17-2233

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PRIME INTERNATIONAL TRADING LTD., ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, WHITE OAKS FUND LP, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, KEVIN MCDONNELL, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, ANTHONY INSINGA, AND ALL OTHERS SIMILARLY SITUATED, ROBERT MICHIELS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JOHN DEVIVO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, NEIL TAYLOR, AARON SCHINDLER, PORT 22, LLC, ATLANTIC TRADING USA LLC, XAVIER LAURENS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

(caption continued on inside cover)

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, AND THE FUTURES INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Plaintiffs,

— v. —

BP PLC, TRAFIGURA BEHEER B.V., TRAFIGURA AG, PHIBRO TRADING LLC, VITOL S.A., MERCURIA ENERGY TRADING S.A., HESS ENERGY TRADING COMPANY, LLC, STATOIL US HOLDINGS INC., SHELL TRADING US COMPANY, BP AMERICA, INC., VITOL, INC., BP CORPORATION NORTH AMERICA, INC., MERCURIA ENERGY TRADING, INC., MORGAN STANLEY CAPITAL GROUP, INC. ("MSCGI"), PHIBRO COMMODITIES LTD. ("PHIBRO COMMODITIES"), SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LIMITED, STATOIL ASA,

Defendants-Appellees,

ROYAL DUTCH SHELL PLC, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, JOHN DOE 6, JOHN DOE 7, JOHN DOE 8, JOHN DOE 9, JOHN DOE 10, JOHN DOE 11, JOHN DOE 12, JOHN DOE 13, JOHN DOE 14, JOHN DOE 15, JOHN DOE 16, JOHN DOE 17, JOHN DOE 18, JOHN DOE 19, JOHN DOE 20, BP PLC ROYAL DUTCH SHELL PLC, MORGAN STANLEY, JOHN DOES 1 THROUGH 50, SHELL TRADING AND SHIPPING COMPANY LIMITED ("STASCO"), JOHN DOES 1 THROUGH 50,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Amici Curiae the Chamber of Commerce of the United States of America, the Securities Industry and Financial Markets Association, the International Swaps and Derivatives Association, and the Futures Industry Association each state, respectively as to each *amicus*, that it has no parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

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IN THE
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FOR THE SECOND CIRCUIT

No. 17–2233

PRIME INTERNATIONAL TRADING LTD., *et al.*,
Plaintiffs-Appellants,

—*v.*—

BP PLC, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, AND THE FUTURES INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members, and indirectly

[1] No counsel for a party authored this brief in whole or in part, and no one other than *amici curiae*, their members, or their counsel contributed money to fund the preparation or submission of this brief.

represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases that raise issues of concern to the nation's business community, including cases involving the federal securities and commodities laws, and cases involving the territorial scope of those and other United States statutes. *See*, *e.g.*, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010); *In re Petrobras Sec.*, 862 F.3d 250 (2d Cir. 2017); *Parkcentral Glob. Hub Ltd.* v. *Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014); *Sec. Indus. & Fin. Mkts. Ass'n* v. *CFTC*, 67 F. Supp. 3d 373 (D.D.C. 2014).

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. SIFMA champions policies and practices that foster a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. It regularly files *amicus curiae* briefs in cases that raise important issues under the securities or commodities laws, including their territorial scope—issues of direct relevance to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. *E.g.*, *Morrison*, 561 U.S. 247; *Petrobras*, 862 F. 3d 250; *Parkcentral*, 763 F.3d 198.

The International Swaps and Derivatives Association, Inc. ("ISDA") is the global trade association representing leading participants in the derivatives industry. Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 875 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on its website, www.isda.org.

The Futures Industry Association ("FIA") is the leading global trade organization for the futures, options, and centrally cleared derivatives markets, with offices in London, Singapore and Washington, D.C. FIA's membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from more than 48 countries, as well as technology vendors, lawyers and other professionals serving the industry. FIA's mission is to support open, transparent and competitive markets; protect and enhance the integrity of the financial system; and promote high standards of professional conduct.

The plaintiffs' Commodity Exchange Act claims here—which seek to impose massive class action liability for foreign conduct involving foreign commodities transactions and the supposed "ripple effects"

that foreign conduct supposedly had upon plaintiffs' transactions, with which the defendants had no involvement—present important issues concerning the territorial scope of that statute. As advocates for global business and investment interests whose members are subjected to regulation and potential liability in jurisdictions throughout the world, *amici* have a strong interest in the proper application of the presumption against extraterritoriality to the CEA, and also bring unique perspectives and expertise to the issues presented in this case.

This brief is being filed pursuant to a motion for leave to file.

SUMMARY OF ARGUMENT

This putative class action, if certified, would present Commodity Exchange Act claims on behalf of an immense class of everyone in the whole wide world who—during a thirteen-year period, mostly on the Intercontinental Exchange Futures Europe, a foreign exchange, but also on the New York Mercantile Exchange, a domestic exchange—purchased derivatives contracts tied to Brent crude oil prices.

