reporting agency in London; (iii) the foreign price-reporting agency incorporated the foreign transactions into a foreign benchmark, the Dated Brent Assessment; (iv) the Dated Brent Assessment somehow influenced another foreign benchmark, the ICE Brent Index; and (v) petitioners traded futures that settled based on the ICE Brent Index on a European exchange and a U.S. exchange. The lower courts correctly rejected petitioners' attempt to state a CEA claim based on allegations of entirely foreign conduct by respondents and an "attenuated 'ripple effects' theory," Pet.App. 20a, as an impermissible extraterritorial application of the CEA under the framework established by *Morrison* v. *National Australia Bank*

Ltd., 561 U.S. 247 (2010). No further review is warranted.

In *Morrison*, this Court applied the presumption against extraterritorial application of federal statutes to the Securities Exchange Act of 1934 (the "1934 Act"). This case, by contrast, concerns the extraterritorial reach of the CEA, a different statute with a different text and structure that addresses different markets. Petitioners point to no circuit split on the CEA's extraterritorial reach or on *Morrison*'s application to the CEA, and the decision below does not conflict with any decision of this Court. Neither this Court nor any other court of appeals has applied *Morrison* to the CEA.

Moreover, the decision below rests on two alternative and independent holdings. Even petitioners concede the absence of a circuit split on one holding—that the focus of Sections 6(c)(1) and 9(a)(2) of the CEA is on the defendant's alleged manipulation, not the plaintiff's transactions. The absence of a circuit split on this dispositive ruling makes this case a poor vehicle for the Court's review and is reason enough to deny certiorari. On the other holding—the extraterritorial reach of Section 22 of the CEA, the statute's private right of action—petitioners try to create a split with the Ninth Circuit's decision in *Stoyas* v. *Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018), a case involving Section 10(b) of the 1934 Act. But the Second Circuit's interpretation of Section 22 based on the CEA's text and structure does not conflict with *Toshiba*'s interpretation of Section 10(b) based on the 1934 Act's text and structure.

Nor is there a conflict with any decision of this Court. The Second Circuit faithfully applied *Morrison*'s framework to the CEA and carefully analyzed the text and structure of Sections 6(c)(1), 9(a)(2), and 22 in holding that petitioners fail to plead a domestic application of the CEA. Petitioners' suggestion that the Second Circuit is a rogue circuit "thumbing its nose at this Court," although colorful, is false. Pet. 3.

This case also is a particularly poor vehicle for this Court to address the CEA's extraterritorial reach for the additional reason that the outcome here would not change even if this Court were to grant certiorari and reverse. In an accompanying order rejecting petitioners' antitrust claims—which petitioners do not ask this Court to review—the Second Circuit held that the complaint fails to allege that the Dated Brent Assessment, the benchmark supposedly affected by respondents' alleged manipulation, was incorporated into the price of the futures petitioners purportedly traded on a U.S. exchange. That holding is fatal to both petitioners' claim of a domestic application of the CEA and their theory of liability. As a result, on any remand from this Court, the Second Circuit still would reject petitioners' CEA claims. Furthermore, petitioners fail adequately to allege that respondents' purported manipulation of the price of Brent crude oil was intended to affect the price of futures traded on a U.S. exchange. That pleading deficiency also is fatal to petitioners' claims and distinguishes this case from the hypothetical fact patterns discussed in the petition and various *amicus* briefs.

Finally, the decision below is of little significance beyond its resolution of the claims asserted here. Petitioners contend that the Second Circuit's ruling could have negative consequences for U.S. enforcement

agencies' pursuit of traders that intentionally engage in foreign manipulation in order to profit on U.S. futures trades. That is not this case. Given the highly attenuated chain of causation alleged here and the absence of any non-conclusory allegation that respondents plausibly intended to profit on U.S. futures trading, the decision below will have little, if any, impact on the ability of the Commodity Futures Trading Commission ("CFTC") and the Department of Justice ("DOJ") to bring enforcement actions. And any potential gaps in the CEA's reach should be resolved not by writ of certiorari but by Congress, which already is considering this issue. Conversely, granting and reversing here could open the federal courts to a flood of litigation based on allegations mirroring the attenuated "ripple effects" theory asserted in this case.

In short, petitioners offer no reason for this Court's review, and their petition should be denied.

OPINIONS BELOW

The Second Circuit's opinion affirming dismissal of petitioners' CEA claims (Pet.App. 1a-24a) is reported at 937 F.3d 94. The Second Circuit's order affirming dismissal of petitioners' antitrust claims and their claims against respondents Shell International Trading and Shipping Company Ltd. and Statoil ASA (now known as Equinor ASA) (Pet.App. 25a-35a) is not reported but is available at 784 F. App'x 4. The district court's opinion dismissing petitioners' complaint (Pet.App. 36a-72a) is reported at 256 F. Supp. 3d 298.

STATEMENT

A. Legal Framework

1. The presumption against extraterritorial application of federal statutes reflects a "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. In *Morrison*, this Court established a two-step framework for applying that presumption. At the first step, courts consider whether Congress provided "affirmative indication" that a statute "applies extraterritorially." *Id.* at 265. Absent such indication, the statute "does not apply extraterritorially," *id.* at 266, and courts move to the second step. There, courts assess whether a "domestic application" of the statute is alleged by analyzing whether the "activity … involved in the case" is "the object[] of the statute's solicitude." *Id.* at 266-67. This two-step framework is "applied separately to both [the statute's] substantive prohibitions and its private right of action." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2108 (2016).

Morrison applied this framework to Section 10(b) of the 1934 Act. The two cases discussed at length in the petition, *Parkcentral Global Hub Ltd.* v. *Porsche Automobile Holdings SE*, 763 F.3d 198 (2d Cir. 2014), and *Toshiba*, likewise applied *Morrison*'s framework to the 1934 Act. In *Loginovskaya* v. *Batratchenko*, 764 F.3d 266 (2d Cir. 2014), the Second Circuit applied *Morrison*'s framework to the CEA for the first time. It is the only court of appeals to have done so.

2. A key purpose of the CEA is "to deter and prevent price manipulation or any other disruptions to

market integrity." Pet.App. 22a (quoting 7 U.S.C. § 5(b)). To that end, the CEA contains two anti-manipulation provisions. Section 6(c)(1), titled "Prohibition against manipulation," makes it unlawful to "use or employ, or attempt to use or employ, in connection with ... a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance." 7 U.S.C. § 9(1). Section 9(a)(2) similarly prohibits, in relevant part, "manipulat[ion] or attempt[s] to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity." *Id.* § 13(a)(2).

