12-1967(L),
12-2090(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

ROSS H. MANDELL, ADAM HARRINGTON a/k/a "Adam Rukdeschel,"

Defendants-Appellants,

—*and*—

STEPHEN SHEA, ARN WILSON, ROBERT GRABOWSKI and MICHAEL PASSARO,

Defendants.

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

BRIEF FOR *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF DEFENDANTS-APPELLANTS

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BRIEF FOR *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF DEFENDANTS-APPELLANTS

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Association of the Bar of the City of New York is a voluntary association of lawyers and law

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* or its counsel, make any monetary contribution intended to fund the preparation or submission of this brief.

students. Founded in 1870, the City Bar is one of the oldest bar associations in the United States. Its purposes include "cultivating the science of jurisprudence, promoting reforms in the law, [and] facilitating and improving the administration of justice."

Today the City Bar has more than 23,000 members. It also has 150 standing and special committees that focus on particular legal practice areas and issues, and through which the City Bar comments on legal issues and public policy. This brief was prepared by the City Bar's Special Committee on White-Collar Crime, which addresses issues concerning the administration, application, and interpretation of criminal laws addressing white-collar crime. The Committee in particular, and the City Bar as a whole, thus have a strong interest in the important issues in this case: the correct determination of the territorial scope of Section 10(b) of the Securities Exchange Act of 1934 and other federal statutes in criminal cases.

Certain members of the Committee, including all members employed by the Federal Government and its agencies, have recused themselves from any participation in the decision to submit, and the preparation of, this brief, and accordingly cannot be understood as joining in any position this brief may take.

This brief is submitted pursuant to Fed. R. App. P. 29(a), as all parties have consented to its filing.

SUMMARY OF ARGUMENT

In this case and in another case recently argued before this Court, the Government has taken an extraordinary position. As expressed in its opposition

to bail on this appeal, the Government asserts that the Supreme Court's decision in *Morrison* v. *National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), "does not apply to the offenses charged in this case"—in particular, to criminal charges brought under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, the very statute and regulation interpreted in *Morrison*.[2]

The Government thus claims that Section 10(b) now has *two* controlling constructions. In civil cases, as the Government does not dispute, *Morrison* governs, and Section 10(b) only applies to domestic transactions. But according to the Government, "the Supreme Court did not intend its decision in *Morrison* to limit the ability of the United States to bring criminal securities fraud prosecutions involving overseas transactions." Gov't *Vilar* Br. 97. In the Government's view, Section 10(b) may apply in criminal cases "even if the transactions at issue were executed overseas." Gov't *Mandell* Bail Opp. ¶ 32.

The Government is wrong. To begin with, its position that Section 10(b) can simultaneously have two authoritative constructions—an extraterritorial

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[2] Affirmation of Katherine R. Goldstein, Esq., in Opposition to Motion for Bail Pending Appeal ¶ 28 (filed July 5, 2012), ECF No. 49 ("Gov't *Mandell* Bail Opp."); *see also id.* ¶¶ 22, 29-32; Brief for the United States of America at 96-101, *United States* v. *Vilar*, No. 10-521(L) (2d Cir. filed Apr. 18, 2012) ("Gov't *Vilar* Br."); Sur-Reply Brief for the United States of America at 8-11, No. 10-521(L) (2d Cir. filed May 14, 2012) ("Gov't *Vilar* Sur-Reply Br."). This Court heard oral argument in *Vilar* on August 21, 2012.

reading that applies in criminal cases, and a purely domestic one that applies in civil cases—is mistaken because its premise is mistaken. The Government's mistaken premise is its assertion that, under *United States* v. *Bowman*, 260 U.S. 94 (1922), "the presumption against extraterritoriality does not apply to criminal statutes." Gov't *Vilar* Sur-Reply Br. 8; *accord* Gov't *Mandell* Bail Opp. ¶ 27. Indeed, in recently arguing to this Court that RICO similarly has two meanings, the Government has gone so far as to suggest that, under *Bowman*, criminal "statutes enjoy a presumption *in favor of* extraterritoriality."[3]

That is not true, and has never been true. As *Morrison* holds, the presumption against extraterritoriality must "apply … in *all* cases." 130 S. Ct. 2881 (emphasis added). Well before *Morrison*, in fact, this Court recognized that

> The Supreme Court's recent discussions of the presumption against extraterritoriality, none of which mentions *Bowman*, seem to require that *all* statutes, without exception, be construed to apply within the United States only, unless a contrary intent appears.

Kollias v. *D&G Marine Maint.*, 29 F.3d 67, 71 (2d Cir. 1994) (emphasis in original).