The conduct of which the plaintiffs complain—the defendants' allegedly manipulative fraudulent transactions—all took place in foreign countries. The commodity whose price that foreign conduct supposedly manipulated, Brent crude, is foreign oil. That foreign oil was sold on foreign markets. That foreign oil sold on foreign markets yielded foreign prices that were used to produce a price benchmark that was supposedly affected by defendants' foreign manipulation, the

Platts' Dated Brent Assessment. That foreign benchmark was calculated and disseminated by a foreign price-reporting agency in a foreign country.

Everything that the defendants did took place abroad; most of the plaintiffs' trading took place abroad; and the plaintiffs have not alleged that they engaged in any dealings, any trades, or any transactions, with the defendants. And yet plaintiffs claim that the commodities laws *of the United States*—specifically Sections 6(a)(1), 9(a)(2), and 22 of the Commodity Exchange Act—not only regulate and prohibit the defendants' purely *foreign* conduct, but also give plaintiffs a right of action, in an American federal court under the CEA, against the defendants. The reason: the defendants' foreign conduct involving the foreign oil in foreign markets affected foreign prices, which, in turn, affected the foreign benchmark, which, in turn, "'ha[d] effects that ripple[d]'" around the world, SA54 (quoting A1980), and, which, in turn, may have affected the plaintiffs' transactions on the foreign ICE Futures Europe exchange and the domestic NYMEX exchange, and thereby, in turn, possibly caused plaintiffs harm.

As the district court correctly concluded, this lengthy foreign-anchored chain that comprises plaintiffs' CEA claims cannot withstand the presumption against extraterritoriality. That court correctly concluded that the CEA's private right provision, Section 22, could not apply to plaintiffs' claims even if plaintiffs engaged in domestic transactions, because, as this Court held in applying the presumption to Section 10(b) in *Parkcentral Global Hub Ltd.* v. *Porsche Automobile Holdings SE*, 763 F.3d 198, 215 (2d Cir. 2014), a domestic transaction was "*necessary* to a properly

domestic invocation of § 10(b), [but] not alone *sufficient* to state a properly domestic claim under the statute." (Emphasis added.) The district court correctly concluded that, given "the parallels between § 10(b) and § 22 of the CEA," "the logic underlying … *Parkcentral*" applied here, and given that "the claims were 'so predominantly foreign,'" they were "impermissibly extraterritorial" and had to be dismissed. SA60, 66 (quoting *Parkcentral*, 763 F.3d at 216).

Yet there is an even more fundamental reason why plaintiffs' claims cannot withstand the presumption against extraterritoriality. Above all else, the presumption stands for the proposition that "[f]oreign conduct is generally the domain of foreign law." *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 455 (2007) (citation and internal quotation marks omitted). And only when "Congress has affirmatively and unmistakably instructed that" "a statute [should] apply to foreign conduct" "will [it] do so." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). Here, leaving aside a 2012 amendment that does not apply here, the underlying substantive CEA provisions upon which plaintiffs rely—Sections 6(a)(1) and 9(a)(2)—evince *no* Congressional indication, let alone a clear one, of extraterritorial reach.

And that dooms plaintiffs' claims here. Here, plaintiffs' claims hinge upon an interpretation of Sections 6(a)(1) and 9(a)(2) that would effectively give them worldwide effect—without the slightest textual or contextual support in the statute. For the reasons shown below, the presumption against extraterritoriality requires that those interpretations—and plaintiffs' CEA claims—be rejected.

ARGUMENT

POINT I

PLAINTIFFS' COMMODITY EXCHANGE ACT CLAIMS EXCEED THE TERRITORIAL SCOPE OF THAT STATUTE.

A. The presumption against extraterritoriality requires all doubts to be resolved against construing a law as regulating foreign conduct.

As the Supreme Court has repeatedly emphasized in recent years, the "[m]ost notabl[e]" purpose of the presumption against extraterritoriality is that "it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). The presumption averts "'unintended clashes between our laws and those of other nations,'" and—in particular—keeps the courts from having "'to run interference in [the] delicate field of international relations.'" *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*")). This important and age-old canon of construction "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* at 116.

As a result, the presumption ultimately boils down to a simple command—courts must "'presum[e] that United States law governs domestically but does not rule the world.'" *Id.* at 115 (quoting *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454 (2007)); *accord*, *e.g.*, *RJR*, 136 S. Ct. at 2100. Judges must presume that

"[f]oreign conduct is generally the domain of foreign law." *Microsoft*, 550 U.S. at 455 (citation and internal quotation marks omitted). They must "'assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'" *Id.* (quoting *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004)). After all, "foreign law may 'embody different policy judgments'" than does American law, *id.* (citation omitted), and usually does—"the regulation of other countries often differs from ours as to what constitutes fraud, … what damages are recoverable, what discovery is available in litigation … and many other matters," *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 269 (2010).