Section 22 of the CEA creates a private right of action for parties that engaged in certain domestic transactions to recover damages for harm caused by violations of the CEA's substantive provisions. 7 U.S.C. § 25(a)(1)(D). Such an action may be brought against any person "who violates [the CEA] or who willfully aids, abets, counsels, induces, or procures the commission of a violation of [the CEA]." *Id.* Section 22 holds violators "liable for actual damages ... caused by such violation" if the violation involved the use of "any manipulative device or contrivance" or "a manipulation of the price of any such contract ... or the price of the commodity underlying such contract." *Id.*

B. Factual Background

1. Brent crude oil is extracted from oil fields in the North Sea. Pet.App. 4a. It then is transported to ports in Europe and sold in private over-the-counter ("OTC") transactions. Because of the private and bilateral nature of those transactions, even a daily price of Brent

crude oil is not readily available. *Id.* Market participants instead rely on price-reporting agencies that collect and disseminate price information on the OTC transactions. *Id.* London-based Platts (U.K.) LTD ("Platts") is one such price-reporting agency. *Id.* Platts publishes various Brent-related benchmarks, one of which is the Dated Brent Assessment. *Id.* That benchmark is based on transactions in physical cargoes of the four different grades of North Sea oil that have been assigned specific delivery dates. *Id.* at 4a-5a.

Petitioners purportedly traded Brent futures and other Brent derivatives. Pet.App. 5a-6a. Most of their alleged trades were on the Intercontinental Exchange ("ICE") Futures Europe, a foreign exchange in London. A small number, however, were on the domestic New York Mercantile Exchange ("NYMEX"). *Id.*

Brent futures traded on ICE Futures Europe are cash-settled based on the ICE Brent Index, a different benchmark that incorporates an average of several price assessments. Pet.App. 6a. Petitioners do not allege that the Dated Brent Assessment is one of those price assessments. *Id.* at 30a, 40a-41a, 54a. In fact, they "concede that the Dated Brent Assessment is not 'express[ly] incorporat[ed]' into the ICE Brent Index." *Id.* at 30a. Brent futures traded on NYMEX are based on the price of ICE Brent futures, and therefore are pegged indirectly to the ICE Brent Index. *Id.* at 6a.

Respondents are a diverse group of participants in numerous aspects of the oil business. Their activities include producing, refining, and distributing Brent crude oil; buying and selling Brent crude oil; trading various derivatives tied to Brent crude oil prices; and investment banking. C.A.App. 1956-60. Respondents

thus have differing and often conflicting interests in the price of Brent crude oil at any given time. *E.g.*, *id.* at 2119-20.

2. Petitioners do not allege that respondents engaged in any manipulative trading of Brent futures on NYMEX or ICE Futures Europe. Pet.App. 8a. They instead allege that respondents manipulated the price of physical oil extracted from the North Sea when it was sold at European ports and then reported those transactions to Platts. *Id.* at 7a. According to petitioners, the allegedly manipulative transactions, in turn, purportedly influenced Platts' Dated Brent Assessment. *Id.*

The complaint does not allege that petitioners traded any futures directly pegged to the Dated Brent Assessment, but rather that they traded futures based on a different benchmark—the ICE Brent Index. Pet.App. 5a-6a. As the Second Circuit explained, petitioners contend that respondents' purportedly manipulative transactions in Brent crude oil in Europe "initiated a chain of events that caused ripple effects across global commodities markets" and that ultimately had some undefined impact on petitioners' trades on ICE Futures Europe and NYMEX, which were based, either directly or indirectly, on the ICE Brent Index. *Id.* at 8a, 20a.

The complaint makes only conclusory and speculative allegations as to respondents' motive for engaging in purportedly manipulative foreign transactions to buy or sell oil. C.A.App. 2118-20. As petitioners admit, because respondents include oil producers, refiners, distributors, and traders, the "[f]actors motivating [their alleged] manipulation varied among [them] and

may have changed at times during the Class Period." *Id.* at 2119-20.

Petitioners do not identify any futures trades by respondents. Rather, based on general statements in respondents' annual reports or on their websites, the complaint merely asserts that respondents or their affiliates "traded Brent Crude Oil futures contracts and other Brent Crude Oil derivative contracts." C.A.App. 2095-105. From this, the complaint contends, with no supporting facts, that respondents intended "at least in part to benefit their Brent Crude Oil derivatives positions." *Id.* at 1948.

C. Proceedings Below

1. In 2013, following reports of the European Commission's investigation of allegedly anticompetitive practices by parties that participated in the Platts price-assessment process, various putative class actions were filed against respondents. Those actions were consolidated in the U.S. District Court for the Southern District of New York. Pet.App. 8a. The European Commission's investigation that prompted this litigation ended with no enforcement action against respondents.

As relevant here, the complaint alleges that respondents manipulated the price of Brent crude oil in violation of Sections 6(c)(1) and 9(a)(2) of the CEA. Pet.App. 8a.[1] Respondents moved to dismiss petitioners' CEA claims under Rule 12(b)(6) as impermissibly

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[1] The complaint also asserted antitrust and unjust enrichment claims. The Second Circuit affirmed the district court's dismissal of those claims, Pet.App. 30a-31a, 55a, 66a-67a, and petitioners do not seek further review.

extraterritorial because respondents' alleged manipulation occurred entirely overseas and this lawsuit's only connection to the United States is petitioners' futures trades on NYMEX. Pet.App. 8a, 9a, 46a.[2]

2. The district court dismissed petitioners' CEA claims as impermissibly extraterritorial. Under *Morrison*'s first step, the court held that "[t]he CEA does not contain any statements suggesting that Congress intended the reach of the law to extend to foreign conduct." Pet.App. 49a. Under the second step, the court relied on the "logic underlying" the Second Circuit's decision in *Parkcentral*, which held that a domestic transaction is necessary, but not sufficient, to plead a domestic application of the 1934 Act. Pet.App. 52a-54a. The district court concluded that petitioners' claims involved an extraterritorial application of Section 22 of the CEA because "the crux of [petitioners'] complaint[] against [respondents] does not touch the United States." *Id.* at 53a. As the court explained, petitioners' "claims are based on [respondents'] allegedly manipulative and misleading reporting to Platts in London about physical Brent crude oil transactions conducted entirely outside of the United States" that, at most, "indirectly affected" the Brent futures petitioners purportedly traded, which "do[] not incorporate the Dated Brent assessment." *Id.* at 53a-54a.