Indeed, the Supreme Court recognized the presumption's applicability in criminal cases as long ago as 1818, and even did so in *Bowman* itself. *Bowman*

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[3] Brief of the United States as *Amicus Curiae* in Support of Limited Rehearing *En Banc* at 3, *Norex Petroleum Ltd.* v. *Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (emphasis in original).

merely establishes that the presumption can be overcome when extraterritoriality is strongly suggested by a statute's particular context (a principle that *Morrison* confirms), and holds that such context *may* be found in some statutes prohibiting fraud committed *against the Government* when it carries out its *global* activities. That certainly does *not* describe Section 10(b), which, as *Morrison* holds, is concerned with protecting *private* persons who make *domestic* securities trades. This Court, moreover, has more than once recognized that *Bowman* must be "read narrowly" and "limited to its facts," *Kollias*, 29 F.3d at 71; *accord United States* v. *Gatlin*, 216 F.3d 207, 211 n.5 (2d Cir. 2000), and has in fact *reversed* criminal convictions because of the presumption against extraterritoriality. See Point I, below.

In any event, the Government's contention that *Morrison* does not apply here is irreconcilable with *Morrison* itself. The Supreme Court in *Morrison* emphasized that it was deciding "what conduct § 10(b) *reaches*" and "what conduct § 10(b) *prohibits*"—what conduct "Section 10(b) … *punishes*." *Id.* at 2877, 2887 (emphasis added). It was thus defining when and "where a putative *violation* [of Section 10(b)] occurs." *Id.* at 2884 n.9 (emphasis added). Here, the defendants were convicted under Section 32(a) of the Exchange Act, the statute's criminal liability provision, which punishes any "willful[] violat[ion]" of any provision or rule under the Act, including Section 10(b) and Rule 10b-5. If there is no violation of Section 10(b) and Rule 10b-5 under *Morrison*, then no criminal liability may be imposed under Section 32(a). See Point II, below.

Finally, and most fundamentally, the Government's contention that a single statutory provision can have two authoritative meanings is wrong. The Supreme Court has made clear that, when a statute has both civil and criminal applications, "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context …." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004). This principle is illustrated by the rule of lenity: although the rule of lenity governs only the interpretation of statutes imposing penal sanctions, it still applies to the interpretation of the same statutes in civil cases. The reason: a statute can have only one meaning. And that is true of Section 10(b). See Point III, below.

ARGUMENT

POINT I

THE PRESUMPTION AGAINST EXTRATERRITORIALITY FULLY APPLIES TO CRIMINAL LAWS.

A. The Supreme Court has consistently recognized that the presumption against extraterritoriality applies to criminal statutes.

This case involves a canon of statutory construction as old as the Nation itself: the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Morrison* v. *Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quoting *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*")). This presumption against extraterritoriality

is a powerful one: "'unless there is the *affirmative* intention of the Congress *clearly* expressed' to give a statute extraterritorial effect, 'we must presume that it is primarily concerned with domestic conditions.'" *Morrison*, 130 S. Ct. at 2877 (emphasis added; quoting *Aramco*, 499 U.S. at 248). And although "[a]ssuredly context may be consulted as well" as statutory text in determining whether the presumption has been overcome, courts must always look for "a clear indication of extraterritoriality." *Id.* at 2883. "When a statute gives no clear indication of an extraterritorial application, it has none"; "uncertain indications do not suffice." *Id.* at 2878, 2883.

The presumption against extraterritoriality mainly "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.* at 2877. As a result, courts "consequently assume a congressional intent that [statutory language] applies domestically, not extraterritorially." *Small* v. *United States*, 544 U.S. 385, 390-91 (2005). The presumption is thus an "expected-meaning canon." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247 (2012); *see id.* at 247, 268-69. It "helps [courts] determine Congress' intent where Congress likely did not consider the matter and where other indicia of intent are in approximate balance." *Small*, 544 U.S. at 390.

Other salutary purposes support the presumption as well—purposes relating to the Nation's conduct of foreign affairs as well as to the separation of powers. The presumption reflects the "desire to avoid conflict with the laws of other nations," *Sale* v. *Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 174 (1993), as it "serves

to protect against unintended clashes between our laws and those of other nations which could result in international discord," *Aramco*, 499 U.S. at 248; *accord United States* v. *Gatlin*, 216 F.3d at 211, 216 n.11 (2d Cir. 2000); *see also Morrison*, 130 S. Ct. at 2886. The presumption also embodies judicial deference to Congress in the sensitive area of foreign affairs: it recognizes that Congress is "able to calibrate its provisions in a way that [courts] cannot," *Aramco*, 499 U.S. at 259, and "leaves to Congress' informed judgment any adjustment [of the law that] it deems necessary or proper," *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 442 (2007).

