No. 23-80

In the Supreme Court of the United States

JEFFREY LAYDON, INDIVIDUALLY AND 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

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* BETTER MARKETS, INC., CONSUMER FEDERATION OF AMERICA, AND THE INSTITUTE FOR AGRICULTURE AND TRADE POLICY IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 21.2(b) of the Rules of the Supreme Court of the United States (the "Supreme Court Rules"), Better Markets, Inc. ("Better Markets"), The Consumer Federation of America ("CFA"), and The Institute for Agriculture and Trade Policy ("IATP") (collectively, the "Amici") respectfully request leave to submit a brief as *amici curiae* in support of the petitioner's petition for a writ of certiorari.

Rule 37.2(a) of the Supreme Court Rules requires that *amici* notify all parties' counsel of their intent to file an *amicus* brief in support of a petition for certiorari at least ten days before the brief is due, and further that the due date is thirty days after a response is called for. A response was called for on August 28, 2023. On August 14, 2023, Respondents filed their response to the petition for certiorari. Due to an oversight, *amici*'s counsel notified the parties of its intent to file this brief on August 28, 2023. Because Respondents filed their opposition to the petition for certiorari prior to the deadline required by Rule 37.2(a), granting leave to file will not prejudice any party.

Accordingly, *Amici* respectfully request that this Court grant them leave to file this amicus brief.

Respectfully submitted,

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INTERESTS OF *AMICI*[1]

Better Markets, Inc. ("Better Markets") is a nonprofit, nonpartisan organization that promotes the public interest in the financial markets through comment letters on proposed rules, litigation, independent research, and public advocacy. It fights for a stable financial system, fair and transparent financial markets, and measures that effectively protect investors from fraud and abuse, so that all Americans can achieve greater economic prosperity. Better Markets has filed hundreds of comment letters with the federal financial regulators, including the Commodity Futures Trading Commission ("CFTC"), and dozens of amicus briefs in the federal courts supporting strong financial regulation. Much of Better Markets' advocacy has focused specifically on the derivatives markets, including the importance of position limits in those markets to curb excessive speculation and the need for strong cross-border application of the rules under Title VII of the Dodd-Frank Act governing swaps. *See generally* Better Markets, http://www.bettermarkets.org (including an archive of comment letters, briefs, and reports).

The Consumer Federation of America ("CFA") is an association of more than 250 nonprofit consumer organizations. CFA was established in 1968 to advance the consumer interest through research, advocacy, and education. CFA works to ensure that

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[1] Counsel of record received notice of *amici*'s intent to file this brief under Supreme Court Rule 37.2. A motion for leave is included as the notice was within ten days of filing. No counsel for a party authored this brief, in whole or in part, and no such counsel or party made any monetary contribution intended to fund its preparation or submission.

the millions of Americans who rely on investments to fund their retirement or other life goals can count on a fair financial marketplace that provides strong protections against fraud, manipulation, and abuse, and meaningful remedies when they are victims of wrongdoing.

The Institute for Agriculture and Trade Policy ("IATP") is a nonprofit, nonpartisan organization founded in 1986, headquartered in Minneapolis, Minnesota, with offices in Washington, DC and Berlin, Germany. IATP's research and advocacy support economically and environmentally sustainable agriculture and food policy. To realize this mission through the derivatives markets, IATP has submitted 46 comment letters to the CFTC since 2010. Market manipulation and excessive speculation in derivatives contracts disrupt price formation and weaken the ability of derivatives markets to provide reliable price benchmarks used by physical commodity producers, processors, and traders in the forward contracting and auctioning of raw materials used in consumer and industrial goods in the United States and internationally. Agricultural lenders and traders likewise depend on interest rate and foreign exchange derivatives to be uncorrupted benchmarks to facilitate remunerative lending and trade. IATP commented on three versions of the CFTC's proposed cross-border trading rule to help prevent regulatory evasion and support CFTC enforcement activities.