Given these imperatives, the presumption is a powerful one, and requires that all doubts be resolved against interpreting a statute to regulate foreign conduct. For the presumption demands "'the *affirmative* intention of the Congress *clearly* expressed' to give a statute extraterritorial effect." *Id.* at 255 (emphasis added; quoting *Aramco*, 499 U.S. at 248 (quoting *Benz* v. *Compania Naviera Hidalgo*, *S.A.*, 353 U.S. 138, 147 (1957)). And so "uncertain indications do not suffice." *Id.* at 265. "The 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*, 136 S. Ct. at 2100 (emphasis added; quoting *Morrison*, 561 U.S. at 261).

Beyond that, the presumption is not a "timid sentinel" or "craven watchdog [that] retreat[s] to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 561 U.S. at 266. The presumption is

thus so strong, and so important, that it applies even when relevant conduct occurs in the United States.

In determining whether cross-border activities involve a permissible domestic application of a statute having no extraterritorial reach, *Morrison* made clear that it may be helpful to look at "the 'focus' of congressional concern," and to consider whether, in the particular case, that "focus" was present in the United States. *Id.* at 266. But *Morrison* did not say that—and the Court had no occasion to decide whether—a domestic application of a statute automatically arises whenever the statutory "focus" in a particular case is domestic. As this Court has recognized, "the Court did not *say* that … a [domestic securities] transaction"—the domestic statutory "focus" in *Morrison*—"was sufficient to make [Section 10(b) of the Securities Exchange Act] applicable." *Parkcentral Glob. Hub Ltd.* v. *Porsche Auto. Holdings SE*, 763 F.3d 198, 215 (2d Cir. 2014). To the contrary, in *Parkcentral*, this Court recognized that a domestic transaction was "*necessary* to a properly domestic invocation of § 10(b), [but] not alone *sufficient* to state a properly domestic claim under the statute." *Id.* (emphasis added).

The *Morrison* "focus" inquiry is not always dispositive for another reason as well—one of particular relevance here. The Supreme Court has made clear that, when *everything* the defendants have done took place in *foreign* countries, it simply doesn't matter what the domestic "focus" of a domestic statute is—for the simple reason that there isn't any domestic conduct to regulate or to punish. That was the case, for example, in *Kiobel*. As the Court explained, when "'all the relevant conduct' regarding th[e] [alleged] violations 'took place outside the United States,' we [do] not need to

determine, as we did in *Morrison*, the statute's 'focus.'" *RJR*, 136 S. Ct. at 2101 (quoting *Kiobel*, 569 U.S. at 124).

B. The district court correctly concluded that the CEA provisions applicable here have no extraterritorial reach, and Section 2(i) does not change that result.

Applying these principles, the district court correctly concluded that all three of the Commodity Exchange Act provisions involved in this case—the two substantive, conduct-regulating provisions, Sections 6(c)(1) and 9(a)(2), 7 U.S.C. §§ 9(1), 13(a)(2), and the non-conduct-regulating provision creating a private right, Section 22, 7 U.S.C. §§ 25—are "silent as to any extraterritorial application." SA64. Indeed, the "Trader Plaintiffs d[id] not argue otherwise" below, *id.*—an understandable concession given this Court's conclusion that, save for a single 2010 amendment contained in the Dodd-Frank Act, "[t]he CEA as a whole … is silent as to extraterritorial reach." *Loginovskaya* v. *Batratchenko*, 764 F.3d 266, 271–72 & n.4 (2d Cir. 2014).

On appeal, the plaintiffs and the CFTC invoke that Dodd-Frank amendment, Section 2(i) of the CEA, which today gives limited extraterritorial effect to the statute's provisions relating to swaps. Pl. Br. 46–47; CFTC Br. 26–27; 7 U.S.C. § 2(i). But even leaving apart that the plaintiffs didn't raise Section 2(i) in the district court, that they didn't allege they traded swaps—and that, indeed, Section 2(i) *didn't even take effect* until late 2012, *after* the alleged manipulation here, BP Defs. Br. 40–42—Section 2(i) only *undermines* plaintiffs' case.

For just as in *Morrison*, where the exterritorial reach of one section of the Securities Exchange Act, Section 30(a), highlighted the *lack* of extraterritorial reach of Section 10(b), so does Section 2(i) demonstrate the domesticity of the CEA provisions upon which plaintiffs rely here. Section 2(i) "contains what [Sections 6(c)(1), 9(a)(2) and 22, standing alone] lack[]: a clear statement of extraterritorial effect." *Morrison*, 561 U.S. at 265. Section 2(i) "shows … that Congress knows how to give a statute explicit extraterritorial effect—and how to limit that effect to particular applications," *id*. at 265 n.8, that Congress knew how to do exactly that with the CEA, and that it didn't do that in the provisions of the CEA that actually control here, Sections 6(c)(1), 9(a)(2), and 22. Section 2(i) thus makes clear that the district judge—not to mention this Court in *Loginovskaya*—reached exactly the right conclusion about the territorial scope of the CEA.