These important purposes require the presumption's application in all cases, civil and criminal. The Supreme Court recognized this as far back as 1818, when it faced a question of how to interpret antipiracy provisions of the Crimes Act of 1790. Did those provisions reach conduct committed by foreigners aboard foreign vessels traversing the high seas? The Court held that they did not. The Court acknowledged that the words used in the statute, "'any person or persons,' are broad enough to comprehend every human being." *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.). But it nonetheless held that such "general words must … be limited to cases within the jurisdiction of the state." *Id.* To this day *Palmer*, a criminal case, is recognized as one of the earliest expressions of the presumption against extraterritoriality by an American court. *See*, *e.g.*, *Small* v. *United States*, 544 U.S. at 388-89 (citing *Palmer* as example of presumption's application); *accord id.* at 400 (Thomas, J., dissenting; same); *United States* v. *Laboy-Torres*,

553 F.3d 715, 719 (3d Cir. 2009) (O'Connor, Associate Justice (Retired), sitting by designation; same); *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 954 (9th Cir. 2008) (same).

American courts have applied the presumption against extraterritoriality to criminal statutes ever since. In particular, *United States* v. *Bowman*, 260 U.S. 94, 98 (1922), contains a rather explicit statement that the presumption applies to criminal statues, and it cited what was then the leading case on the presumption as support:

> Crimes against private individuals or their property, like … *frauds of all kinds*, … must of course be committed *within the territorial jurisdiction of the government* where it may properly exercise it. *If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.* We have an example of this in the attempted application of the prohibitions of the Anti-Trust Law to acts done by citizens of the United States against other such citizens in a foreign country. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 [(1909)]. That was a civil case, but as the statute is criminal as well as civil, it presents an analogy.

(Emphasis added.)

A decade later, the Supreme Court invoked *Bowman* as authority for applying the presumption against extraterritoriality to criminal laws. The Court explained that *Bowman* stood for the proposition that

> It is true that the criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extraterritorial effect.

United States v. *Flores*, 289 U.S. 137, 155 (1933) (citing *Bowman*, 260 U.S. at 98). Accordingly, under *Bowman*, a criminal case, "legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States." *Blackmer* v. *United States*, 284 U.S. 421, 437 (1932) (citing *Bowman*).[4]

B. *Bowman* merely examined a statute's context to determine its territorial scope and is entirely consistent with *Morrison*.

Thus, contrary to the Government's contentions, nothing in *Bowman* establishes any exception to the presumption against extraterritoriality. In addition to acknowledging the presumption's applicability to criminal statutes, *Bowman* simply recognized what other cases on the presumption, including *Morrison*, teach: the presumption can be overcome by the text of a statute, but "[a]ssuredly context can be consulted as well." *Morrison*, 130 S. Ct. at 2883.

A careful review of *Bowman* makes this clear. After noting that the presumption is typically overcome

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[4] See also *Pasquantino* v. *United States*, 544 U.S. 349 (2005), where the Court did not dispute the dissent's view that the extraterritoriality canon applied to the wire-fraud statute, but held that the statute's application there was domestic. *See id.* at 371; *id.* at 379 (Ginsburg, J., dissenting).

by an express statement—"it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard," 260 U.S. at 98; *see* p. 9, above—the *Bowman* Court explained that, with some statutes involving the Government's worldwide diplomatic and military activities, extraterritorial applicability need not be established by "specific provision," but may "be inferred from the nature of the offense," 260 U.S. at 98.

In particular, extraterritoriality may be inferred in statutes "enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents." *Id.* The Court gave examples: a law that "punishes whoever as consul knowingly certifies a false invoice"; one that prohibits "[f]orging or altering ship's papers"; another that "punishes enticing desertions from the naval service"; a prohibition against "bribing a United States officer of the civil, military or naval service"; a statute punishing fraud against the United States "relating to … property captured as prize"; and a law making it "a crime to steal … property of the United States … to be used for military or naval service." *Id.* at 99. Consuls, ships, naval service, prizes—all clearly connote the high seas or foreign lands. With laws like these, "the natural inference from the character of the offense" is that an extraterritorial location "would be a probable place for its commission." *Id.*

The Court examined whether "[w]hat is true of these sections in this regard is true of" the statute at issue in *Bowman*. *Id.* at 100-02. That statute arose from Congress's creation in 1917, during World War I, of the Government-owned United States Shipping

Board Emergency Fleet Corporation to acquire, maintain, and operate a fleet of merchant ships to ship war materiel. *See id.* at 95.[5] The defendants were American seamen who conspired to defraud the Fleet Corporation by falsely billing it for fuel oil in Rio de Janeiro that was never delivered, and they were charged under a statute that prohibited the making of fraudulent claims on "'any corporation in which the United States of America was a stockholder.'" *Id.* at 95-96, 100 n.1 (citation omitted).