[2] Respondents Shell International Trading and Shipping Company Ltd. and Statoil ASA (now known as Equinor ASA) separately moved to dismiss on personal-jurisdiction and sovereign-immunity grounds, respectively. The Second Circuit affirmed the district court's grant of those motions, Pet.App. 31a-34a, and petitioners do not seek further review.

3. Applying *Morrison*'s framework to the CEA, the Second Circuit unanimously affirmed based on the CEA's text and structure.

a. Under *Morrison*'s first step, the Second Circuit "assess[ed] the text of each of the three provisions implicated by this suit ... to determine if any of them contains 'a clear indication of extraterritoriality.'" Pet.App. 11a. Because Sections 6(c)(1), 9(a)(2), and 22 are "silent as to extraterritorial reach," the court concluded that Congress did not intend for those provisions "to apply to conduct abroad." *Id.* at 12a.

b. Under *Morrison*'s second step, the Second Circuit considered "[w]hether [petitioners'] claims constitute a satisfactory domestic application of the CEA." Pet.App. 15a. Following *Morrison*, the Second Circuit "discern[ed] the 'focus of congressional concern' in enacting the statute" by "consider[ing] the 'conduct' that the statute 'seeks to regulate,' as well as 'the parties and interests it seeks to protect or vindicate.'" *Id.* (quoting *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018)). And following *RJR Nabisco*, the court "separately appl[ied]" its analysis to the CEA's private right of action and substantive provisions. *Id.* (quoting *RJR Nabisco*, 136 S. Ct. at 2106). As the Second Circuit recognized, the CEA requires petitioners to plead a proper domestic application of *both* the CEA's private right of action *and* its substantive provisions. *Id.*

i. Starting with the CEA's private right of action, the Second Circuit held that a plaintiff must allege a "domestic transaction" to plead "a proper domestic application of Section 22." Pet.App. 16a. But that is not enough, the court reasoned, based on the CEA's text

and structure. As the Second Circuit explained, "Section 22 creates no freestanding, substantive legal obligations; instead, it requires the 'commission of a violation of [the CEA].'" *Id.* at 17a. The Second Circuit determined that "the conduct-regulating provisions of the CEA—particularly those at issue here—apply only to *domestic* conduct, and not to foreign conduct." *Id.* The court thus concluded that "while a domestic transaction is necessary to invoke Section 22, it is not *sufficient*, for a plaintiff must also allege a domestic violation of one of the CEA's substantive provisions." *Id.*

In so ruling, the Second Circuit observed that "*Parkcentral*'s insight—that a domestic securities transaction is necessary but not sufficient to state a claim under Section 10(b) [of the 1934 Act]—is required by the text and structure of Section 22." Pet.App. 17a (citation omitted). "To hold otherwise," the Second Circuit stressed, "would be to divorce the private right afforded in Section 22 from the requirement of a domestic violation of a substantive provision of the CEA." *Id.*

Turning to petitioners' factual allegations, the Second Circuit held that petitioners "failed to plead a proper domestic application of Section 22." Pet.App. 20a-21a. "To state a claim under Section 22," the court stated, petitioners must allege "domestic—not extraterritorial—*conduct* by [respondents] that is violative of a substantive provision of the CEA." *Id.* at 18a. The Second Circuit concluded that the alleged misconduct here was "entirely foreign," as petitioners "make no claim that any manipulative oil trading occurred in the United States" and instead rely on an "attenuated 'ripple effects' theory" that does not reach "American

shores" until the "fifth" supposed step in the causal chain. *Id.* at 20a.

ii. The Second Circuit also found petitioners' CEA claims to be impermissibly extraterritorial for a second, independent reason: petitioners "failed to plead a proper domestic application of either Section 6(c)(1) or 9(a)(2)." Pet.App. 21a. The Second Circuit determined that the "focus" of Section 6(c)(1) is on "manipulation in commodities markets" based on "the plain text of the statute" and its statement of purpose. *Id.* at 21a-22a. The court explained that, unlike in Section 10(b) of the 1934 Act, there "is nothing in Section 6(c)(1)'s text suggesting that it is focused on 'purchases and sales of securities in the United States,' and other available evidence in the CEA, such as that statute's statement of purpose, suggests that the focus is on rooting out manipulation and ensuring market integrity—not on the geographical coordinates of [a plaintiff's] transaction." *Id.* The Second Circuit similarly concluded that Section 9(a)(2)'s focus is on "preventing manipulation of the price of any commodity" because it "proscribes 'manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce.'" *Id.* at 22a-23a.

As to petitioners' factual allegations, the Second Circuit stressed that all of respondents' alleged conduct relevant to the focus of Sections 6(c)(1) and 9(a)(2) "occurred abroad—[petitioners] contend that [respondents] sought to manipulate the price of Brent crude, and did so by fraudulently transacting in the physical market in Europe." Pet.App. 23a. The court emphasized that petitioners "make no allegation of manipulative conduct" in the United States, but rather "expressly rely on a 'ripple effect' or chain of events

that resembles a falling row of dominoes commencing in the North Sea." *Id.* Because petitioners "have not pleaded a domestic application of either Section 6(c)(1) or 9(a)(2)," the Second Circuit did "not decide whether *Parkcentral* applies to those sections." *Id.* at 23a n.9.

4. In affirming the dismissal of petitioners' CEA claims, the Second Circuit recited petitioners' contention, not pleaded in their complaint, that the Dated Brent Assessment, the benchmark supposedly affected by respondents' alleged manipulation, was one of the price assessments incorporated into the ICE Brent Index, the pricing benchmark for petitioners' futures contracts. Pet.App. 6a.

In a separate opinion rejecting petitioners' antitrust claims, however, the Second Circuit held that petitioners lack antitrust standing because they do not allege that the price of their futures contracts is linked to the Dated Brent Assessment. Pet.App. 29a-31a. As the Second Circuit explained, petitioners fail to plead that they traded "derivative instruments directly pegged to the Dated Brent Assessment." *Id.* at 29a-30a. Instead, the court stated, petitioners "acknowledge that the operative pricing benchmark for Brent futures ... is the ICE Brent Index, not the Dated Brent Assessment," and petitioners "concede that the Dated Brent Assessment is not 'express[ly] incorporat[ed]' into the ICE Brent Index." *Id.* at 30a. In so ruling, the Second Circuit rejected petitioners' "efforts to re-write their complaint—in order to show that the ICE Brent Index directly incorporates the Dated Brent Assessment." *Id.*

5. The Second Circuit denied petitioners' request for rehearing and rehearing en banc without dissent. Pet.App. 73a-74a.

ARGUMENT

The Second Circuit's unanimous decision holding that petitioners fail to plead a domestic application of the CEA does not warrant review.