C. Plaintiffs have failed to plead any domestic application of any provision of the CEA.

Unable to find extraterritorial reach in the pre-Dodd-Frank Sections 6(c)(1), 9(a)(2), and 22, plaintiffs are reduced to arguing that their case involves a proper *domestic* application of the CEA. That would seem a tall order, given that they seek to impose liability on defendants for engaging in foreign manipulation of foreign transactions in foreign oil on foreign markets that produced foreign prices reported to a foreign price-reporting agency that issued a foreign price benchmark. Plaintiffs' hook is that the foreign benchmark, the Platts' Dated Brent Assessment, which, they say, "has effects that ripple[d]" around the world, SA54 (quoting A1980), must have, by virtue of those

"ripple effects," affected plaintiffs' domestic transactions. Imposition of liability on defendants for their foreign conduct thus constitutes a proper domestic application of Section 22 of the CEA, they say. Pl. Br. 47–59.

That breathtakingly expansive argument proves far too much, and cannot be squared with this Court's decision in *Parkcentral*—as explained by the district court, the defendants, and in Point I.C.4., below. But there is a threshold reason why plaintiffs' argument fails, a reason that does not involve Section 22 or *Parkcentral*—and that presents an additional ground for affirming the district court's conclusion that the plaintiffs failed to allege conduct that would support a domestic application of the CEA. It is that the plaintiffs have failed to demonstrate a domestic application of the *substantive*, *conduct-regulating* CEA provisions that plaintiffs claim were violated, Sections 6(c)(1) and 9(a)(2), 17 U.S.C. §§ 9(1), 13(a)(2).

1. Plaintiffs must separately show that they have pleaded domestic applications of the CEA's substantive regulatory provisions as well as its remedy provision.

Specifically, the district court focused solely on the CEA's *remedy* provision, Section 22, 7 U.S.C. § 25, in analyzing whether a domestic application of the statute has been alleged here. *See* SA64–67; *see also* Pl. Br. 45. But as the Supreme Court made clear with RICO in *RJR*, and as this Court made clear with the CEA in *Loginovskaya*, that is an incomplete approach. The remedy and underlying substantive regulatory provisions, when they are separate, must be examined

separately, both as to the territorial scope of the provisions, and as to whether a domestic application of the provisions has been alleged or proven in a particular case.[2]

For example, in *RJR*, the Supreme Court addressed a private civil claim under RICO, whose civil remedy provision (18 U.S.C. § 1964(c)) provides a right of action for people injured by violations of the statute's substantive criminal prohibitions (18 U.S.C. § 1962(a)–(d)). The court first looked to whether the substantive provisions applied extraterritorially, and concluded that, at least to some extent, they did. 136 S. Ct. at 2101–05. The Court next examined whether the complaint alleged conduct that fell within the territorial scope of those substantive provisions, and concluded that it did. *Id.* at 2105–06. The Court then *separately* looked to whether the *remedy* provision "require[d] a civil RICO plaintiff to allege and prove a *domestic* injury … and does not allow recovery for foreign injuries." *Id.* at 2111 (emphasis added). Applying the presumption against extraterritoriality to the text and context of Section 1964(c), the Court concluded that a domestic injury was required—and held that the case "must be dismissed." *Id.*

Similarly, in *Loginovskaya*, this Court made clear that territoriality questions involving separate substantive and remedial provisions cannot be collapsed.

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[2] This of course was not the case in *Morrison*, which involved "the implied private cause of action under § 10(b) [of the Securities Exchange Act of 1934] and [SEC] Rule 10b–5," "a thing of our own creation," 561 U.S. 261 at n.5—for which the substantive regulation and remedy provision are effectively the same.

Loginovskaya involved a private claim brought under Section 22 of the CEA for damages allegedly caused by a substantive violation of Section 4*o* of the CEA, 7 U.S.C. § 6*o*(1), an anti-fraud provision directed at, among others, commodity trading advisors and commodity pool operators. After determining that neither provision had extraterritorial reach, 764 F.3d at 271–72, this Court then proceeded to examine whether a domestic application of Section 22 had been alleged *separately* from whether a domestic violation of Section 4*o* had been alleged. "Loginovskaya's suit," this Court held, "must satisfy the threshold requirement of CEA § 22 before reaching the merits of her § 4*o* fraud claim." *Id.* at 272. After concluding that Section 22 required a domestic transaction, and that Loginovskaya had not alleged one, the Court concluded that it did "not have to decide how the presumption against extraterritorial effect defines the reach of § 4*o*," and directed that the case be dismissed. *Id.* at 275.