The Court held that the unique context of this law clearly evinced an extraterritorial congressional intent. The dispositive passage of the opinion explains:

> The section was amended in 1918 to include a corporation in which the United States owns stock. This was evidently intended to protect the Emergency Fleet Corporation in which the United States was the sole stockholder, from fraud of this character. That Corporation was expected to engage in, and did engage in, a most extensive ocean transportation business and its ships were seen in every great port of the world open during the war. The same section of the statute protects the arms, ammunition, stores and property of the army and navy from fraudulent devices of a similar character. We can not suppose that when Congress enacted the statute or amended it, it did not have in mind that

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[5] *See also* Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After* Morrison v. National Australia Bank, 67 N.Y.U. ANN. SURV. AM. L. 137, 162 n.103 (2011).

> a wide field for such frauds upon the Government was in private and public vessels of the United States on the high seas and in foreign ports and beyond the land jurisdiction of the United States, and therefore intend to include them in the section.

Id. at 101-02.

In short, *Bowman* "states that the nature and purpose of a statute may provide an indication of whether Congress intended a statute to apply beyond the confines of the United States."[6] At most, *Bowman* holds "that a court can overcome the presumption and infer congressional intent to apply extraterritorially those statutes that protect government contracts from fraud and obstruction."[7]

Bowman thus cannot support the Government's position here. Section 10(b) protects "private individuals or their property," and does not vindicate "the right of the Government to defend itself against obstruction, or fraud wherever perpetrated." 260 U.S. at 98. No argument can be made that Section 10(b)'s context provides a clear and affirmative indication of extraterritorial applicability, let alone anything approaching that of the statute protecting "a most extensive ocean transportation business" of the Government-owned, global-war-materiel-shipping company in *Bowman*. *Id.* at 102. To the contrary, as *Mor-*

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[6] CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 8 (2012), *available at* http://bit.ly/UhKWrU.

[7] Clopton, 67 N.Y.U. ANN. SURV. AM. L. at 167.

rison explains at length, the text and context of Section 10(b) specifically, and of the Securities Exchange Act generally, show quite plainly that the law's "exclusive focus [is] on *domestic* purchases and sales," and that it is the *private* "parties to those transactions that the statute seeks to 'protec[t],'" *Morrison*, 130 S. Ct. at 2884 (emphasis in original; citation omitted).

C. In accordance with *Morrison* and *Bowman*, this Court has reversed criminal convictions because of the presumption against extraterritoriality.

Not surprisingly, and consistently with *Morrison* and a proper reading of *Bowman*, this Court has *reversed* criminal convictions after applying the presumption against extraterritoriality. This Court thus reversed the conviction and ordered the indictment dismissed in *United States* v. *Gatlin*, 216 F.3d 207 (2d Cir. 2000), solely because of the presumption. The defendant had committed his alleged offense on a U.S. Army base in Germany, and the validity of his conviction turned on whether the Criminal Code's relevant definition of "special maritime and territorial jurisdiction of the United States," 18 U.S.C. § 7(3), "appl[ied] to lands outside the territorial boundaries of the United States, including, specifically, United States military installations," 216 F.3d at 212.

This Court explained that Section 7(3) could have extraterritorial scope only if "there appears 'the affirmative intention of the Congress clearly expressed'" to confer such scope, and that "absent 'clear evidence of congressional intent' to apply a statute beyond our borders, the statute will apply only to the territorial United States." *Id.* at 211-12 (quoting *Ar-*

amco, 499 U.S. at 248, and *Smith* v. *United States*, 507 U.S. 197, 204 (1993)). Examining "'all available evidence' about the meaning of the statute, including its text, structure, and legislative history," the Court concluded that "'clear evidence of congressional intent' to apply [the] statute extraterritorially" did not exist. *Id.* at 212, 214-15 (quoting *Sale*, 509 U.S. at 177, and *Smith*, 507 U.S. at 204). This Court even criticized the Fourth Circuit for having "failed to apply the proper canon of statutory construction," the "presumption against extraterritoriality," in construing Section 7(3). *Id.* at 214 (criticizing *United States* v. *Erdos*, 474 F.2d 157 (4th Cir. 1973)).[8]

And this Court noted that "the Government understandably ma[de] no argument" that *Bowman* supported the conviction. *Id.* at 211 n.5. Italicizing key language in *Bowman*, this Court emphasized that *Bowman* involved "'*the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents*.'" *Id.* (quoting *Bowman*, 260 U.S. at 98; emphasis by this Court). *Bowman* was inapposite, this Court held, "since Gatlin committed a crime against a private individual," and because "'*Bowman* should be read narrowly.'" *Id.* (quoting *Kollias*, 29 F.3d at 71).