First, the decision below involved CEA claims and thus does not conflict with any decision of any other court of appeals. The split that petitioners contend exists between the Second and Ninth Circuits relates to claims under a different statute—the 1934 Act. The lack of conflict between the Second Circuit's interpretation of the CEA in this case and the Ninth Circuit's interpretation of the 1934 Act in *Toshiba* is reason enough to deny certiorari.

Even if the Court were tempted to address petitioners' purported split notwithstanding that this case involves a different statute, it still would make no sense to grant certiorari here because the Court also would have to decide a second question on which petitioners *concede* there is no circuit split. As petitioners acknowledge, the Second Circuit's ruling on the CEA's extraterritorial reach rests on two alternative and independent holdings: one construing the CEA's private right of action and the other interpreting the statute's substantive provisions. In concluding that petitioners have not alleged a domestic application of the CEA's substantive provisions, the Second Circuit held that the relevant focus of Sections 6(c)(1) and 9(a)(2) is respondents' supposedly manipulative conduct, not petitioners' transactions. Pet.App. 21a-23a. Petitioners

admit there is no circuit split on that ruling. The presence of a concededly split-less alternative ground for the judgment below makes the denial of certiorari here an even easier call.

Second, the decision below does not conflict with any decision of this Court and is correct. The Second Circuit carefully analyzed the CEA under *Morrison*'s two-step framework to assess its extraterritorial reach. In a well-reasoned decision, the Second Circuit determined the focus of congressional concern for each provision at issue based on the CEA's text and structure, and correctly concluded that petitioners' CEA claims are impermissibly extraterritorial.

Third, this case is a particularly poor vehicle for the Court to address the CEA's extraterritorial reach. As the Second Circuit held in a companion order that is not the subject of the petition, the complaint fails to allege that the Dated Brent Assessment was incorporated into the price of the futures petitioners supposedly traded on a U.S. exchange. This failure eliminates the possibility of a domestic application of the CEA even under petitioners' statutory interpretation because it severs the link between the alleged manipulation and petitioners' purported domestic transactions. It also is fatal to petitioners' CEA claims on the merits. Nor do petitioners adequately plead that respondents' alleged manipulation of the price of physical oil was motivated by a desire to profit on futures trading in the United States. That pleading failure independently dooms petitioners' CEA claims on the merits and distinguishes this action from the hypotheticals and CEA enforcement actions discussed in the petition and various *amicus* briefs.

Finally, petitioners exaggerate the practical significance of the decision below beyond the confines of this case. Contrary to petitioners' suggestion, the Second Circuit's decision is unlikely to limit the ability of the CFTC and DOJ to enforce the CEA or lead to inconsistent application of *Morrison*.

A. The Decision Below Does Not Conflict With Any Decision Of Any Other Court Of Appeals.

Petitioners attempt to manufacture a circuit split between the Second and Ninth Circuits on the proper application of *Morrison* based on decisions interpreting the 1934 Act—a different statute with a different text and structure designed to regulate different types of markets. In both the decision below and the Ninth Circuit's decision in *Toshiba*, the courts applied *Morrison*'s framework to the specific text and structure of the different statutes at issue. The courts reached different outcomes based on differences between those statutes, not based on differences as to the proper application of *Morrison*. Petitioners fail to identify *any* split on the question actually presented in this case: the CEA's extraterritorial reach. That is reason enough to deny certiorari.

What is more, petitioners concede that there is no split on one wholly independent basis for the Second Circuit's decision—the focus of Sections 6(c)(1) and 9(a)(2) of the CEA for purposes of determining whether a domestic application of the CEA's substantive provisions is pleaded. Neither is there a conflict on the other basis for the decision below—the focus of Section 22 of the CEA.

1. Petitioners Concede That No Split Exists Over Applying *Morrison* To The CEA's Substantive Provisions.

To determine whether a plaintiff has alleged a domestic application of a particular statute, *Morrison* instructs courts to look to the "'focus' of congressional concern" in enacting the statute. 561 U.S. at 266. Applying that "mode of analysis," *id.*, the Second Circuit concluded that the "focus" of Sections 6(c)(1) and 9(a)(2) of the CEA is "on manipulation in commodities markets," not on plaintiffs' transactions, Pet.App. 21a-23a. This alternative holding provides an independent basis for the Second Circuit's ruling that petitioners "failed to plead a proper domestic application" of the CEA. *Id.*

Petitioners concede that there is no circuit split on this alternative holding. Pet. 26 ("[N]o court has squarely rejected the Second Circuit's holding below on the second question presented."). And for good reason: the Second Circuit explicitly stated that its alternative holding does not rely on *Parkcentral*, the Second Circuit's earlier decision interpreting the 1934 Act that supposedly creates a split with the Ninth Circuit's *Toshiba* decision. In fact, in the section of its opinion devoted to the CEA's substantive provisions, the Second Circuit did not cite *Parkcentral* except to say in a footnote that it was *not* considering that decision. Pet.App. 23a n.9 ("[W]e need not decide whether *Parkcentral* applies to" Section 6(c)(1) or 9(a)(2).).

Unable to point to a split, petitioners fall back on the broad-brush principle that "parallel language in the CEA and [the 1934 Act]" should "presumptively receive the same interpretation." Pet. 26. But as explained below, *infra* Part B.3.a, petitioners overstate

the linguistic similarity between the two statutes for purposes of applying *Morrison*'s framework. None of the decisions petitioners cite interpreted Sections 6(c)(1) and 9(a)(2) of the CEA to determine the focus of congressional concern or the proper application of *Morrison*.

For example, in *CFTC* v. *Monex Credit Co.*, 931 F.3d 966, 969 (9th Cir. 2019), the Ninth Circuit considered whether "Dodd-Frank extended the CFTC's power only to fraud-based manipulation claims." *Monex* does not address the extraterritorial reach of the CEA or Congress's focus in enacting the CEA's anti-manipulation provisions. *Greenwood* v. *Dittmer*, 776 F.2d 785 (8th Cir. 1985)—which predates Section 6(c)(1) by 25 years—is even less relevant. Like *Monex*, *Greenwood* does not concern the extraterritorial reach of the CEA. Nor does it involve either of the CEA anti-manipulation provisions at issue here, let alone Congress's focus in enacting them. *Id.* at 787. Petitioners' reliance on these readily distinguishable cases underscores the conceded absence of any circuit split.

