No. 23-80

IN THE

Supreme Court of the United States

JEFFREY LAYDON ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

COOPERATIEVE RABOBANK U.A., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

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The petition explained that the circuits are intractably divided over this Court's basic framework for deciding when an application of federal law is permissibly domestic. Most courts understand this Court to have held that an application is domestic so long as the conduct that is the focus of the statute occurred in the United States. The Second Circuit, by contrast, holds that domestic focus-related conduct is merely a necessary, but not a sufficient, condition. It has acknowledged that the focus of both Section 10(b) of the Securities Exchange Act (SEA) and Section 22 of the Commodity Exchange Act (CEA) are transactional yet holds that a domestic transaction is not sufficient. Instead, it requires courts to also consider whether facts unrelated to the statute's focus, including the location of the defendant's fraudulent conduct, make the claim "predominantly foreign." *See* Pet. 6-8, 15-16.

Respondents cannot seriously contest that a division on such a fundamental question is intolerable, as illustrated by the amicus briefs urging review both to reverse and to affirm. *Compare* Better Markets Amicus Br. 4 *with* Toshiba Amicus Br. 23-25. Instead, respondents' principal response is to attempt to rewrite the decision below, reimagine settled Second Circuit precedent, and relitigate unrelated defenses that the district court rejected and the Second Circuit never reached.

These arguments have no merit. The Court should grant the petition, resolve the intractable circuit conflict over its extraterritoriality framework,

and remand to allow the Second Circuit to consider respondents' other defenses in the first instance.

I. The Circuits Are Divided.

Respondents do not dispute that in *Parkcentral Global Hub Ltd. v. Porsche Automobile Holdings SE*, 763 F.3d 198, 215 (2d Cir. 2014), the Second Circuit held that it is insufficient that conduct related to the focus of the SEA occurred in the United States and created the "predominantly foreign" test as an additional, extra-focus requirement. But they claim that whatever error the Second Circuit may have made in *Parkcentral* was not repeated when the court applied the same test to the CEA. In the CEA context, they claim, the "predominantly foreign" test is a means of ensuring the domestic application of the CEA's *substantive* provisions, whose focus, they insist, is on the "*conduct* by Defendants." BIO 21. Not so.

1. Respondents' first problem is that the panel below never even *identified* the substantive provisions petitioner invoked, much less "carefully analyzed each substantive CEA provision at issue," as respondents acknowledge would have been necessary to identify the provisions' focus. BIO 22. That, no doubt, was because respondents never argued that petitioner sought an extraterritorial application of the substantive provisions he pleaded. *Id*. 18. And to this day, respondents offer no argument as to why all of the provisions in this case are focused on the defendant's

conduct rather than the manipulated transactions. *Compare* Pet. 32 n.11 *with* BIO 18.[1]

More importantly, the Second Circuit expressly disavowed respondents' premise that the "predominantly foreign" test arises from the substantive provisions' focus on the defendant's conduct. The panel recognized that taking that view would dramatically restrict the CFTC's enforcement authority, since the agency has no power to enforce the CEA's substantive provisions extraterritorially yet has brought CEA claims in cases like this (indeed, in *this case*, against many of the same defendants, *see* Pet. 9-10). The panel dismissed the possibility that its decision would "undermine the ability of U.S. law and U.S. regulators to protect domestic markets and investors" on the ground that the "extraterritorial reach of *Section 22,* which concerns private rights of action, *has nothing to do with government enforcement*." Pet. App. 19a n.11 (emphasis added).

The Second Circuit was able to provide this reassurance only because the "predominantly foreign" test is an additional requirement for stating a claim under Section 22, *even when the plaintiff seeks a domestic application of the substantive provisions*.

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[1] Respondents say they did not address the focus of the substantive provisions because petitioner did not argue that the provisions here had a different focus than the substantive provisions in *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d Cir. 2019). BIO 18. But petitioner simply responded to the only argument respondents made, which was that Section 22 could not apply because respondents' conduct was predominantly foreign. *See* Resps. C.A. Br. 23.