Accordingly, this Court concluded that Section 7(3) "does not apply extraterritorially" and did not provide authority "to try civilians like Gatlin who commit crimes on military installations abroad." *Id.*

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[8] *See also id.* at 212 n.6 (criticizing a district court decision for "declin[ing] to apply the presumption against extraterritoriality")).

at 223. The Court reversed the conviction and ordered the indictment dismissed—*solely and squarely because of the presumption against extraterritoriality*. *Id.*

Similarly, this Court last year partially reversed a criminal conviction in a case that has been aptly cited as a textbook example of proper use of the presumption. In *United States* v. *Weingarten*, 632 F.3d 60 (2d Cir. 2011), "the Second Circuit applied the presumption that 'Congress does not intend a statute to apply to conduct outside the territorial jurisdiction of the United States unless it clearly expresses its intent to do so.'" SCALIA & GARNER, at 271 (quoting *Weingarten*, 632 F.3d at 64 (citation and internal quotation marks omitted)). This Court explained that it had to "look for a 'clear' and 'affirmative indication' that a statute applies to conduct occurring outside the territorial jurisdiction of the United States." 632 F.3d at 65 (quoting *Morrison*, 130 S. Ct. at 2883). This Court found just "[s]uch a clear and affirmative indication" in a law "criminalizing travel in foreign commerce undertaken with the intent to commit sexual acts with minors." *Id.*

At the same time, however, *Weingarten* held that the presumption required *reversal* on one count of the indictment. That count had charged the defendant with having engaged in purely foreign travel *between* two foreign countries to commit his illicit acts. The Court held that "inferences properly drawn from the presumption against extraterritoriality" compelled the conclusion "that it would be anomalous to construe the [statutory] definition of 'foreign commerce' … as including all forms of commerce occurring outside the United States and without nexus

whatsoever to this country." *Id.* at 70. This Court emphasized that "[t]he presumption requires careful analysis, on a statute-by-statute basis, of Congress's intent to regulate conduct occurring outside the United States." *Id.*

In short, under the law of this Circuit, the presumption against extraterritoriality applies to criminal statutes and to criminal cases. "*[A]ll* statutes, without exception, [must] be construed to apply within the United States only, unless a contrary intent appears." *Kollias*, 29 F.3d at 71 (emphasis in original).

POINT II

MORRISON GOVERNS THE TERRITORIAL SCOPE OF SECTION 10(b) IN ALL CASES, CIVIL AND CRIMINAL.

Even apart from the Government's misunderstanding of the extraterritoriality canon's applicability, its contention that *Morrison* does not control criminal cases must fail because it contradicts *Morrison* itself.

A. *Morrison* forecloses the Government's dual-meaning interpretation of Section 10(b).

In *Morrison*, the Supreme Court applied the presumption against extraterritoriality and concluded that Section 10(b) applies only to domestic securities transactions—that "it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies." 130 S. Ct. at 2884. After thoroughly examining the text and context of Section 10(b) specifically and of the Exchange Act generally, the Court

concluded that "there is no clear indication of extraterritoriality here." *Id.* at 2883; *see id.* at 2881-83. As a result, the Court concluded that Section 10(b)'s reference to "the purchase or sale" of securities referred only to *domestic* purchases and *domestic* sales. *See id.* at 2884; *Absolute Activist Value Master Fund Ltd.* v. *Ficeto*, 677 F.3d 60, 66-67 (2d Cir. 2012).

Nothing about this holding suggests that it was in any way limited to civil cases. In fact, *Morrison* makes the opposite quite clear. The Court emphasized that judges must "apply the presumption *in all cases*, preserving a stable background against which Congress can legislate with predictable effects." *Id.* at 2881 (emphasis added). The Court's opinion in no way suggests that the ordinary assumption that Congress "is primarily concerned with domestic conditions," *id.* at 2877 (quoting *Aramco*, 499 U.S. at 248), is restricted to statutes providing for civil remedies. Nor did the Court suggest that the "interference with foreign securities regulation that application of § 10(b) abroad would produce" was limited to civil cases. *Id.* at 2886.

Instead, just as it held that the presumption against extraterritoriality applies to "all cases," the *Morrison* Court made clear that it was rendering a definitive construction of Section 10(b)'s text—of the words "purchase or sale"—for *all* purposes. The Court explained that it was deciding "what conduct § 10(b) *reaches*," "what conduct § 10(b) *prohibits*," what conduct "Section 10(b) … *punishes*," and what were the "transactions … to which § 10(b) *applies*." *Id.* at 2877, 2887, 2884 (emphasis added); *accord Absolute Activist*, 677 F.3d at 66 (*Morrison* decided "whether § 10(b) applies to particular conduct").

