No. 24-336

IN THE
Supreme Court of the United States

BINANCE and CHANGPENG ZHAO,

PETITIONERS,

— v.—

JD ANDERSON, CORY HARDIN, ERIC LEE, BRETT MESSIEH, DAVID MUHAMMAD, RANJITH THIAGARAJAN, CHASE WILLIAMS, and TOKEN FUND I LLC individually and on behalf of all others similarly situated,

RESPONDENTS.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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Plaintiffs do not dispute that in analyzing whether the transactions at issue in this action qualify as domestic transactions under *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), the Second Circuit considered a variety of factors that do not directly relate to the location where the transactions occurred.[1] Indeed, Plaintiffs concede (as they must) that the Second Circuit's holding of domesticity relied on the policy-based conclusion that this lawsuit "does not implicate international comity concerns," Plaintiffs' Opposition ("Opp.") at 15, and on other considerations such as (1) Plaintiffs' locations and other pre-transaction conduct, *id.* at 17–18, and (2) the (flawed) theory that irrevocable liability for a single transaction can attach at multiple places and times, *id.* at 19–20.

In light of Plaintiffs' *own* reading of the decision below (much of which Plaintiffs seek to downplay by claiming certain portions can be ignored), this much is clear: The Second Circuit abandoned the bright-line rules required by *Morrison* and applied a multi-factor test that undermines it. Nonetheless, Plaintiffs oppose the Petition ("Pet.") by asserting that Petitioners merely seek case-specific error correction concerning the Second Circuit's application of *Morrison* and the *Iqbal* pleading standard.

Contrary to Plaintiffs' arguments, Petitioners do not merely contend that the Second Circuit "misapplied" *Morrison*. Opp. 10. Rather, the Second Circuit created

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[1] Terms capitalized in this submission have the same meaning as defined in the Petition for a Writ of Certiorari, No. 24-336 (Sept. 23, 2024).

a new legal standard that turns *Morrison* on its head. The Second Circuit's gymnastics are tantamount to a revival of the conduct and effects test that *Morrison* explicitly rejected. The ruling weakens *Morrison*'s protections against the extraterritorial application of U.S. law, transforming this Court's holding into a "muzzled Chihuahua." *Abitron Austria GmbH* v. *Hetronic Int'l, Inc.*, 600 U.S. 412, 426 (2023).

This misguided decision is likely to have a significant negative impact, moreover, as the Second Circuit is the leading court in interpreting U.S. securities laws. Certiorari is appropriate to reclaim the boundaries demanded by *Morrison* and provide bright-line rules to the ascendant cryptocurrency industry, which is globally focused and surging in prevalence, as well as traditional markets which operate in an increasingly borderless world. Furthermore, this case, which is at the motion-to-dismiss stage and where the extraterritoriality issue is outcome-determinative, presents a strong vehicle for the Court's review.

I. The Second Circuit's Decision Conflicts With *Morrison*

As Petitioners explained (Pet. 13–24), the Second Circuit's analysis directly conflicts with *Morrison* because it rejects its bright lines and instead creates a new multi-factor test focused on (1) policy considerations, like the purported absence of comity concerns and foreign regulatory oversight of Petitioners and (2) ancillary transaction factors, like the U.S. residency of the Plaintiffs and other pre-transaction conduct. In other words, the test applied by the Second Circuit effectively revives the uncertain balancing approach *Morrison* explicitly rejected.

When evaluating transactions on an exchange under *Morrison*, "the place of matching buy/sell orders is the location where buyers and sellers incur irrevocable liability and thus, of the transaction." Pet. 19; *accord* Opp. 1. The Second Circuit did not apply this well-established rule for determining the domesticity of alleged securities transactions. Instead, the Second Circuit inappropriately focused on whatever domestic touchpoints it could find in the Complaint, including the U.S. residency of the Plaintiffs and the location of servers allegedly used to host the Binance.com website (as opposed to the servers on which the trades occurred). *See* Pet. 16–20.

This analysis is not a mere "misapplication" of the *Morrison* standard (*cf.* Opp. 10); it is a complete repudiation that in practical effect revives the Circuit's pre-*Morrison* conduct and effects paradigm.

A. The Second Circuit's Focus On The Purported Absence Of Foreign Regulation Or Comity Concerns Infected Its Analysis

As Petitioners explained (Pet. 13–16), the Second Circuit replaced the analysis required by *Morrison* with a multi-factor test that considers, *inter alia*, whether and how comity concerns are implicated. This resulted in the Second Circuit relying heavily (and improperly) on Plaintiffs' allegations regarding the absence of foreign regulation applicable to BHL to find that the comity concerns animating *Morrison* were not implicated. *See, e.g.*, Pet. App'x 17a–18a.