The Petitioners have persuasively established multiple grounds warranting the grant of certiorari, including: (1) the stark conflict that the Second Circuit's decision has created with the Ninth and Seventh Circuits; (2) the lower court's unfounded attempt to graft additional requirements onto this

Court's test for ascertaining the territorial reach of a law established in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010); and (3) its misreading of the Commodity Exchange Act ("CEA"), which plainly *does* focus on manipulation on designated contract markets in the U.S.—the precise counterparts of the domestic securities exchanges analyzed in *Morrison*.

The *amici* here wish to emphasize the enormous *importance* of this case. The Second Circuit's decision, unless reversed, threatens to immunize unquestionably illegal and harmful manipulation *in* the U.S. commodity futures markets, simply because it was carried out from overseas locations. By in effect encouraging manipulation, the Second Circuit's decision will undermine the integrity of U.S. futures markets, hurt the countless businesses that rely on them as hedging and price discovery tools, and ultimately burden millions of American consumers who are unwittingly forced to pay more for the essential goods they need in everyday life, from gasoline to groceries. At stake, then, are fair and transparent financial markets, as well as the economic well-being of all Americans, interests of direct relevance to the *amici*'s missions.

SUMMARY OF ARGUMENT

Certiorari should be granted because, by exempting a huge swath of fraudulent and manipulative conduct occurring on or targeting American futures markets from the CEA, the Second Circuit's ruling poses a threat to the integrity of those markets, with far-reaching adverse economic consequences for American businesses and consumers.

The Second Circuit based its decision on a series of misconceptions: (1) it failed to apprehend or consider the true scope of the futures markets, the enormous impact they have on virtually every aspect of economic life, and their inherently international nature; (2) it failed to account for the many harms that flow from manipulation in those markets, including its negative impact on hedging, price discovery, and consumer prices; and (3) it failed to appreciate the essential role that the U.S. futures transactions played in the concededly manipulative scheme in this case. Far from an incidental postscript, those trades *consummated* the manipulation and generated the Respondents' ill-gotten gains.

If left intact, the decision will serve as a virtual invitation to commit manipulation on U.S. futures markets—provided such schemes are launched from abroad. Over time, the cumulative harm will be prodigious, hurting countless businesses and consumers who depend on fair and transparent futures markets.

ARGUMENT

I. The U.S. futures markets are a critical component of the modern economy.

The sole ground for the Second Circuit's dismissal of the CEA claims was that the manipulative trading of Yen-LIBOR and Euroyen TIBOR[2] at issue was "predominantly foreign." *Laydon v. Coöperatieve Rabobank U.A., et al.*, 55 F.4th 86, 96–99 (2d. Cir. 2022). Relying on *Prime International Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94 (2d. Cir. 2019), the Second Circuit held that even though the contracts traded in the United States, the fact that Defendants conspired to manipulate Euroyen TIBOR and Yen-LIBOR "from foreign trading desks" made Plaintiffs' CEA claims impermissibly extraterritorial under the CEA. *Laydon*, 55 F.4th at 97–98 (citing *Prime*, 937 F.3d at 106–08). But that conclusory statement ignores the reality that benchmark interest rates like Yen-LIBOR and Euroyen TIBOR, and the futures markets in general, are effectively *borderless* in terms of the role they play in the modern economy, a role whose importance is hard to overstate. As just one example, the price of vast amounts of commercial paper

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[2] This action concerns two daily reference rates: (i) the Tokyo Interbank Offered Rate ("Tibor"), a daily reference rate based on the interest rates at which banks offer to lend unsecured funds to other banks in the Japanese wholesale money market (or interbank market) and (ii) the London Interbank Offered Rate ("Libor"), a daily reference rate based on the interest rates at which banks borrow unsecured funds from other banks in the London wholesale money market (or interbank lending market). Specifically, Defendants' unlawful manipulation relates to the setting of the Japanese Bankers Association (the "JBA") Euroyen Tibor and the British Bankers Association (the "BBA") Yen-Libor.

(including short-term debt issued by countless U.S. corporations) is tied to such rates. Indeed, so important are such rates that, in the wake of scandals involving LIBOR manipulation, a new rate called the Secured Overnight Financing Rate ("SOFR") was created under the leadership of the Federal Reserve to protect against future manipulation. And yet, the Second Circuit's ruling stands for the proposition that so long as manipulation of SOFR is effected via "predominantly foreign" conduct, the CEA would not apply, notwithstanding the manipulation's impact on related futures contracts traded on domestic exchanges.