Morrison flatly "reject[ed] the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad." 130 S. Ct. at 2885. With singular clarity, the Supreme Court decided exactly what Section 10(b) did not reach, did not prohibit, did not apply to, and thus did not punish: conduct in connection with "transactions conducted upon *foreign* exchanges and markets." *Id.* at 2882 (emphasis in original).

In holding that "Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with …' … transactions in securities listed on domestic exchanges, and domestic transactions in other securities," the Supreme Court thus addressed when and "where a putative *violation* occurs." *Id.* at 2884 & n.9 (emphasis added). *Morrison* accordingly limits the scope of the statute criminally here as well. For under Section 32(a) of the Exchange Act, the defendants here were charged with having "willfully violate[d] [a] provision" of the Act, namely Section 10(b), and a "rule … thereunder the violation of which is made unlawful or the observance of which is required under the terms of" the Act, namely Rule 10b-5. 15 U.S.C. § 78ff(a); *see* A88, 89, 99, 102. If there has been no underlying violation of Section 10(b) and Rule 10b-5 under *Morrison*, then no criminal liability may be imposed under Section 32(a).

B. The fact that private civil claims under Section 10(b) have additional elements that criminal violations do not have does not render *Morrison* inapplicable in criminal cases.

The fact that a violation of Section 10(b) is the same in a criminal case as it is in a civil case is not contradicted by the fact that the implied Rule 10b-5

private right of action has additional elements that are unique to it. At oral argument before this Court in *United States* v. *Vilar*, the Government invoked those elements in an attempt to justify its one-statute, two-meanings interpretation. The Government argued that

> insofar as there's a difference interpreting the same statutory language in the criminal context as opposed to [the] civil context, *we already do that. We do that with respect to reliance*, for example …. There's no such requirement in a criminal prosecution …. *Same thing with loss causation* ….[9]

This argument may be swiftly dispatched. Not only is it foreclosed by *Morrison*, but it also misconceives the relationship between the implied Rule 10b-5 right of action and the text of Section 10(b). "The § 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes." *Stoneridge Inv. Partners LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). As a result, "because the implied private cause of action under § 10(b) and Rule 10b-5 is a thing of our own creation, we have also defined its contours." *Morrison*, 130 S. Ct. at 2881 n.5. "It is only with respect to the additional 'elements of the 10b-5 private liability scheme'"—elements *not* established by the text of Section 10(b), which provided for no such scheme—that "we 'have had to infer how the 1934 Congress would have addressed the issue[s] had the 10b-5 ac-

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[9] Oral Argument at 1:21:00, *United States* v. *Vilar*, No. 10-521(L) (2d Cir. Aug. 21, 2012) ("*Vilar* Oral Arg.") (emphasis added).

tion been included as an express provision in the 1934 Act.'" *Id.* (quoting *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994) (citation and internal quotation marks omitted)).[10]

But as *Morrison* explained, the question of Section 10(b)'s territorial scope did *not* involve these "additional 'elements of the 10b-5 private liability scheme.'" *Id.* For the question of extraterritoriality "ask[s] what conduct § 10(b) reaches" and "what conduct § 10(b) prohibits." *Id.* at 2877. As for *those* questions—"when it comes to 'the scope of [the] conduct prohibited by [Rule 10b-5 and] § 10(b)'"—the Court in *Morrison* made clear that "'the text of the statute controls our decision.'" *Id.* at 2881 n.5 (quoting *Central Bank*, 511 U.S. at 173). That controlling text is the same whether a violation of the statute is pleaded in a civil complaint by a private plaintiff or charged in an indictment by a grand jury. And the authoritative interpretation of the geographic reach of that text was set forth by the Supreme Court—in *Morrison*.

C. *Morrison* rejected the Government's attempt in that case to preserve the extraterritorial applicability of Section 10(b) in criminal cases.

One additional aspect of *Morrison* forecloses the Government's argument here. Before the Supreme Court in *Morrison*, the Government unsuccessfully advocated the *same* result it urges here: that Section

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[10] *See*, *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 243 (1988) (reliance); *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 342-46 (2005) (loss causation).

10(b) should extend extraterritorially in cases brought by the Government, but not in cases brought by private parties.

Much as the Government does here and in *United States* v. *Vilar*, the Solicitor General in *Morrison* argued that Section 10(b) applied to "a transnational securities fraud," including "securities transactions that occur abroad" and "injure[] overseas investors."[11] The Solicitor General concluded that the *Morrison* complaint had "stated a violation of Section 10(b)," one that the Government or the SEC could have charged. Gov't *Morrison* Br. at 30-31. She nonetheless urged the Court to employ, in effect, a stricter territoriality standard applicable only to civil cases: she argued that the plaintiffs could not recover because the domestic "component of the alleged fraud … was not a direct cause of [their] alleged injury." *Id.* at 31.