2. Neither Is There A Split Over Applying *Morrison* To The CEA's Private Right Of Action.

In arguing that the Second Circuit's interpretation of the CEA's private right of action in this case implicates a circuit split, petitioners point to two decisions—the Second Circuit's *Parkcentral* decision and the Ninth Circuit's *Toshiba* decision—that involved a different statute, the 1934 Act. Like the decision below, *Toshiba* and *Parkcentral* turned on the specific language and structure of the statute at issue.

In *Toshiba*, plaintiffs asserted claims under Section 10(b) of the 1934 Act on behalf of a putative class

of purchasers of American Depositary Receipts ("ADRs") linked to the value of Toshiba common stock. 896 F.3d at 937-38, 941. Although Toshiba common stock is traded on a foreign exchange, plaintiffs purchased their ADRs in the United States on an OTC market. *Id.* at 939, 946. In determining whether plaintiffs alleged a domestic application of Section 10(b), the Ninth Circuit "[a]nalyz[ed] the text of Section 10(b)" and applied *Morrison*'s holding that "the focus of the [1934] Act is ... upon purchases and sales of securities in the United States." *Id.* at 936, 944. Notwithstanding that the OTC market for Toshiba ADRs is "not an 'exchange' under the [1934] Act," the Ninth Circuit held that plaintiffs' OTC trades could qualify as domestic transactions under *Morrison* if plaintiffs incurred "irrevocable liability" in the United States. *Id.* at 945, 949.

Nothing in the Ninth Circuit's "straightforward application of ... *Morrison*" to Section 10(b) of the 1934 Act, U.S. Br. 8, *Toshiba Corp.* v. *Auto. Indus. Pension Tr. Fund*, No. 18-486 (May 20, 2019), conflicts with the Second Circuit's application of *Morrison* to Section 22 of the CEA. Indeed, the 1934 Act contains no equivalent to Section 22's private right of action for violations of the CEA's substantive provisions because Section 10(b) claims rest on an implied private right of action. See *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 196 (1976). The Second Circuit's holding that "a domestic transaction ... is 'necessary' to invoke ... Section 22" of the CEA, but "not 'sufficient,'" Pet.App. 19a, was based on the "text and structure of Section 22," *id.* at 17a. The Second Circuit considered how the CEA's private right of action "works in tandem with other provisions"

of the statute in "discern[ing]" the "focus of congressional concern." *Id.* at 15a, 17a. It concluded that a domestic transaction is necessary to plead a domestic application of Section 22, but not sufficient, "for a plaintiff must also allege a domestic violation of one of the CEA's substantive provisions." *Id.* at 17a.

Based as it was on an interpretation of the CEA, the decision below does not conflict with *Toshiba*. Petitioners nevertheless attempt to manufacture an indirect split with the Ninth Circuit simply because the decision below, in considering the extraterritorial reach of Section 22, cited *Parkcentral*, a decision the Ninth Circuit distinguished in *Toshiba*. Although the Second Circuit discussed *Parkcentral* in interpreting Section 22, its decision was founded on the language and structure of the CEA. The Second Circuit concluded that "*Parkcentral*'s insight—that a domestic securities transaction is necessary but not sufficient to state a claim under Section 10(b)—*is required by the text and structure of Section 22*." Pet.App. 17a (emphasis added; citation omitted). As such, the Second Circuit's discussion of *Parkcentral* in interpreting the CEA's private right of action does not conflict with *Toshiba*.

B. The Decision Below Is Correct And Does Not Conflict With Any Decision Of This Court.

The petition strains to depict the Second Circuit as "thumbing its nose at this Court" by "finding ways to prop-up the conduct-and-effects test that *Morrison* acerbically rejected." Pet. 3. To the contrary, the Second Circuit faithfully applied *Morrison*'s framework for assessing the extraterritorial reach of federal statutes to the CEA's specific text, structure, and purpose.

1. Tellingly, petitioners cite no decisions of this Court addressing the CEA's extraterritorial reach. There are none. Because this Court has never considered the "focus" of the CEA provisions at issue here, the decision below applying *Morrison*'s framework to the CEA does not conflict with any decision of this Court.

In *Morrison*, this Court applied the presumption against extraterritoriality to claims under Section 10(b) of the 1934 Act. 561 U.S. at 250-51. After first concluding that Section 10(b) does not "appl[y] abroad," *id.* at 262-65, the Court moved to the second step of its analysis and determined that the "focus" of Section 10(b) is "upon purchases and sales of securities in the United States," *id.* at 266. That determination was based on the specific text, structure, and purpose of the 1934 Act. See *id.* at 266-67 (considering Section 10(b)'s "purchase or sale" language and purpose described in statute's prologue). Thus, "the transactional test ... adopted" in *Morrison* is particular to the 1934 Act and says nothing about the "objects" of the CEA's "solicitude." *Id.* at 267, 269. Contrary to petitioners' suggestion, see Pet. 3, 6, 20, 26, 29, 31-34, *Morrison* does not stand for the proposition that every federal statute has a transactional focus just because Section 10(b) does. Instead, *Morrison* established a two-step framework of general applicability for determining the extraterritorial reach of federal statutes. See, *e.g.*, *WesternGeco*, 138 S. Ct. at 2136-37 (applying *Morrison*'s "two-step framework for deciding questions of extraterritoriality" and discerning non-transactional focus in Patent Act). In this case, the Second Circuit correctly applied that general framework to the CEA.

Petitioners rely on two post-*Morrison* decisions applying the *Morrison* framework to determine the extraterritorial reach of different federal statutes: *RJR Nabisco* and *WesternGeco*. Pet. 5, 14, 18, 22, 25, 31. Petitioners cite those cases for the proposition that "[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application," *id.* at 31, but that simply begs the question of what conduct is relevant to the statute's focus.