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, this Court reviewed the origins and importance of futures markets, explaining that, before futures exchanges existed, "dramatic price fluctuations sometimes created severe hardship for farmers or for [the] processors" who bought those farmers' goods. 456 U.S. 353, 357 (1982).

These hardships were alleviated, as this Court noted, by the advent of the type of exchange-based futures trading at issue in this case, which "produced [a] well-recognized benefit[] for producers and processors of agricultural commodities" alike: the ability to manage, or hedge, the risk of fluctuating prices. *Id.* at 358. "A farmer [with crops to sell] who takes a 'short' position in the futures market is protected against a price decline; a processor [who needs to procure raw material] who takes a 'long' position is protected against a price increase." *Id.*

Today, not only farmers but all types of manufacturing enterprises can protect against price increases in the raw materials they need, or price declines in the finished goods they produce, by

entering opposite positions in the futures markets—locking in a purchase price or sale price, as the case may be, at a future date. If prices move against them when the time comes to buy supplies or sell finished products, those losses are offset by corresponding gains when their futures positions are liquidated.[3] While the "immediate beneficiaries of a healthy futures market are the producers and processors of commodities who can minimize the risk of loss," *id.* at 390, "federal regulation of futures trading benefits the entire economy [as] a sound futures market tends to reduce retail prices of the underlying commodities." *Id.*

This important risk-mitigation and price-stabilization function has extended well beyond traditional physical commodities such as crops, crude oil, and precious metals, to encompass a wide variety of financial products, resulting, for example, in futures contracts on foreign currencies and stock indices. Portfolio managers can thereby efficiently hedge investments against anticipated currency and other market fluctuations, without the transaction costs and market risks associated with liquidating positions outright. *See generally Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966 (2d Cir. 1987) (discussing stock index trading).

Another core function of futures exchanges is that they allow "investors to know, at any given time, the value of a commodity by simply looking at the prices

[3] Critical to this hedging function is the ability of market participants to extinguish or offset their futures positions not by actually taking or making physical delivery of the commodities underlying their contracts but by simply entering an opposite contract to buy or sell, which neutralizes their futures position.

on a board of trade." Jerry W. Markham, *Manipulation of Commodity Futures Prices—the Unprosecutable Crime*, 8 YALE J. REG. 281, 287 (1991). This is known as "price discovery," which, as the Seventh Circuit has put it, is a "basic justification for [the existence of] futures market[s]" in the first place. *Bd. of Trade of City of Chi. v. S.E.C.*, 677 F.2d 1137, 1173 n.15 (7th Cir. 1982), *vacated as moot* 459 U.S. 1026 (1982). Indeed, the price-discovery function of futures markets is of such public importance that Congress has seen fit to explicitly link the scope of the CEA, and the jurisdiction of the CFTC, with the degree to which an instrument "perform[s] . . . a significant price discovery function." 7 U.S.C. § 6a(a)(1); 7 U.S.C. § 2(a)(1)(A) (conferring jurisdiction on CFTC over "significant price discovery contracts").[4] As with hedging, the role of price discovery extends to a vast range of physical commodities and financial instruments, serving as critical benchmarks influencing a wide range of business decisions, from storage, inventory, and production to investment allocation. *See* John Kern, *Price Manipulation in the Commodity Futures Markets: A Reexamination of the*

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[4] Exchange-based trading enables hedging and price discovery by increasing the participation of people who use them not to hedge against commercial risk but to profit from price moves they anticipate as they analyze market conditions, commonly referred to as "speculators." As this Court explained in *Merrill Lynch*, "the availability of speculators willing to assume the market risk that the hedging farmer or processor wants to avoid . . . substantially enlarges the number of potential buyers and sellers . . . and therefore makes it easier for farmers and processors to make firm commitments for future delivery at a fixed price." 456 U.S. at 358. Indeed, without speculators, "futures markets 'simply would not exist.'" *Id.* at 359 (citations omitted).