See Prime, 937 F.3d at 104 ("[W]e must discern the 'focus' of each provision individually, for even if Plaintiffs satisfactorily pleaded a domestic application for one of the conduct-regulating provisions . . . they must also do the same for the CEA's private right of action provision, Section 22.").

2. Accordingly, the only reason the panel dismissed petitioner's CEA claims was because Second Circuit precedent requires not only that the conduct relevant to Section 22's focus occur in the United States, but also that conduct that is *not* the focus of the provision (*i.e.*, the defendants' actions) be sufficiently domestic as well. Respondents do not contest that other circuits hold that the only permissible consideration is the location of the conduct relevant to the statute's focus. BIO 13; Pet. 16-19.

Respondents nonetheless oppose certiorari on the ground that no other circuit has applied this Court's extraterritoriality framework to the CEA. BIO 14-18. But the relevant conflict is over the framework itself and, as shown, nothing in the Second Circuit's decision here turned on anything unique to the CEA. That resolving the doctrinal conflict would also resolve the more specific split over the SEA simply provides additional reason to intervene. *See* Toshiba Amicus Br. 17-26.[2]

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[2] Respondents' half-hearted attempt (BIO 19-20) to deny the SEA split is meritless. *See* Toshiba Amicus Br. 18, 21-22. Although the First and Ninth Circuits *also* distinguished *Parkcentral* on its facts, their "principal reason" for not following that decision was "because it is contrary to Section 10(b) and

II. Respondents' Defense Of Second Circuit Precedent Has No Merit.

On the merits, respondents briefly attempt to argue that *Morrison v. National Australian Bank Ltd.*, 561 U.S. 246 (2010), "did not address" what would happen when "the transaction allegedly occurs in the United States, but virtually all the allegedly unlawful conduct occurs abroad." BIO 23. But subsequent decisions did, holding that "[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application of the statute, even if other conduct occurred abroad." *Abitron Austria GmbH v. Hetronit Intn'l, Inc.*, No. 21-1043, slip op. at 5 (June 29, 2023) (cleaned up); *see also* Pet. 25-27. Respondents' belief that Congress nonetheless could not have intended the CEA to apply to a case like this (BIO 24) is just the kind of standardless "speculation-made law" *Morrison* and its progeny reject. 138 S. Ct. at 258.[3]

Respondents argue (for the first time in this case) that Section 2(i) of the CEA suggests that "'activities outside the United States generally are not subject to the CEA." BIO 25. But the very text respondents quote makes clear that Section 2(i)'s limitation applies only to claims "relating to swaps," 7 U.S.C. § 2(i), a small subset of the trades regulated by the CEA. The

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Morrison itself." *Stoyas v. Toshiba Corp.*, 896 F.3d 933, 950 (9th Cir. 2018); *see also SEC v. Morrone*, 997 F.3d 52, 60 (1st Cir. 2021) (same).

[3] Respondents notably offer no defense of the avowedly indeterminant "predominantly foreign" test. *See* Pet. 7, 27-29.

inclusion of that qualifier demonstrates that there is no general presumption that conduct outside of the U.S. *unrelated to swaps* is immune from challenge under the Act when conduct relevant to the statute's focus occurs domestically.

III. Respondents' Vehicle Objections Provide No Reason To Deny Review.

Respondents argue that this case is a poor vehicle because the Second Circuit should have dismissed petitioner's CEA claims for failure to adequately allege that the conspiracy caused him injury. BIO 26. That argument has no merit either.

1. There is no genuine Article III question in this case, as illustrated by the fact that no one—not the district court, the Second Circuit, or any of respondents' army of capable lawyers—has ever raised the possibility of an Article III issue before now. *See* BIO 27 n.2.

Petitioner alleged that he was injured by shorting "Euroyen-based derivatives during the Class Period at artificial prices proximately caused by Defendants' unlawful manipulation" of Yen-LIBOR. Complaint ¶ 912.[4] Specifically, he explained that as "a result of Defendants' manipulative conduct, Plaintiff Laydon initiated his short position of five CME Euroyen TIBOR futures contracts on July 13, 2006, at an artificially lower price" and "purchased the five offsetting long CME Euroyen TIBOR futures contracts

[4] The Complaint is reproduced at pages 1309-1751 of the Second Circuit Excerpt of Records.

on August 30, 2006, at artificially inflated prices." *Id*. ¶¶ 914, 916.