2. Petitioners argue that the Second Circuit's holding that a domestic transaction is "necessary but not sufficient" to plead a domestic application of Section 22 of the CEA added an extra requirement to *Morrison*'s framework. Pet. 31. Not so. Under *Morrison*'s second step, the Second Circuit held that although the focus of the CEA's private right of action is transactional, plaintiffs also must allege a violation of one of the CEA's "conduct-regulating provisions," which apply "only to *domestic* conduct, and not to foreign conduct." Pet.App. 17a. As the court explained, "Section 22 creates no freestanding, substantive legal obligations; instead, it requires the 'commission of a violation of [the CEA].'" *Id.* In so ruling, the Second Circuit correctly applied the *Morrison* framework "separately to ... [the CEA's] private right of action," *RJR Nabisco*, 136 S. Ct. at 2108, which has no analogue in the 1934 Act, and correctly held based on "the text and structure of Section 22" that this provision must be assessed in concert with the CEA's substantive provisions, Pet.App. 17a (citing *WesternGeco*, 138 S. Ct. at 2137). "To hold otherwise," the Second Circuit stressed, "would be to di-

vorce the private right [of action] afforded in Section 22 from the requirement of a domestic violation of a substantive provision of the CEA." *Id.*

3. The Second Circuit's alternative holding that petitioners "failed to plead a proper domestic application of either Section 6(c)(1) or 9(a)(2)," Pet.App. 21a, likewise correctly applied *Morrison* to the CEA. The Second Circuit expressly followed *Morrison*'s direction to determine the "focus" of those two substantive provisions, *id.* at 11a, 15a, and correctly concluded based on their "plain text" and "purpose" that their focus is on "manipulation in commodities markets" and "manipulation of the price of any commodity," *id.* at 21a-23a.

a. Petitioners incorrectly state that Section 6(c)(1) of the CEA and Section 10(b) of the 1934 Act are "identical." Pet. 33. As the Second Circuit recognized, "the language of Section 6(c)(1) crucially differs from [that of] Section 10(b)" for purposes of applying *Morrison*'s framework because "Section 6(c)(1)'s text" is not focused on "purchases and sales." Pet.App. 21a-22a.

Petitioners argue that "*Morrison*'s core reason for discerning that Section 10(b) focuses on transactions" was that it "only [punishes] deceptive conduct '*in connection with* the purchase or sale of any security registered on a national securities exchange.'" Pet. 32. In petitioners' view, the phrase "in connection with" "established the 'primacy of the domestic exchange' as the 'object' of the [1934 Act's] 'solicitude.'" *Id.* But *Morrison* actually found that the key language of Section 10(b) is "purchase or sale." After explaining that "the focus of the [1934] Act" is "upon *purchases and sales* of securities in the United States," this Court reasoned that "those *purchase-and-sale* transactions are

the objects of the statute's solicitude." 561 U.S. at 266-67 (emphases added); see also *id.* at 269-70 ("[t]he transactional test we have adopted" depends on "whether the *purchase or sale* is made in the United States") (emphasis added).

That "purchase or sale" language is absent from Section 6(c)(1) of the CEA. As the Second Circuit correctly recognized, "[t]here is nothing in Section 6(c)(1)'s text suggesting that it is focused on 'purchases and sales.'" Pet.App. 22a. Titled "Prohibition against manipulation," 7 U.S.C. § 9(1), Section 6(c)(1) instead "centers on manipulation," Pet.App. 22a. It prohibits the use of "any manipulative or deceptive device or contrivance" "in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity." 7 U.S.C. § 9(1). Here, the alleged "manipulative device" was respondents' transactions in physical oil in Europe, thereby requiring an extraterritorial application of the provision's focus.

The same reasoning applies to Section 9(a)(2), which proscribes "manipulat[ing] or attempt[ing] to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity." 7 U.S.C. § 13(a)(2). Section 9(a)(2) likewise lacks the "purchase or sale" language central to *Morrison*'s holding that Section 10(b)'s focus is on purchase-and-sale transactions. Thus, just as "Section 6(c)(1) centers on manipulation," Pet.App. 22a, "[t]he focus of Section 9(a)(2) is preventing manipulation," *id.* at 23a. Here, the alleged manipulation took place entirely outside the United States, thus again requiring an extraterritorial application of the provision's focus.

b. Following *Morrison*'s guidance, the Second Circuit also carefully considered the CEA's statement of purpose, which explains that "the purpose" of the CEA is to "deter and prevent price manipulation or any other disruptions to market integrity." 7 U.S.C. § 5(b). As the court explained, this "statement of purpose[] suggests that the focus is on rooting out manipulation and ensuring market integrity—not on the geographical coordinates of the [plaintiff's] transaction." Pet.App. 22a.

4. Finally, the decision below is consistent with the primary rationale underlying the presumption against extraterritoriality—"avoid[ing] … international discord" from the application of U.S. law to "conduct in foreign countries." *RJR Nabisco*, 136 S. Ct. at 2100. Petitioners do not plead a direct link between respondents' alleged foreign manipulation and the United States—just, in petitioners' own words, "ripple effects." Pet.App. 20a; see C.A.App. 1980. All the alleged misconduct was "entirely foreign": respondents' transactions in Brent crude oil occurred in Europe, and they reported those transactions to Platts in London, which allegedly affected a foreign benchmark. Pet.App. 20a. Leaving aside the complaint's conclusory assertions, the only alleged connection to the United States is petitioners' trading. *Id.* If all that is required to plead a domestic application of the CEA is domestic transactions by plaintiffs, even though "[n]early every link in [the alleged] chain of wrongdoing is entirely foreign," *id.*, there would be regular con-

flict between U.S. and foreign laws, and "the presumption against extraterritorial application would be a craven watchdog indeed," *Morrison*, 561 U.S. at 266.[3]

C. The Decision Below Is An Exceptionally Poor Vehicle For Addressing The CEA's Extraterritorial Reach.

This case is littered with complications that counsel strongly against certiorari. Apart from the issues addressed above, two additional impediments stand out.

1. The Second Circuit held (in a separate opinion affirming the dismissal of petitioners' antitrust claims) that the complaint fails to plead that the foreign benchmark supposedly affected by respondents' allegedly manipulative physical-oil transactions, the Dated Brent Assessment, is incorporated into the price of the futures petitioners purportedly traded on a U.S. exchange. Pet.App. 30a. Petitioners do not seek this Court's review of that holding, which is fatal to petitioners' CEA claims even under petitioners' interpretation of the statute.