Justifications for Simultaneous Causes of Action Under the CEA and the Sherman Act, 34 UCLA L. REV. 1305, 1325 (1987) (footnotes omitted).

Moreover, it is not just Americans who rely on the proper functioning of U.S. futures exchanges, and from the beginning of federal legislation concerning the futures markets, Congress has recognized the international nature of commodities markets. Grain Futures Act of 1922, Pub. L. No. 67-331, 42 Stat. 998 ("'22 Act") (declaring a national public interest in futures markets in part because "prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining" grain prices).

For decades, market participants from around the world have chosen to list futures contracts on U.S. exchanges, tied to all manner of commodities. For instance, by the mid-1970s, when Congress created the CFTC by enacting the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 ("'74 Act"), futures on foreign-produced coffee, cocoa, copper, and foreign currency were available for trading on American exchanges. *See* H.R. REP. NO. 93-975, at 41, 62 (1974).[5] Today, in addition to futures for domestic products like Texas oil or Kansas wheat, U.S. futures exchanges are the locus

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[5] Notably, Congress rejected arguments that such futures should be exempt from the CEA and concluded that whether the commodity "is produced in the United States or outside" was of little relevance "to those in this country who buy, sell, [] process," or use "the commodity, or to the U.S. consumers whose prices are affected by the futures market in that commodity." S. REP. NO. 93-1131, at 19 (1974).

of untold volumes of daily trading in contracts tied to commodities, including foreign products as diverse as Australian Wheat, Canadian Dollars, Chinese Iron Ore, Czech Korunas, Dubai crude oil, Malaysian palm oil, Mexican Pesos, Singapore marine fuel, South African Rand, and Swiss Francs, *see generally CME Group All Products – Codes and Slate*, CME GROUP, (last visited Aug. 7, 2023), *available at*: https://www.cmegroup.com/markets/products.html.

In short, the efficient hedging and price-discovery functions of exchange-based futures confer multiple benefits. They help businesses hedge risk, they disseminate commodity prices used widely in commerce, and they benefit ordinary Americans by limiting and stabilizing the prices they pay for virtually every major class of consumer product.

Given the volume,[6] variety, and scope of the U.S. futures markets, and the sheer number of economic decisions determined by those markets, it is no overstatement to say that virtually every aspect of the global economy is affected by activity on the U.S. futures markets, directly or indirectly.

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[6] According to a 2021 report by the Futures Industry Association, *billions* of contracts change hands in the U.S. futures markets. *ETD Volume 2021 Exchange Ranking*, FUTURES INDUSTRY ASS'N (last visited Aug. 2, 2023), *available at*: https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.fia.org%2Fsites%2Fdefault%2Ffiles%2F2022-01%2FETD%2520Volume%25202021%2520Exchange%2520Ranking_1.xlsx&wdOrigin=BROWSELINK (listing trading volumes of, among others, CME Group, Intercontinental Exchange, CBOE Holdings, and NASDAQ).

II. Market manipulation poses a serious threat to properly functioning futures markets, and it has therefore been a dominant Congressional and regulatory focus for nearly a century.

Yet the foregoing description of the futures markets is incomplete, for it omits what has long been the bane of those who participate in those markets in good faith: market manipulation.

Suppose a producer controls a substantial portion of the total supply of a product. The producer then takes a large position in the futures market, which, if prices were to increase, would net the producer more profit than selling the product itself. The producer then destroys or otherwise restricts the supply of the product for the sole purpose of profiting from the producer's economically more valuable futures position. *E.g.*, *Great W. Food Distrib. v. Brannan*, 201 F.2d 476, 478 (7th Cir. 1953) (describing a "corner" scheme "whereby a trader . . . gains control of the supply . . . of a commodity and requires [opposing traders] to settle their obligations . . . at an arbitrary, abnormal and dictated price imposed by the cornerer"). Here, Respondents, as Yen-Libor contributor banks, intentionally caused and created artificial Libor prices for the benefit of their own Yen-Libor positions.