Importantly, Plaintiffs do not dispute that these policy considerations influenced the Second Circuit's decision. Rather, Plaintiffs freely admit that such policy concerns were an essential component of the

Second Circuit's analysis. *See* Opp. 8, 14, 19 ("The Second Circuit emphasized the limited, fact-specific basis of its ruling, concluding that '[w]hile it may not always be appropriate to determine where matching occurred solely based on the location of the servers the exchange runs on, it is appropriate to do so here given that Binance has not registered in any country, purports to have no physical or official location whatsoever, and the authorities in Malta, where its nominal headquarters are located, disclaim responsibility for regulating Binance.'" (citing Pet. App'x 15a–16a)). Indeed, the Opposition is littered with references to what Plaintiffs view as "unusual" aspects of BHL's operations, which Plaintiffs assert justify a "bespoke" version of *Morrison*. Opp. 3; *see also id.* at 14 (noting that the Second Circuit's conclusions were based on "the unusual factual circumstance of an exchange that 'has not registered in any country [and] purports to have no physical or official location whatsoever'" (citing Pet. App'x 16a)); *id.* at 23 ("As the Second Circuit observed, the *Morrison* analysis in this case turns on its highly unusual facts.").

But this type of defendant-specific judicial policymaking is exactly the type of freewheeling and unpredictable analysis that *Morrison* guards against. *Morrison*, 561 U.S. at 261 ("The results of judicial-speculation-made-law . . . demonstrate the wisdom of the presumption against extraterritoriality. Rather than guess anew in each case, we apply the presumption in all cases, preserving a stable

background against which Congress can legislate with predictable effects.").

By requiring case-by-case determinations of whether a foreign regulator has asserted jurisdiction over the defendant, whether the lawsuit creates comity concerns, and whether application of U.S. securities laws is consistent with congressional intent, the Second Circuit's new policy-based analysis undermines *Morrison*. *See* Pet. 15–16. *Morrison* demands a neutral test that focuses on the location of *transactions*, *Morrison*, 561 U.S. at 267, and whether they "occurred in United States territory," *Abitron*, 600 U.S. at 418. If the transactions occurred outside the U.S., it is for other countries to decide how—and whether—to regulate them. Pet. 14–16.

B. The Second Circuit's Decision Cannot Be Saved By Ignoring Much Of Its Analysis

The Second Circuit's decision also undermines *Morrison* by improperly considering several pre-transaction acts that are irrelevant to the location of the alleged securities transactions, including Plaintiffs' U.S. residences—where they allegedly entered orders, made payments, and entered into Binance's Terms of Use. As Petitioners explained (Pet. 16–19), the location of one party's residence or trading machinery, the submission of payment from the U.S., and where users agreed to a website operator's terms of use do not determine where two parties transacting over an online exchange became irrevocably committed to transact with one another. And case law in other circuits readily confirms this understanding. *See, e.g.*, *United States* v. *Georgiou*, 777 F.3d 125, 136 n.14 (3d Cir. 2015); *see also Stoyas* v. *Toshiba Corp.*,

896 F.3d 933, 949 (9th Cir. 2018) (allegations that securities were purchased and sold in the United States were devoid of "specific factual allegations regarding where the parties to the transaction incurred irrevocable liability").

The Second Circuit's analysis was not simply a "fact-specific application of longstanding appellate precedent" (Opp. 17–18 (citing cases)). Indeed, the irrevocable liability inquiry in each of the decisions cited by Plaintiffs turned on facts relevant to the location of the *specific transaction(s)* at issue, not "other factors" relating to traders' locations, or the policy concerns the Second Circuit weighed here. Pet. App'x 18a.

Plaintiffs also attempt to rescue the Second Circuit's flawed analysis by dividing the test applied by the Second Circuit into two separate analyses—one that purportedly applies *Morrison* and one that Plaintiffs say can be ignored (tacitly admitting that the Second Circuit's opinion is inconsistent with *Morrison*). *See* Opp. 2, 17. Specifically, Plaintiffs argue that the Second Circuit's finding of domesticity based on the locations in which Plaintiffs "entered into the Terms of Use with Binance, placed their purchase orders, and sent payments from the United States" (Pet. App'x 17a) was "unnecessary to the Second Circuit's decision" (Opp. 17). But this both misreads the opinion and misses why it will have a harmful precedential impact on future cases.