In urging a more lenient standard for the Government, just as the Government has done in *Vilar*, the Solicitor General urged that it would be good public policy to allow the Government to prosecute frauds involving overseas transactions. *See* Gov't *Morrison* Br. at 16-17; *Vilar* Oral Arg. at 1:20:00.

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[11] Brief for the United States as *Amicus Curiae* Supporting Respondents at 14, 16, 17, *Morrison* (No. 08-1191), 2010 WL 719337 ("Gov't *Morrison* Br."); *accord* Gov't *Mandell* Bail Opp. ¶ 32 (10(b) applies "even if the transactions at issue were executed overseas"); Gov't *Vilar* Br. 100 ("even if the transactions … were executed overseas, that fact would not alter the illegality of the scheme under the U.S. securities laws").

And just as in *Vilar*, the Solicitor General argued that "enforcement actions," in contrast to private civil actions "are unlikely to produce conflict with foreign nations." Gov't *Morrison* Br. at 26; *see Vilar* Oral Arg. at 1:20:45.

The Supreme Court roundly rejected the Solicitor General's position. The Solicitor General failed to "provide any textual support for [her] test." *Morrison*, 130 S. Ct. at 2886. The Solicitor General "relied on cases we disapprove, which ignored or discarded the presumption against extraterritorality." *Id.* at 2887-88. As for the policy justifications, the Solicitor General provided "no textual support" for those as well, and ignored the fact that it is the courts' "function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve." *Id.* at 2886.

The Court did not directly address the Solicitor General's argument that enforcement actions are less likely to foment international conflict. But in "reject[ing] the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad," the Court cited the "obvious" "probability of incompatibility with the applicable laws of other countries." *Id.* at 2885. "[T]he regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, … and many other matters." *Id.* The Court clearly understood that, regardless of the means of enforcement, "application of § 10(b) abroad would produce" "interference with foreign securities regulation," and noted that "[t]he transactional test we have adopted" "will avoid that consequence." *Id.* at 2886.

D. Section 929P(b) of the Dodd-Frank Act reflects an understanding that *Morrison* applies to criminal cases.

Beyond this, in the proceedings below in this case, the Government attempted to draw support from Congress's post-*Morrison* enactment of Section 929P(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 929P(b), 124 Stat. 1376, 1864-66 (2010). Section 929P(b) amended the jurisdictional provision of the 1934 Act, Section 27, to provide that "[t]he district courts of the United States … shall have jurisdiction of an action or proceeding brought or instituted by the [SEC] or the United States alleging a violation of the antifraud provisions" involving significant conduct or effects in the United States. *Id.* § 929P(b)(2); *see* 15 U.S.C. § 78aa(b). The Government argued below that the legislative history of that provision reflects a "*pre-existing* intent to permit the Exchange Act to apply to criminal offenses involving significant conduct in the United States."[12]

This argument is meritless. To begin with, as the Government does not dispute, the Dodd-Frank Act by its terms does not apply retroactively. Pub. L. 111-203, § 4, 124 Stat. at 1390. And as many commentators have observed, there is grave doubt whether Section 929P(b) even has *any* practical *prospective* effect, because it amended only *jurisdictional* provisions of the securities laws, and *not* any *substantive* provisions, and thus addressed only the dis-

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[12] Gov't's Mem. of Law in Response to Def'ts' Pretrial Motions at 15, *United States* v. *Mandell*, No. 09-662 (S.D.N.Y. filed Feb. 4, 2011) (emphasis added).

trict courts' "power to hear a case" and not "what conduct [the law] prohibits." *Morrison*, 130 S. Ct. at 2877 (citation and internal quotation marks omitted).[13] More importantly, legislative history in *2010* can shed no light on what Congress meant in *1934*

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[13] *See*, *e.g.*, Richard W. Painter, *The Dodd-Frank Extraterritorial Jurisdiction Provision: Was It Effective, Needed or Sufficient?*, 1 HARV. BUS. L. REV. 195, 207-08 (2011); A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 142 (2011); Genevieve Beyea, Morrison *v.* National Australia Bank *and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 571 (2011); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 346-47 (2012); Milosz Morgut, *Extraterritorial Application of U.S. Securities Law*, 2012 EUR. BUS. L. REV. 547, 552-53; Wolf-Georg Ringe, *The International Dimension of Issuer Liability—Liability and Choice of Law from a Transatlantic Perspective*, 31 OXFORD J. LEG. STUD. 23, 41 (2011); Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison *v.* National Australia Bank, 92 B.U. L. REV. 535, 546 & n.74 (2012); Andrew Rocks, *Whoops! The Imminent Reconciliation of U.S. Securities Laws with International Comity after* Morrison v. National Australia Bank *and the Drafting Error in the Dodd-Frank Act*, 56 VILL. L. REV. 163, 188-95 (2011); Meny Elgadeh, Morrison *v.* National Australia Bank: *Life After Dodd-Frank*, 16 FORDHAM J. CORP. & FIN. 573, 593-96 (2011).

when the operative language of Section 10(b) was passed. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011).