This type of activity yields no benefit to society,[7] instead causing an array of harms. The immediate counterparties to the futures transactions, be they

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[7] "To borrow language from antitrust law, manipulation of the futures market constitutes a *per se* violation of the CEA; the activity is always harmful and produces no ancillary benefits." Kern, *supra*, 34 UCLA L. REV. at 1327.

hedgers or speculators, suffer losses not because they misjudged genuine economic conditions, but because of the producer's manipulations. As fear of manipulation spreads, participation in the futures markets declines, reducing liquidity and impairing the hedging function. *Merrill Lynch*, 456 U.S. at 358 ("The liquidity of a futures contract, upon which hedging depends, is directly related to the amount of speculation that takes place."). Meanwhile, doubt creeps in as to whether futures prices reflect genuine economic conditions at all, which in turn impairs their utility in price discovery, with the quality of decision-making on a wide range of economic and business matters suffering as a result. Finally, the prices of finished goods rise and become more volatile than they otherwise would be.[8]

Given these harms, it is no wonder that Congress has sought to curb futures manipulation since as early as the 1800s. "Between 1880 and 1920, some 200 bills were introduced to Congress to regulate futures trading." Markham, *supra*, 8 YALE J. REG. at 291 n.40. In the 1920s, these sporadic efforts took more comprehensive form in the passage of the Futures Trading Act of 1921 and the '22 Act, both of which were focused on combating the scourge of manipulation. Then, in 1936, Congress expanded on those efforts by enacting the CEA.

Initially, the principal method by which Congress attempted to curb manipulation was by requiring that exchanges themselves adopt and enforce rules

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[8] Indeed, in the example above, the producer's manipulations would have been particularly harmful because they would have caused prices to rise directly, not just by increasing the cost of hedging.

banning manipulation. *See generally*, *e.g.*, 7 U.S.C. § 7; *Rice v. Bd. Of Trade of City of Chi.*, 331 U.S. 247, 250 (1947). Over the years, as the shortcomings of that approach became evident, Congress began adopting what can only be described as a breathtaking array of additional statutory tools to fight manipulation more effectively. They included establishing the CFTC in 1974; authorizing state enforcement of the CEA as *parens patriae* in 1978, 7 U.S.C. § 13a-2; and granting an express private right of action in 1983. 7 U.S.C. § 25.

Ultimately, the purpose of all this Congressional focus was simple: to maintain the integrity of, and confidence in, the U.S. futures markets, and to ensure they are perceived as fair, safe, and reliable. As one senator put it in a series of hearings on the U.S. futures markets 30 years ago, "[w]ithout confidence in our futures markets," America's "leadership [in these markets] is in jeopardy." *Oversight Hearings with Regard to the Reauthorization of the Commodity Futures Trading Commission Before the S. Comm. on Agriculture, Nutrition, and Forestry*, 101st Cong. 3 (1989) (statement of Hon. Richard G. Lugar).

This is perhaps truer today than it has ever been. Advances in technology have greatly reduced the barriers to locating financial exchanges—including the order-matching engines that constitute their beating hearts[9]—in places outside the United States.

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[9] That futures exchanges like ICE Futures Europe choose to put their order-matching engines in Chicago is no accident. Chicago is the epicenter of global commodities trading, *e.g.*, Gregory Meyer, *Chicago retains role as capital of derivatives industry*, FINANCIAL TIMES (Dec. 16, 2016), *available at*: https://www.ft.com/content/3b43d082-acf8-11e6-ba7d-76378e

Confidence in American futures markets—and in the legal system that protects their integrity—is critical to ensuring that the United States continues to enjoy its leading role in this area. But unless the prohibitions against manipulation in the CEA can be enforced in the multiple ways Congress intended, and applied to all manipulative schemes that contaminate the U.S. futures markets regardless of their origins, that confidence will fade, the functioning of the markets will be impaired, and Americans will suffer. This is especially true because futures-based investment strategies recently have become widely available to retail investors, including through exchange-traded managed futures funds.[10] As a result, ordinary Americans are now *directly* exposed

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4fef24, and market participants around the world want access to that ecosystem. That is why order-matching engines, which are the functional equivalents of the open outcry trading pits of a bygone era, tend to be in Chicago. *E.g.*, *Choi v. Tower Research Capital LLC*, 890 F.3d 60, 68 (2d Cir. 2018) (noting that an order-matching engine "is analogous to the traditional practice, prior to the advent of remote algorithmic high-speed trading, in which buyers and sellers of commodities futures would 'reach an agreement on the floor of the exchange' and then subsequently submit their trade to a clearinghouse for clearing and settling.") (quoting *Leist v. Simplot*, 638 F.2d 283, 287 (2d Cir. 1980)) (modification omitted).