Likewise here, for plaintiffs' claims to survive, they must show not only that their claims set forth a domestic application of Section 22, the remedy provision, but also that they state a domestic application of the substantive provisions that their complaint invokes, Sections 6(c)(1) and 9(a)(2).

2. Plaintiffs have failed to plead a domestic application of Section 6(c)(1).

Section 6(c)(1) is a lengthy provision, one whose focus is far less clear than Section 10(b)'s was in *Morrison*. Entitled "Prohibition against manipulation," Section 6(c)(1) makes it "unlawful for any person, di-

rectly or indirectly, to use or employ, … any manipulative or deceptive device or contrivance," violative of CFTC rules, "in connection with" a variety of things—"any swap"; or "a contract of sale of any commodity in interstate commerce"; or "for future delivery on … any registered entity"; or "subject to the rules of any registered entity." 7 U.S.C. § 9(1).

Despite Section 6(c)(1)'s passing similarity to Section 10(b), the common thread uniting these phrases is manipulation, and so the focus of the prohibition is manipulation—just as Congress's title for the section makes clear. Since *all* of the manipulation here occurred abroad, that means that all of "the conduct relevant to the focus occurred in a foreign country," which, in turn, means that "the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *RJR*, 136 S. Ct. at 2101. Plaintiffs have thus failed to allege that the violation they assert involved any domestic conduct that would be covered by Section 6(c)(1).

But it is even worse than that for plaintiffs. For plaintiffs cannot state a domestic violation of Section 6(c)(1) *regardless* of what the *Morrison* "focus" of that provision is deemed to be. That is because *all* of the defendants' alleged conduct here occurred abroad. And the Supreme Court has made clear that, when "'all the relevant conduct' regarding th[e] [alleged] violations 'took place outside the United States,' [courts] d[o] not need to determine, as we did in *Morrison*, the statute's 'focus.'" *RJR*, 136 S. Ct. at 2101 (quoting *Kiobel*, 569 U.S. at 124). So too here: it does not matter what the focus of Section 6(c)(1) is—whatever that may be, here it happened outside the United States,

because *everything* the defendants allegedly did happened outside the United States.

To this the plaintiffs will no doubt respond that *plaintiffs'* conduct, *plaintiffs'* commodities contracts, took place within the United States, and that the "focus" of Section 6(c)(1) is *those* domestic transactions, and that, given the "ripple effects" in international markets, defendants' manipulations were—to quote the statute—at least "indirectly" "in connection with" plaintiffs' transactions (even if defendants didn't know about them). One problem with this is that most of plaintiffs' transactions took place on ICE Futures Europe, a *European* exchange that is not a domestic "registered entity" under the CEA. *See* BP Defs. Br. 34–35 & n.17. But even leaving that aside, plaintiffs' construction of the statute—in particular, their expansive reading of the words "indirectly" and "in connection with"—cannot be squared with the presumption against extraterritoriality.

The Supreme Court has made clear that broadly ambiguous words like these cannot be used to impose liability in American courts for foreign conduct. In *Kiobel*, for example, the Court addressed the question whether the phrase "*any* civil action" in the Alien Tort Statute "suggest[ed] application to torts committed abroad." 569 U.S. at 118. The Court held that it did not. Citing several of its prior cases—including *Morrison*—the Supreme Court explained that broad, unspecific terms such as "any" or "every" "do not rebut the presumption against extraterritoriality." *Id.*; *see, e.g.*, *Aramco*, 499 U.S. at 249 (rejecting extraterritorial application of law applying to "'any activity, business, or industry in commerce'"; citation omitted); *Foley Bros.* v. *Filardo*, 336 U.S. 281, 282, 285–88

(1949) (rejecting extraterritorial application of law referring to "'[e]very contract made to which the United States … is a party'"; citation omitted); *see also Lauritzen* v. *Larsen*, 345 U.S. 571, 577–78 (1953); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.).

If the use of "broad, inclusive language" like "'any'" or "'[e]ach'" "is not sufficient to overcome the presumption against the extraterritorial application of statutes," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 586–87 n.4 (1992), then the phrases "indirectly" and "in connection with" cannot, consistently with the presumption, be given the elastic construction that the plaintiffs would urge here. To hold otherwise would entirely vitiate the presumption against extraterritoriality as to Section 6(c)(1): merely with an allegation of tenuous "ripple effects," *any* allegation of foreign manipulation of a globally traded commodity could be turned into domestic class actions under Section 6(c)(1) in a United States District Court brought by plaintiffs alleging, as here, international losses against defendants who had no involvement in, or even knowledge of, plaintiffs' transactions. American law would thus "rule the world," *Microsoft*, 550 U.S. at 454—and all without "the affirmative intention of the Congress clearly expressed," *Morrison*, 561 U.S. at 255 (citation and internal quotation marks omitted).