That is all Article III requires. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up). Here petitioner went even further in paragraphs 913 and 915 of the Complaint, citing specific examples of manipulation, two that artificially lowered the initiation price in the lead up to his purchase and one that increased it just before liquidation. *Id*. ¶¶ 913, 915.

In another appeal involving the same conspiracy, some of the same defendants, and two of the same circuit judges, the author of the opinion below held that similar allegations were sufficient to "affirmatively and plausibly suggest that [Plaintiffs] have standing to sue" under Article III because they identified "instances when Plaintiffs entered into derivatives transactions at prices that were 'artificial' due to Defendants' price fixing." *Sonterra Capital Master Fund Ltd. v. UBS AG*, 954 F.3d 529, 534 (2d Cir. 2020) (Park, J.) (cleaned up).

Respondents nonetheless claim that "petitioner does not allege that any injurious manipulative conduct occurred on or around the dates he traded." BIO 27. As just discussed, no such specificity is required at the pleading stage. Moreover, respondents can make that claim only by denying the truth of the Complaint's allegations. Specifically, respondents

insist that the examples of manipulation discussed in paragraphs 913 and 915 of the Complaint could not have affected the prices of petitioner's futures contracts because those contracts were pegged to the three-month Euroyen TIBOR while the manipulation alleged in those paragraphs involved Yen-LIBOR rates for different maturities. BIO 27-29. They then argue that the only manipulation of three-month rates alleged in the Complaint occurred after petitioner's transactions and pushed future prices in a direction that would have benefited petitioner. BIO 28-29.

These arguments thus depend on the factual claims that: (1) manipulation of Yen-LIBOR rates has no effect on the price of futures contracts pegged to Euroyen TIBOR, BIO 28 (citing counsel's lay analysis of six weeks' of extra-record data); and (2) "manipulation of one maturity had no effect on the calculation of other maturities," *id*. 28 n. 4 (citing BIO 5 (citing nothing)). Both are factual claims about how these specific markets function and both flatly contradict the allegations in the Complaint. *See* Complaint ¶¶ 839-48, 899-900, 911, 913-15.

Whose factual premises are right cannot be resolved on a motion to dismiss. These are classic issues for economic evidence and expert testimony. Indeed, petitioner submitted an expert report on precisely these questions in support of his motion for class certification. Petitioner's expert explained that "artificiality" in Yen-LIBOR rates "affect, and cause artificiality in, . . . Euroyen TIBOR futures prices." Dct. Doc. 978, Ex. 32, ¶ 6.1.4. He further testified that using a form of multiple regression analysis, he could "captur[e] and quantif[y] the potential future impact

of a manipulation in one rate (*e.g.*, the three-month Yen-LIBOR) on itself, and the other seven possibly manipulated rates" with different maturities. *Id*. ¶ 6.1.7. Indeed, under the district court's supervision, millions of dollars in settlements with other defendants have been distributed on the basis of Plaintiff's expert's methodology. *See* Dct. Doc. 591-5, 1098.

2. The Second Circuit nonetheless dismissed petitioners' antitrust claims because this mode of analysis requires following a chain of causation that the Circuit's "first-step" antitrust rule precludes. *See* Pet. App. 48a. It was in this context that the Second Circuit faulted petitioner's claims for "depend[ing] on a series of causal steps," *id.* 21a, and an "attenuated chain of causation," *id*. 23a. The conclusion the Court drew was not that petitioner failed to plead an Article III injury but that his "injury thus occurred far from the first step following Defendants' harmful behavior." Pet. App. 21a (cleaned up).