[10] *E.g.*, Andrew Greene, *Managed futures reach retail portfolios*, FINANCIAL TIMES (June 9, 2012), *available at*: https://on.ft.com/3sdWhFM; *What are Managed Futures?*, CME GROUP, https://www.cmegroup.com/education/courses/managed-futures/what-are-managed-futures.html (last accessed Aug. 21, 2023); *Managed Futures ETC List*, VETTAFI, https://etfdb.com/etfs/alternatives/managed-futures/ (last accessed Aug. 21, 2023).

to futures manipulation in a way and to a degree that was not true just a decade ago.

III. The Second Circuit's ruling creates a safe haven for market manipulators, posing a long-term threat to countless market participants, businesses, and American consumers.

The Second Circuit's ruling threatens the continued utility and success of America's futures exchanges, and their attendant economic benefits, by inviting bad actors to manipulate them—so long as they do so from abroad. And the disabling impact of the decision on enforcement of the anti-manipulation provisions in the CEA is sweeping: It not only prevents injured investors like the Petitioners from seeking redress for manipulation, it also threatens to put such schemes beyond the reach of the states and even the CFTC's enforcement authority, which the agency has often applied to foreign-based manipulation that infects U.S. exchanges—like the activity at issue in this case.[11] This conflicts with

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[11] To be sure, footnote 11 of the Second Circuit opinion purports to limit the decision to "Section 22, which concerns private rights of action, [which] ha[ve] nothing to do with government enforcement." *Laydon*, 55 F.4th at 98 n.11. But the opinion relies entirely on *Prime*, which the opinion said "mandates dismissal of Plaintiff's CEA claims[,]" *id.* at 97 (citing *Prime,* 937 F.3d at 106), and which was *not* limited to Section 22, but to the CEA's *substantive* provisions. Footnote 11 therefore does little to curb the threat posed to the CFTC's enforcement authority, especially since the opinion does not actually draw a principled distinction between Section 22 and the rest of the CEA, much less one that is grounded in the text of the CEA or any other authority. All this is confirmed by Respondents' opposition brief, filed on August 14, 2023, which similarly fails to draw any such principled distinction.

Congress's clear intent, as reflected in the multi-tiered approach to enforcement described above, designed to provide effective deterrents against manipulation in the U.S. futures markets.

The decision is especially troubling because the harm that it portends needlessly arises from a fundamental misunderstanding of the hugely important, indeed *indispensable*, role that the U.S.-based trading played in the Respondents' scheme. As alleged, the Respondents' manipulation was directed at benefiting, among other things, the Respondents' trading positions in Yen-LIBOR and Euroyen TIBOR-linked futures contracts. *See Laydon*, 55 F.4th at 93. The *sine qua non* of the Respondents' ability to benefit from those positions was nothing other than the *undisputedly American activity* in this case: the Respondents' trading of futures linked to Yen-LIBOR and Euroyen TIBOR on the CME. In fact, it is emphatically the case that, but for this American activity, the Respondents' futures manipulation simply could not have succeeded.

More to *amici*'s point in this brief, as a result of the Respondents' alleged manipulation, the *prices* at which those transactions were executed were artificial, distorted, and unreflective of genuine economic conditions. As such, their manipulation did not just injure the Petitioners, but the U.S. futures markets themselves.

Yet, by deeming such manipulation beyond the reach of the CEA, what the Second Circuit has said to the world's fraudsters and manipulators is that you may manipulate our futures markets and victimize our traders, businesses, and consumers, provided you do so remotely. It is self-evident that Congress could

not have intended the CEA to serve as such a "craven watchdog." *Morrison*, 561 U.S. at 266.