Even if this Court were to determine that the focus of the relevant CEA provisions is on purchases and sales of futures contracts, this Court still could not rule in petitioners' favor because petitioners fail plausibly to allege a direct link between their futures transactions on a U.S. exchange and respondents' allegedly

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[3] Petitioners' contention that the decision below is "likely to precipitate conflict with foreign laws" because it "purport[s] to regulate foreign *transactions* based on domestic *conduct*" misconstrues the decision. Pet. 34-36. The Second Circuit held that Section 22 creates a private right of action only for plaintiffs that suffered damages in connection with *domestic* transactions because of domestic violations the CEA's substantive provisions. See Pet.App. 15a-23a.

manipulative conduct. Absent such a link, petitioners have not even pleaded a domestic transaction supposedly affected by respondents' alleged foreign manipulation. See Pet. 29 (arguing that "CEA's substantive provisions" should "apply to overseas manipulation that *impacts* domestic commodities markets") (emphasis added).

Petitioners' entire claim of a domestic transaction—and thus a domestic application of the CEA—depends on their contention that their futures trades on NYMEX were affected by respondents' allegedly manipulative transactions in Brent crude oil. But the law of the case is otherwise. The Second Circuit already has held that the ICE Brent Index (the benchmark relevant to the pricing of petitioners' futures trades) does not incorporate the Dated Brent Assessment (the benchmark supposedly affected by respondents' alleged manipulation). See Pet.App. 30a ("[petitioners] could not have suffered an antitrust injury if they dealt in products that were not linked to the benchmark they complained of"). Because petitioners cannot rely on their purported domestic transactions to establish a domestic application of the CEA here, petitioners essentially ask this Court for an impermissible advisory opinion on the extraterritorial reach of the CEA.

Petitioners' failure to allege that the ICE Brent Index incorporates the Dated Brent Assessment also dooms their CEA claims on the merits. Petitioners do not plead, as they must "[t]o establish a claim for price manipulation under the CEA," that respondents' purported manipulation of the price of Brent crude oil (which supposedly affected the Dated Brent Assessment) was the "proximate cause" of any losses petitioners suffered on futures trades that settled based on the

ICE Brent Index. *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530, 566, 568 (S.D.N.Y. 2016).

2. The complaint likewise fails adequately to allege that respondents engaged in manipulative transactions in Brent crude oil with the *intent* to distort the price of futures traded on a U.S. exchange. That pleading failure not only requires dismissal of petitioners' CEA claims on the merits, see *In re Commodity Exch., Inc. Silver Futures & Options Trading Litig.*, 560 F. App'x 84, 86 (2d Cir. 2014), but also demonstrates that this case bears no resemblance to the counterfactuals presented in the petition and various *amicus* briefs. Contrary to petitioners' suggestion, the facts alleged here are nothing like those in the "Black Sea Wheat" hypothetical discussed in the petition and the CFTC's *amicus* brief below. See Pet. 14-16, 29-30; Pet.App. 106a-08a.

In that hypothetical, the CFTC "imagine[d] a scenario in which traders in Turkey establish positions in Black Sea Wheat contracts on [the Chicago Mercantile Exchange]" and then artificially "disrupt a significant portion of the physical supply" of that commodity "with the *intent* to distort the price of the Black Sea Wheat contract" directly. Pet.App. 106a-07a (emphasis added). Although the CFTC took "no position on whether [petitioners] have stated a claim" under the CEA on the different facts alleged here, the CFTC argued that it should be able to bring an enforcement action against the Turkish traders on the "clean set of facts" in its hypothetical. *Id.* at 87a, 107a. Petitioners point to this strawman hypothetical in arguing that the Court should grant certiorari. See, *e.g.*, Pet. 15-16, 29-30.

In an effort to make this case resemble the CFTC's hypothetical, petitioners assert that respondents "intended" their transactions in physical Brent crude oil "to affect domestic futures transactions [on U.S. exchanges] so that [respondents] could profit from positions they took in those" same futures. Pet. 9-10. But the complaint's factual allegations do not support that assertion. Rather, the complaint offers only conclusory and speculative theories of respondents' supposed motivation. Given respondents' varying roles as oil producers, refiners, distributors, traders, or some combination, the complaint attempts to plead intent in vague alternatives. According to petitioners, the alleged manipulation was intended to "(a) enhance[] the value of [respondents'] financial *or* derivative *or* physical positions, and (b) improve[] the price of purchase or sale obligations." C.A.App. 2118-19 (emphases added).

With respect to derivatives trading, petitioners offer only the bald assertion, with no supporting factual allegations, that respondents' physical-oil transactions in the North Sea were intended "at least in part to benefit their Brent Crude Oil derivatives positions." C.A.App. 1948. The complaint does not identify any respondent's supposed derivative positions or explain how any such positions may have benefited from the purportedly manipulative transactions. Instead, the complaint merely alleges based on general statements in respondents' annual reports and on their websites that respondents or their affiliates "actively traded Brent Crude Oil futures contracts and other Brent Crude Oil derivative contracts." *Id.* at 2095-105.

Equally problematic, petitioners concede that the "[f]actors motivating [respondents'] manipulation varied among [respondents] and may have changed at

times during the Class Period." C.A.App. 2119. Because the alleged conspiracy includes oil producers, refiners, distributors, and traders, *id.* at 2119-20, the complaint variously contends that (i) "refiners" sought "lower crude oil prices," (ii) "net exporter[s]" "prefer[red] higher prices" on some days but not others, and (iii) "middle-men and traders" "opportunistic[ally]" benefitted from price movements based on "their trading books," *id*. at 2010, 2119-20. Given those differing interests, petitioners' theory that respondents conspired to manipulate the price of Brent crude oil in the same direction makes no sense.

Simply stated, the complaint's conclusory and contradictory allegations of intent are a far cry from the CFTC's hypothetical. This case is not a vehicle for this Court to consider the extraterritorial application of the CEA to overseas manipulation undertaken with an intent to affect the price of domestic futures trading.

D. Petitioners Exaggerate The Significance Of The Decision Below.

The decision below is a straightforward application of *Morrison* to the CEA and the unusual factual allegations of this case. Petitioners' efforts to portray the decision as a radical "expan[sion of] *Parkcentral*," Pet. 2, that will hamstring U.S. enforcement agencies' ability to pursue "international frauds they have long prosecuted," *id*. at 4, are entirely overblown.