To be sure, the court also said at one point that petitioner "failed to plead any injury." Pet. 22a. But this conclusion, too, was premised on the first-step restriction, which the court viewed as limiting petitioner to proving an injury resulting from manipulation "involving three-month Euroyen TIBOR futures." *Id*. 23a. That ruled out the three acts specifically alleged in paragraphs 913 and 915 of the Complaint, which involved manipulation of rates for other maturities and affected the three-month Euroyen TIBOR futures only indirectly. *See supra* 8. The only other manipulative acts expressly mentioned in the Complaint regarding the three-month rates

during this period "involved Defendants' alleged attempts to manipulate Yen-LIBOR upwards," which "would have benefited" petitioner. Pet. App. 23a. Viewed from this limited perspective, wearing first-step blinders, the Complaint alleged no cognizable injury for antitrust purposes. *Ibid*.[5]

But that does not mean that the Second Circuit believed that petitioner had not suffered any injury sufficient to satisfy Article III or the CEA. Had it thought *that*, the opinion would have been considerably shorter. Absent an Article III injury, the court would have been compelled to dismiss for lack of jurisdiction, forbidden from reaching the merits of *any* of the claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). There is no reason to think the Second Circuit disregarded its obligation to ensure its own jurisdiction.

At the same time, if the court believed that its antitrust causation ruling equally precluded a claim under the CEA, it would have been simple to say so (as it did with respect to the RICO count, Pet. App. 25a-26a) and avoid the need to decide anything about extraterritoriality. The court did not simply overlook this possibility—respondents raised causation as an

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[5] The Second Circuit notably did not accept respondents' assertion that manipulation of Yen LIBOR cannot affect the prices for Euroyen TIBOR futures. BIO 27-28. The Complaint plausibly alleges otherwise for reasons explained at length by Plaintiffs' expert. *See supra* 8. Respondents' contrary factual claim, on the other hand, is the product of counsel's armchair economic theorizing based on a facile analysis of six weeks of data drawn from an unauthenticated website. *See* BIO 28-29 & n.4; *see also* Petr. C.A. Reply Br. 24-27.

independent ground for dismissing the CEA claims. Resps. C.A. Br. § I.A.2. The court did not do so because the panel realized that the CEA and antitrust standards are different. *See Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 112 (2d Cir. 2018) (to plead CEA injury, plaintiff "must plausibly allege (1) that she transacted in at least one commodity contract at a price that was lower or higher than it otherwise would have been absent the defendant's manipulations, and (2) that the manipulated prices were to the plaintiff's detriment.").

That is exactly what the district court—the only court to have ruled on causation under both statutes—concluded. It rejected respondents' causation challenge to the CEA count yet dismissed the antitrust claims for failure to prove antitrust standing. *Compare* Pet. App. 90a *with id*. 59a-60a. Respondents may think the district court was wrong, but they have yet to convince the Second Circuit of that.

* * *

Accordingly, there is no prospect of this Court getting bogged down in causation questions were it to grant review. *Contra* BIO 3. Respondents raise no serious Article III objection this Court would be compelled to address. And shorn of its jurisdictional veneer, respondents' causation arguments present nothing more than an alternative ground for affirmance that the court of appeals did not decide. This Court routinely grants certiorari despite such assertions, deciding the question presented and remanding to allow the lower courts to decide in the first instance any additional arguments the parties

may have preserved. *See, e.g.*, *Slack Techs., LLC v. Pirani*, 598 U.S. 758, 770 (2023); *Dupree v. Younger*, 598 U.S. 729, 738 (2023); *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022); *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1476, (2022); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021).

IV. The Court Should At Least CVSG or GVR.

As discussed, respondents' principal response to the petition is to claim that the Second Circuit applies the "predominantly foreign" test to all CEA claims because it views the focus of the Act's substantive provisions to be on the defendant's conduct. If this Court thinks it is even remotely possible that this is what the Second Circuit has held, it should not deny the petition without first hearing from the Government, given the grave implications of such a holding for the CFTC's enforcement authority. *See* Corcoran Amicus Br. 16-17; Better Markets Amicus Br. 15-16.

At the very least, the Court should remand with instructions to reconsider the decision in light of last term's decision in *Abitron*. That would allow the Second Circuit to clarify its holding's effect on the CFTC and permit the panel, freed from the constraining effect of *Prime*, to reconcile its SEA and CEA precedents with the Courts' now unmistakable insistence that if conduct relevant to a statute's focus occurred in the United States, then the statute applies domestically.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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August 29, 2023