What is ironic is that the Second Circuit itself, in a pre-*Morrison* decision, explicitly recognized as much. In *Psimenos v. E.F. & Hutton Co., Inc.*, the court considered whether the CEA applied to a fraud perpetrated on a Greek citizen, through representations made in Athens, Paris, and Geneva, in which the principal United States activities were the exchange-based trades cementing the wrongful gains and losses. 722 F.2d 1041, 1045-46 (2d Cir. 1983) ("Far weightier is the fact that Hutton's agents completed the alleged fraud by trading domestic futures contracts on American commodities exchanges."). In holding that the CEA applied, the Second Circuit reasoned that "Congress did not want . . . United States commodities markets to be used as a base to consummate schemes concocted abroad[.]" *Id.* at 1046. The court stated that "[t]rading activities on United States commodities markets were significant acts without which [plaintiff's] losses could not have occurred," and that "'to hold otherwise could make it convenient for foreign citizens and corporations to use this country to further fraudulent securities schemes.'" *Id.* at 1048 (modifications omitted) (quoting *Grunenthal GmBh v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983)).

The Seventh Circuit held essentially the same view. In *Tamari v. Bache & Co.*, it explained the incongruity of allowing such schemes to fall outside the purview of the CEA:

> Were we to construe the CEA as inapplicable to the foreign agents of commodity exchange members when they facilitate trading on

> domestic exchanges, the domestic commodity futures market would not be protected from the negative effects of fraudulent transactions originating abroad. Because the fundamental purpose of the Act is to ensure the integrity of the domestic commodity markets, we expect that Congress intended to proscribe fraudulent conduct associated with any commodity future transactions executed on a domestic exchange, regardless of the location of the agents that facilitate the trading.

730 F.2d 1103, 1108 (7th Cir. 1984).

Post-*Morrison*, the same result should obtain here, and for a similar reason: The wrongful transactions at the heart of the case were concededly "domestic transactions" that Congress unquestionably intended would be governed by the CEA. By holding otherwise, the Second Circuit not only contradicts its own precedent and rationale but also makes all too real the court's own fear in *Psimenos* that the failure to apply the CEA in such cases might turn America into a "base to consummate schemes concocted abroad."

The Second Circuit held below that private CEA suits necessarily must be based on transactions occurring in the United States. *Laydon*, 55 F.4th at 96. However, applying *Prime*, the Second Circuit held that "a plaintiff must [] plead not only a domestic transaction, but also sufficiently domestic conduct by the defendant" *Id.* (citing *Prime*, 937 F.3d at 105) (cleaned up).

As an initial matter, the Second Circuit's requirement that something more than a domestic commodities transaction is required to plead a

permissibly territorial CEA claim is out-of-step with this Court's prior precedent. *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 337-38 (2016). The Second Circuit then compounded its error by breezily concluding in a footnote that its ruling would not hinder the Government's efforts to regulate the United States' commodities markets, *Laydon*, 55 F.4th at 98 n.11. To the contrary, the Second Circuit's ruling—that the CEA's substantive provisions only apply where the manipulative conduct occurred in the United States—will, by definition, inhibit the Government's enforcement objectives because the Government polices the commodities markets *via those substantive provisions*.

The dangers posed by the Second Circuit's ruling are especially heightened given the increasingly global nature of market manipulation—and the increasing irrelevance of national boundary lines in finance and commerce. *E.g., Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 477 (7th Cir. 2002) (describing a global scheme to manipulate the market for copper led by a Japanese trading corporation); *United States v. Sindzingre*, 17-CR-0464(JS), 2019 WL 2290494, at *4 (E.D.N.Y. May 29, 2019) (describing scheme to manipulate LIBOR by French citizens); *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 182 (S.D.N.Y. 2018) (describing manipulation where much of the conduct occurred in Australia).

Indeed, bad actors in the 21st century do not just disregard national borders, they actively seek to exploit regulatory gaps created by such borders. The Second Circuit's decision is a flashing neon sign inviting them to do just that.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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