1. Petitioners' contention that the Second Circuit's decision will foreclose U.S. authorities "from pursuing criminals that intentionally use their foreign conduct to steal from Americans transacting on American exchanges," Pet. 3, overlooks a crucial point: None of the enforcement actions that petitioners cite, or that the

CFTC raised in its *amicus* brief below, involves fact patterns remotely similar to the facts alleged here. Petitioners cite *United States* v. *Sindzingre*, 2019 WL 2290494 (E.D.N.Y. May 29, 2019), as an example of a U.S. "prosecution based on banks' overseas manipulation of LIBOR"—a benchmark interest rate incorporated into a variety of financial instruments. Pet. 29. In *Sindzingre*, however, the traders allegedly manipulated U.S. Dollar LIBOR, which is itself a domestic commodity under the CEA. 2019 WL 2290494, at *12. That manipulation, in turn, directly affected the price of Eurodollar futures contracts traded on a U.S. exchange. *Id.* In other words, *Sindzingre* involved allegations of direct manipulation of a domestic commodity and of futures contracts traded on a domestic exchange—both of which are missing here. See Pet.App. 7a, 30a, 40a-41a, 54a.

The decision below also has no effect on U.S. authorities' ability to bring enforcement actions against overseas manipulative conduct under Section 2(i) of the CEA. Added to the CEA in 2010 as part of the Dodd-Frank Act, Section 2(i) provides that certain CEA provisions "relating to swaps ... shall not apply to activities outside the United States unless those activities ... have a direct and significant connection with activities in, or effect on, commerce of the United States." 7 U.S.C. § 2(i). "Unlike Sections 6(c)(1) and 9(a)(2), Section 2(i) contains, on its face, a 'clear statement' of extraterritorial application." Pet.App. 13a (citation omitted). Petitioners waived the argument that their CEA claims are not impermissibly extraterritorial under Section 2(i) because they "neglected to raise this argument until *after* the district court rendered its final judgment." *Id.* at 13a-14a. As a result, the decision

below has no effect on the CFTC's and DOJ's authority under Section 2(i) because the Second Circuit did not interpret that provision. See *CFTC* v. *TFS-ICAP, LLC*, 2020 WL 362930, at *3 (S.D.N.Y. Jan. 22, 2020) (relying on Section 2(i) to bring enforcement action against overseas conduct).

In any event, policing entirely *foreign* conduct—such as that alleged here—is best left to *foreign* enforcement agencies. Those agencies can, and do, police overseas manipulation of *foreign* commodities markets. And "the regulation of other countries often differs from ours." *Morrison*, 561 U.S. at 269. In fact, before this litigation was filed, the European Commission commenced an investigation of allegedly anticompetitive practices by parties that participated in the Platts price-assessment process and ultimately chose not to bring an enforcement action against respondents. Interference by U.S. authorities with this type of foreign enforcement is exactly the type of conflict with "foreign laws and procedures" that the presumption against extraterritoriality is meant to avoid. *Id.*; see also, *e.g.*, *RJR Nabisco*, 136 S. Ct. at 2100 ("Most notably, [the presumption] serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries.").

Even if the decision below could have some effect on U.S. authorities' efforts to enforce the CEA, expanding the overseas reach of domestic enforcement agencies is best left 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). After *Morrison*, Congress amended the 1934 Act to expand the SEC's authority to bring enforcement actions based on overseas conduct. See Dodd-

Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864 (2010). And Congress currently is considering proposed legislation that would expand the CFTC's and DOJ's ability to enforce the CEA against certain conduct abroad. See CFTC Reauthorization Act of 2019, H.R. 4895, 116th Congress, § 112 (1st Sess. 2019). Such recourse to the political branches is the proper mechanism for redressing any perceived gaps in the ability of U.S. authorities to carry out their enforcement missions abroad.

2. Petitioners also try to imbue the decision below with added significance by claiming that the Second Circuit's decision "entrenche[s] disagreement" between the Second and Ninth Circuits and "recreates the same uncertain case-by-case outcomes that *Morrison*" eschewed. Pet. 18, 31. Petitioners are incorrect for several reasons.

First, any tension between the Second and Ninth Circuits is between *Parkcentral* and *Toshiba*, not this case and *Toshiba*. *Parkcentral* and *Toshiba* involved the 1934 Act—a different statute with a different text and structure that applies to different markets than the CEA. Any purported split over the proper interpretation of the 1934 Act is not a reason to grant certiorari in this case. See *supra* Part A.2.

Second, *Parkcentral* does not squarely conflict with *Toshiba*. As the Solicitor General explained in recommending the denial of certiorari in *Toshiba*, "no clear conflict exists between [*Toshiba*] and ... *Parkcentral*." U.S. Br. 9, *Toshiba Corp.*, No. 18-486. In *Toshiba* itself, the Ninth Circuit emphasized that "*Parkcentral* is distinguishable on many grounds." 896 F.3d at 950.

Third, any conflict between *Parkcentral* and *Toshiba* has not resulted in a lack of uniformity among courts of appeals in their application of *Morrison* to the 1934 Act. No other circuit has weighed in on this purported split over the extraterritorial reach of the 1934 Act, and only one district court outside the Second and Ninth Circuits has discussed the issue. See *Lykuong Eng* v. *Akra Agric. Partners, Inc.*, 2017 WL 5473481, at *2 (W.D. Tex. Aug. 9, 2017) (holding that *Parkcentral* does not apply under given facts, without any criticism of Second Circuit's approach). By its own terms, *Parkcentral* is *sui generis*, 763 F.3d at 217, and it has had no widespread effect even within the Second Circuit. See *In re Picard*, 917 F.3d 85, 100 (2d Cir. 2019) (finding "domestic applications" without citing *Parkcentral*); *Myun-Uk Choi* v. *Tower Research Capital LLC*, 890 F.3d 60, 66-68 (2d Cir. 2018) ("*Morrison* clearly provided that the 'domestic transaction' prong is an independent and sufficient basis for application of the [1934] Act to purportedly foreign conduct.").

Fourth, the decision below will not leave "district courts ... stumbling blind." Pet. 27. The Second Circuit's holding that the focus of the CEA's substantive provisions is on the defendant's manipulative conduct rather than the plaintiff's transactions is a clear rule that can be applied "uniform[ly] and predictab[ly]" to evaluate whether CEA claims are impermissibly extraterritorial. *Id.*

3. If the Court were to grant review and reverse on the facts of this case, a deluge of litigation could follow modeled on the attenuated chain of causation posited here—alleged manipulation of the price of a physical commodity overseas that "cause[s] ripple effects across global commodities markets" that "resemble[] a

falling row of dominoes" starting abroad and ultimately reaching "American shores." Pet.App. 8a, 20a, 23a.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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