3. Plaintiffs have failed to plead a domestic application of Section 9(a)(2).

The same reasoning applies to the other substantive provision invoked by plaintiffs, Section 9(a)(2). Indeed, even less need be said. That section prohibits,

among other things, the "manipulat[ion of] or [any] attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity," or "knowingly … deliver[ing] … through the mails or interstate commerce … false or misleading or knowingly inaccurate reports concerning … market information … that affect or tend to affect the price of any commodity in interstate commerce." 7 U.S.C. § 13(a)(2). If the *Morrison* focus of this provision is the manipulative conduct, that allegedly occurred abroad in this case. If the allegedly manipulated commodity or its price is the focus, that too was foreign—the defendants allegedly manipulated the price of Brent crude oil. If the allegedly manipulated market information is the focus, that was foreign too—the Platts' Dated Brent Assessment. Making matters worse for plaintiffs, the defendants weren't using the U.S. mails or communicating in the United States, an essential element of the offense, and, again, most of the plaintiffs' transactions took place on a foreign exchange, ICE Futures Europe.

But in any event, there is no "need to determine … the statute's 'focus,'" because "'all the relevant conduct' regarding th[e] [alleged] violations 'took place outside the United States.'" *RJR*, 136 S. Ct. at 2101 (quoting *Kiobel*, 569 U.S. at 124). And if it is the plaintiffs' contention that global "ripple effects" from the defendants' European conduct, by crossing the Atlantic and somehow "affect[ing] or tend[ing] to affect the price of [the] commodit[ies] in interstate commerce … … for future delivery" that plaintiffs allegedly did purchase, suffices to establish a domestic application of Section 9(a)(2), that would stand the presumption

against extraterritoriality on its head. For it would once again mean that, with the mere incantation of the words "ripple effects," global class actions against defendants for purely foreign conduct could be brought in the United States for domestic transactions with which the defendants had utterly no involvement.

As the Supreme Court said in *Morrison*, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 561 U.S. at 266. But it is not "such a timid sentinel." *Id.* If the presumption means anything, it surely means that plaintiffs cannot turn defendants' purely *foreign* conduct into *domestic* violations of Sections 6(c)(1) and 9(a)(2)—provisions containing no indication of extraterritorial reach—merely by virtue of domestic purchases of derivatives indirectly affected by the foreign conduct.

***4. Plaintiffs have failed to plead a domestic application of Section 22 in light of* Parkcentral.**

Plaintiffs' failure to plead a domestic application of the substantive provisions of the CEA suffices to defeat plaintiffs' claims. But the district court's reasoning was correct as well: plaintiffs fail to state a claim under the private right provision, Section 22, in light of this Court's decision in *Parkcentral*. In that case, which addressed claims involving securities derivatives under Section 10(b) of the Securities Exchange Act, this Court held that "'while [*Morrison*] unmistakably made a domestic securities transaction (or transaction in a domestically listed security) *necessary* to a

properly domestic invocation of § 10(b), such a transaction is not alone *sufficient* to state a properly domestic claim under the statute.'" SA65–66 (quoting 763 F.3d at 215). The district court found "the logic underlying the decision in *Parkcentral* … equally persuasive here in light of the parallels between § 10(b) and § 22 of the CEA." SA66.

Plaintiffs now argue, for various reasons sufficiently addressed in defendants' brief, that *Parkcentral* should not apply to Section 22 claims involving transactions on domestic commodities exchanges. *See* Pl. Br. 47–56; BP Defs. Br. 20–30. But even a cursory examination of Section 22 and its relationship with the rest of the CEA makes clear that the district court *understated* the relevance of *Parkcentral* here. For *by its terms*, Section 22 makes clear that a domestic transaction *does not suffice* to create liability; there must be the "commission of a violation of this chapter," 7 U.S.C. § 25(a)(1)—of *some substantive regulatory provision* elsewhere in the CEA first. And leaving apart the effect of the extraterritorial swaps amendment, Section 2(i), which postdates the conduct here, wasn't pleaded, and wasn't argued below, *all* of the CEA's *substantive* regulatory provisions are *domestic*. Accordingly, to paraphrase *Parkcentral*, while Section 22 makes a domestic commodities transaction *necessary* to a properly domestic invocation of Section 22, such a transaction is not alone *sufficient* to state a properly domestic claim under the statute.

Given that the underlying substantive provisions here are not extraterritorial, it thus makes perfect sense to apply *Parkcentral* in this case. And given the requirement of a domestic substantive violation under

Section 22, if the "relevant actions" are "predominantly foreign," there is simply no way that civil recovery may be had under Section 22 and "in a manner consistent with the presumption against extraterritoriality." 763 F.3d at 216.

