No. 19-1141

In the Supreme Court of the United States

ATLANTIC TRADING USA, LLC, ET AL.,
Petitioners,
v.

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

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

BRIEF OF *AMICI CURIAE* BETTER MARKETS, INC. AND AMERICANS FOR FINANCIAL REFORM EDUCATION FUND IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI*[1]

Americans for Financial Reform Education Fund ("AFREF") works in concert with a coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups to lay the foundation for a strong, stable, and ethical financial system. Formed in the wake of the 2008 financial crisis, AFREF fights for a fair and transparent financial marketplace that contributes to shared prosperity for all families and communities. Through policy analysis, research, education, and outreach, AFREF advocates for greater accountability and transparency in financial markets and stronger protections for consumers and investors. AFREF frequently engages with federal financial regulators in support of strong financial regulation and protection of the financial markets from speculation and abuse.

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 and dozens of amicus briefs in the federal courts supporting strong

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[1] 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. All parties have consented to the filing of this brief.

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 rules under Title VII of the Dodd-Frank Act governing swaps. *See generally* Better Markets, http://www.bettermarkets.com (including an archive of comment letters, briefs, and reports).

The Petitioners have persuasively established multiple grounds for the grant of certiorari: the stark conflict that the Second Circuit's decision has created with the Ninth Circuit; the lower court's unwarranted attempt to graft a new test onto this Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010); and 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 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 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 court 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, generated the Respondents' ill-gotten gains, and more broadly contaminated the futures market price for crude oil.

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.

In the ruling below, the Second Circuit based its decision in part on the ground that the futures contracts at issue here and the equity swaps at issue in *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings Se*, 763 F.3d 198 (2d Cir. 2014) were both "derivatives." *Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 106 (2d Cir. 2019). But that relatively superficial similarity masks a far more important reality, namely that unlike the equity swaps in *Parkcentral*, the futures contracts here, and the futures markets in general, play a role in the modern economy the significance of which is difficult to overstate.

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.* "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.[2] While the "immediate beneficiaries of a healthy futures market are the producers and processors of commodities who can minimize the risk of loss," *Merrill Lynch,* 456 U.S. 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 market fluctuations, without the transaction costs and market risks associated with liquidating positions outright. *See generally Katara v. D.E. Jones*

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

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 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. *Board of Trade of City of Chicago v. S.E.C*, 677 F.2d 1137, 1174 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 of the Commodity Futures Trading Commission's ("CFTC") jurisdiction, 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").[3] As with hedging, the role of price

[3] 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 357. Indeed, without speculators, "futures markets 'simply would not exist.'" *Id.* at 359 (citations omitted).

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." John Kern, *Price Manipulation in the Commodity Futures Markets: A Reexamination of the 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. 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, futures on foreign-produced coffee, cocoa, copper, and foreign currency were available for trading on American exchanges. H.R. REP. NO. 93-975, at 41, 62 (1975).[4] Today, in addition to futures for domestic products like Texas oil or Kansas wheat, American exchanges are the locus of untold volumes of daily trading in contracts tied to commodities as diverse as Australian Wheat, Canadian Dollars, Chinese Iron Ore, *see generally Markets*, CME GROUP, https://www.cmegroup.com/markets.html (last visited April 17, 2020), and the Korean stock market. *See Choi v. Tower Research Capital LLC*, 890 F.3d 60 (2d

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[4] 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. 93-1131, at 19 (1974).

Cir. 2018) (involving futures contracts tied to the "KOSPI 200, a stock index akin to the S&P 500 or the Dow Jones").

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,[5] 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.

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

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[5] According to a 2019 report by the Futures Industry Association, U.S futures markets saw more than 10 *billion* contracts change hands that year. *Top 40 Derivatives Exchanges Worldwide*, FUTURES INDUSTRY ASSOC'N, https://www.fia.org/media/2407 (last visited April 17, 2020) (listing trading volumes of, among others, CME Group, Intercontinental Exchange, CBOE Holdings, and NASDAQ).

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 Western Food Distributors 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").

This type of activity yields no benefit to society,[6] instead causing an array of harms. The immediate counterparties to the futures transactions, be they 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 ("[T]he 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

[6] "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.

finished goods rise and become more volatile than they otherwise would be.[7]

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 Grain Futures Act of 1922, 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 banning manipulation. *See generally, e.g.*, 7 U.S.C. § 7; *Rice v. Chicago Board of Trade*, 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

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[7] 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.

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 more true 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[8]—in places outside the United States. 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

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[8] 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), https://www.ft.com/content/3b43d082-acf8-11e6-ba7d-76378e4fef24 (last visited April 17, 2020), 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*, 890 F.3d at 67 (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).

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.

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 puts 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. This conflicts with 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'

"Brent Futures positions." *Prime Int'l Trading*, 937 F.3d at 100 (2d Cir. 2019). 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 Brent Futures on NYMEX, and, in the case of ICE Futures Europe, the matching of the Respondents' buy and sell orders in Chicago. 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 outside 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, 1046 (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 1047-48 (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 condededly "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 failure to apply the CEA in such cases might turn America into a "base to consummate schemes concocted abroad."

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 Industries, 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); *In re Platinum & Palladium Antitrust Litig.*, 1:14-cv-9391-GHW, at *26 (S.D.N.Y. Mar. 29, 2020) (describing global scheme to manipulate the platinum and palladium markets and dismissing CEA claims as impermissibly extraterritorial as a result of the Second Circuit ruling that is the subject of this petition); *United States v. Sindzingre*, 17-CR-0464(JS), 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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