And to the extent Section 929P(b)'s legislative history is relevant here, it undermines the Government's argument. In the Congressional Record passage cited by the Government below, a Member of Congress noted how, "applying a presumption against extraterritoriality," "the Supreme Court [in *Morrison*] held that section 10(b) of the Exchange Act applies only to transactions in securities listed on United States exchanges and transactions in other securities that occur in the United States." 156 CONG. REC. H5237 (daily ed. June 30, 2010) (statement of Rep. Kanjorski). That this legislator then argued that 929P(b) was "intended to rebut that presumption by clearly indicating that Congress intends extraterritorial application in cases brought by the SEC or the Justice Department," *id.*, shows that he recognized—correctly—that *Morrison* applies to criminal cases.

POINT III

STATUTES THAT PROVIDE FOR BOTH CIVIL REMEDIES AND CRIMINAL SANCTIONS CAN HAVE ONLY ONE AUTHORITATIVE MEANING THAT APPLIES IN ALL CASES.

Finally, and most fundamentally, the Government's assertion that *Morrison* does not apply to criminal charges brought under Section 10(b) contradicts a simple and commonsensical principle of

statutory interpretation: the text of a statute can have only one authoritative meaning. That principle controls even if, as the Government wrongly claims about the presumption against extraterritoriality, a particular canon of construction governs only some applications of a statute but not others. As the Supreme Court has explained: "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. *The lowest common denominator, as it were, must govern*." *Clark* v. *Martinez*, 543 U.S. 371, 380 (2005) (emphasis added).

This "lowest common denominator" principle—that a statute can only have one meaning—is nicely illustrated by cases applying the rule of lenity. Unlike the presumption against extraterritoriality, the age-old rule of lenity is a canon of construction that actually *does* distinguish between criminal statutes and civil ones. The rule holds, of course, that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,'" and "that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (citation omitted).

But even though the rule of lenity applies only to criminal *statutes*, its application is not confined to criminal *cases*. The Supreme Court has consistently applied the rule of lenity in *civil* cases involving the application of ambiguous statutes that have both

criminal and civil applications. *See*, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004); *United States* v. *Thomson/Center Arms Co.*, 504 U.S. 505, 518 & n.10 (1992) (plurality opinion of Souter, J.); *accord id.* at 519, 523 (Scalia, J., concurring in judgment); *Crandon* v. *United States*, 494 U.S. 152, 158, 168 (1990); *Comm'r* v. *Acker*, 361 U.S. 87, 91 (1959).

Why? "*Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context ….*" *Leocal*, 543 U.S. at 11-12 n.8 (emphasis added). "The rule of lenity … is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language. It is not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation." *Thomson/Center Arms*, 504 U.S. at 518-19 n.10 (plurality opinion of Souter, J.). When a statute provides for both civil remedies and criminal penalties, it is thus "inconceivable" for "the language defining [a] violation to be given one meaning (a narrow one) for the penal sanction and a different meaning (a more expansive one) for the private compensatory action." SCALIA & GARNER, at 297.

It would be equally inconceivable here (if not more so, given the rule of lenity) to give the language defining a Section 10(b) violation a narrow meaning for a private compensatory action and a more expansive meaning for a penal sanction. Because presumptions are employed "to help give authoritative meaning to statutory language," *Thomson/Center Arms*, 504 U.S. at 518-19 n.10 (plurality opinion), and "[b]ecause we must interpret the statute consistent-

ly, whether we encounter its application in a criminal or noncriminal context …," *Leocal*, 543 U.S. at 11-12 n.8, the presumption against extraterritoriality must be applied here. Even in criminal Section 10(b) cases, "[t]he lowest common denominator, as it were, must govern," *Clark*, 543 U.S. at 380, and as far as the territorial scope of Section 10(b) is concerned, that lowest common denominator is *Morrison*. The Government's attempt here to turn the presumption against extraterritoriality into a reverse rule of lenity must fail.

CONCLUSION

This Court should reaffirm its prior holdings that the presumption against extraterritoriality applies to criminal statutes, and it should hold that *Morrison* applies to criminal Section 10(b) cases. To the extent the judgments of conviction in this case involve the application of Section 10(b) to extraterritorial transactions, those judgments should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,999 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

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