The application of *Parkcentral* makes even greater sense in light of the obvious factual parallels between the claims in that case and those in this case. Both cases involved statutory provisions that do not apply extraterritorially. Both cases involve defendants who allegedly engaged in manipulative transactions abroad, and (except for a few statements in *Parkcentral*) not in the United States. Both cases involve defendants who did not transact in any way with the plaintiffs. Both cases involve plaintiffs who allegedly traded derivative instruments in the United States, instruments whose value was allegedly affected by the foreign conduct. *See id.* at 207–08.

And if anything here, the connection between defendants' alleged foreign misconduct and the plaintiffs' alleged domestic harm is even more attenuated than it was in *Parkcentral*. The security-based swaps in *Parkcentral* were "*directly* tied" to Volkswagen's foreign share price there, SA66 (emphasis added; citing 763 F.3d at 205–07)—in marked contrast to the amorphous "ripple effects" urged here. To top matters off, the *Parkcentral* plaintiffs actually alleged *domestic* misconduct by their defendants—that defendants there made false statements about Volkswagen *in the United States*. 763 F.3d at 201, 207–08. Plaintiffs here allege *no* domestic misconduct by the defendants of *any* sort. This case thus presents a much *weaker* case for the application of American law than did *Parkcentral*.

Nor, finally, is there merit to the CFTC's claim that *Parkcentral* contravenes the Supreme Court's decision in *RJR*, or that this Court's decision there amounts to a resurrection of the "conduct" and "effects" tests discarded in *Morrison*. CFTC Br. 19–21. *RJR*, of course, involved a different statute, RICO, and primarily considered what happens when substantive regulatory provisions *do* apply extraterritorially, *not* what happens when such regulatory provisions (like the CEA prohibitions invoked here) do not. More to the point, the language upon which the agency relies is dictum—a handful of words in the legal *background* section of the opinion. *See* 136 S. Ct. at 2101, *cited in* CFTC Br. 19. That language could hardly be said to have considered, let alone decided, the question presented here, or to have abrogated *Parkcentral*. And it certainly cannot overrule the fundamental, age-old principles undergirding the presumption against extraterritoriality: that "[f]oreign conduct is generally the domain of foreign law," *Microsoft*, 550 U.S. at 455, that "United States law … does not rule the world," *Kiobel*, 569 U.S. at 115 (citation and internal quotation marks omitted)—and that the presumption applies even when "some domestic activity is involved in the case," *Morrison*, 561 U.S. at 266 (emphasis omitted).

The CFTC errs in arguing that the district court's *Parkcentral*-based "analysis was indistinguishable from [the] discredited … conduct-and-effects test" abandoned in *Morrison*. CFTC Br. 20. In fact, the agency's argument misconstrues the problem with this Court's pre-*Morrison* case law. The issue with the old conduct and effects tests was *not* that they considered conduct and effects, but that they did so *without*

regard to the presumption against extraterritoriality, and *without regard* to the text of the laws being construed. Instead of applying the presumption, the pre-*Morrison* cases tried to *guess*, on *policy* grounds, with no "textual or even extratextual basis," whether, "'if Congress had thought about the point,' it would have wanted § 10(b) to apply." *Morrison*, 561 U.S. at 257, 258 (quoting *Leasco Data Processing Equip. Corp.* v. *Maxwell*, 468 F.2d 1326, 1337 (2d Cir. 1972)). The result of that judicial policymaking was an unpredictable mess of extraterritorially overreaching litigation, *see id.* at 257—one that threatened international comity, as pointed out by the foreign-government *amicus* briefs filed in *Morrison*, *see id.* at 269.

A defendant's conduct is *still* relevant after *Morrison*—but in a different way: it must be considered *in light of the presumption against extraterritoriality*. The presumption means that "United States law … does not rule the world," *RJR*, 136 S. Ct. at 2100 (citation and internal quotation marks omitted), and, especially, that "[f]oreign conduct is generally the domain of foreign law," *Microsoft*, 550 U.S. at 455. *Only* if "Congress has affirmatively and unmistakably instructed that the statute will do so" will a statute "apply to foreign conduct." *RJR*, 136 S. Ct. at 2100. Accordingly, courts must reject any proffered statutory reading that would extensively *regulate* a defendant's *foreign conduct* in the *absence* of an affirmative and unmistakable Congressional instruction to that effect. That is the sense in which conduct remains relevant.

And that, at the end of the day, is why *Parkcentral* was correct, why it is consistent with *Morrison*, why the district court's reasoning was right, and why

plaintiffs fail to state a CEA damages claim here. To paraphrase this Court, if a domestic commodities transaction "could *alone suffice* to invoke [CEA] liability with respect to the defendants' alleged conduct in *this case*, then it would subject to U.S. [commodities] laws conduct that occurred in a *foreign* country, concerning [commodities from] a *foreign* [country], traded entirely [in] *foreign* [countries], in the absence of any congressional provision addressing the incompatibility of U.S. and foreign law"—"a result *Morrison* plainly did not contemplate and that [its] reasoning does not … permit." *Parkcentral*, 763 F.3d at 215–16 (emphasis added).

POINT II

STRICT APPLICATION OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY IS OF PARTICULAR IMPORTANCE IN THE COMMODITIES AND DERIVATIVES REALM.

The strict application of the presumption against extraterritoriality assumes particular importance in the commodities and derivatives realm, where the instruments involved are complex and various nations' regulatory regimes may differ. As noted above, the presumption is in part designed to avoid international conflict, and to avoid having federal courts trigger or get in the middle of such conflict. The presumption against extraterritoriality reflects the understanding that *Congress* is the branch of government best equipped to weigh the costs and benefits of regulation that may trench upon the interests of other nations.

As the Supreme Court has repeatedly explained, the requirement that "'there must be present the affirmative intention of the Congress clearly expressed'" stems from the fact that Congress "'alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.'" *Kiobel*, 569 U.S. at 115–16 (quoting *Benz,* 353 U.S. at 147). If Congress wishes to regulate extraterritorially, it is "able to calibrate its provisions in a way that [the courts] cannot." *Aramco*, 499 U.S. at 259.

That is as true here with the world's commodities and derivatives markets and regulatory regimes, as it was true with the securities markets and regulatory regimes at issue in *Morrison* and *Parkcentral*. In *Morrison*, the Supreme Court emphasized how, "[l]ike the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction," and how "the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorneys' fees are recoverable, and many other matters." 561 U.S. at 269. And the Court noted how foreign government *amici*—including Britain, France, and Australia—had "complain[ed] of the interference with foreign securities regulation that application of § 10(b) abroad would produce." *Id*. By applying the presumption against extraterritoriality, the Court left it to Congress to decide whether to apply American securities laws abroad in the face of such complaints, and if

so, how to "'address[] the subject of conflicts with foreign laws and procedures.'" *Id*. (quoting *Aramco*, 499 U.S. at 256); *see also Parkcentral*, 763 F.3d at 211, 215–16.

All that applies with equal force to the Commodity Exchange Act. As a matter of substance, commodities and derivatives trading in the European Union is governed by the substantive laws and regulations of the EU and its member states—substantive laws and regulations that differ from the CEA and the rules promulgated by the CFTC. And all of the points made by the foreign government *amici* in *Morrison* about the differences in foreign investor compensation systems control in a CEA class action like this one. Most notably, as the French government rather understatedly put it, "the U.S. approach" of relying upon "privately initiated class actions instituted by plaintiffs' attorneys working on a contingency-fee basis" "is not one that has commended itself to most foreign nations." Brief for the Republic of France as *Amicus Curiae* in Support of Respondents at 20, *Morrison* (No. 08–1191), 2010 WL 723010, at *20. To the contrary, "European nations generally prefer 'state actions, not private ones' for the enforcement of law." *Id.*, 2010 WL 723010 at *20 (citation omitted). If American litigation is allowed to reach extraterritorially, this and other crucial procedural differences will create "conflict[s] with fundamental regulatory choices of foreign nations." *Id.* at 23, 2010 WL 723010, at *23.[3]

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[3] *See also* Brief of the United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* in Support of Respondents at 15–29, *Morrison* (No. 08–

That is especially true here, given the potential for massive class damages for supposed "ripple effect" losses of the sort that plaintiffs here would have a federal district court award. As France said in *Morrison*, "[e]specially troubling is the potential for U.S. courts … to hand down large damages awards that greatly exceed what would be available under foreign law," and to do so against "foreign companies" that "would potentially be exposed to greater or different regulation than their governments have decided is fair or necessary." *Id.* at 22 n.8, 2010 WL 723010, at *23 n.8.

If such foreign conduct is to be regulated and punished in American courts in private actions, it is not for those courts to say so on their own. The choice must be left to Congress, which "has the facilities necessary to make fairly [that] important policy decision," can weigh "the possibilities of international discord" against countervailing policy considerations, *Kiobel*, 569 U.S. at 115–16 (citation and internal quotation marks omitted), and can "calibrate its provisions" to balance those policy considerations "in a way [judges] cannot," *Aramco*, 499 U.S. at 259. Under the presumption against extraterritoriality, all this court need and can decide is a purely legal, indeed, textual, question—whether Congress in the CEA "affirmatively and unmistakably instructed" that foreign conduct be regulated. *RJR*, 136 S. Ct. at 2100. Because the answer to that question is no, the dismissal of plaintiffs' CEA claims must be affirmed.

1191), 2010 WL 723009, at *15–*29; Brief of the Commonwealth of Australia as *Amicus Curiae* in Support of Respondents at 28–37, *Morrison* (No. 08–1191), 2010 WL 723006, at *28–*37.

CONCLUSION

The dismissal of the plaintiffs' claims under the Commodity Exchange Act should be affirmed.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Local Rule 32.1(a)(4)(A) because it contains 6,816 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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