It is clear that the entirety of the Second Circuit's opinion applies the same multi-factor test, which includes factors such as "(1) whether and to what extent comity concerns are implicated by the particular suit; (2) the residency of investors and pre-

transaction conduct; and (3) the location of servers used in hosting the website on which the transaction is conducted." *See* Pet. 13. The first factor is woven into the entirety of the Second Circuit's opinion. *See, e.g.*, Pet. App'x 16a–17a ("*[S]ince Binance notoriously denies the applicability of any other country's securities regulation regime, and no other sovereign appears to believe that Binance's exchange is within its jurisdiction*, the application of United States securities law here does not risk incompatibility with the applicable laws of other countries" (citations and quotations omitted; emphasis added)); *id.* at 17a ("*Because Binance disclaims having any location*, Plaintiffs have plausibly alleged that irrevocable liability attached when they entered into the Terms of Use with Binance, placed their purchase orders, and sent payments from the United States." (emphasis added)). Indeed, the Second Circuit confirmed that its decision did not consist of severable analyses when it referred to its discussion of Plaintiffs' U.S. residency and other factors as "a second, *interrelated* reason" for its decision to reverse the district court. Pet. App'x 17a (emphasis added).

This portion of the Second Circuit's analysis should not and cannot be ignored, as "it is not only the result but also those portions of the opinion necessary to that result" which constitute binding authority. *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 67 (1996). Thus, absent intervention, the flawed reasoning of the decision below will remain binding authority for litigants in the Second Circuit—the "'Mother Court' of securities law" (Pet. 27)—and persuasive authority for litigants elsewhere, severely weakening *Morrison*. *See infra* 11–12.

C. The Second Circuit Erred In Holding That Irrevocable Liability Can Attach At Multiple Times

The errors in the Second Circuit's analysis are also visible in the court's holding that parties to a single transaction may incur irrevocable liability at multiple points in time and at multiple places. Logically, this makes little sense. Once parties are bound to a transaction, there cannot be a later point at which they become "more bound." *See* Pet. 22–24. The Second Circuit's conclusion to the contrary strongly suggests its extraterritoriality analysis is inconsistent with "the measure of certainty that the presumption against extraterritoriality is designed to provide." *Abitron*, 600 U.S. at 425.

In a tacit admission of the Second Circuit's errors, Plaintiffs again argue that this Court can simply ignore certain aspects of the opinion as "unnecessary to the outcome below." Opp. 19. But for the reasons stated above (*supra* Section I.B), this Court should not ignore the analysis leading to the Second Circuit's new multi-factor test.

Plaintiffs also argue that "the place where irrevocable liability attaches 'may be more than one location' because buyers and sellers need not be in the same place when they transact." Opp. 20. Whatever the merits of this argument, it does not address a core problem with the Second Circuit's analysis: Liability cannot become "irrevocable" more than once. As Petitioners explained (Pet. 22), encouraging courts to examine transactions in this way—especially based on a test that turns on policy considerations—would

effectively create a balancing test and push U.S. law into places it does not belong under *Morrison*.

D. The Second Circuit's Free-Ranging Analysis Resulted In An Overly Generous View Of The Pleading Standard That Will Undermine *Morrison*

The Second Circuit's policy considerations also led it to adopt an overly generous pleading standard, under which the court accepted that Plaintiffs' buy/sell orders were matched in the U.S. despite Plaintiffs' failure to plead *any* facts regarding the location of the servers on which the transactions were matched. Pet. 19–21.

Although Petitioners agree with Plaintiffs that (1) "matching occurred on the Binance exchange," and (2) "the location of Binance's servers may be relevant to determining where matching occurs on the Binance platform" (Opp. 2), this does not establish that the Second Circuit's opinion applied the correct test or that the Plaintiffs pleaded domestic transactions subject to the U.S. securities laws under *Morrison*. Indeed, Plaintiffs do not allege that Petitioners operated a domestic exchange or that transactions matched on the Binance.com platform were matched in the United States, as they must to plead domestic transactions. Pet. 19–22. Despite the absence of such allegations, the Second Circuit credited threadbare allegations regarding the location of BHL's *website* and *data-hosting* servers to find that BHL's *matching* servers were located in the United States. Pet. 20.

Contrary to Plaintiffs' assertions (Opp. 13), this goes beyond a mere case-specific misapplication of *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). Rather, and as explained in Section I.A, *supra,* the Second Circuit's strained

efforts to find a plausible inference of domestic transactions stem directly from its disregard of *Morrison* and its belief that foreign regulators are not up to the task of regulating foreign exchanges. With respect to BHL, the Second Circuit reasoned that "Binance notoriously denies the applicability of any other country's securities regulation regime, and no other sovereign appears to believe that Binance's exchange is within its jurisdiction." Pet. App'x 17a. The Second Circuit thus credited Plaintiffs' threadbare allegations *because* it found that the comity concerns underlying *Morrison* do not apply in this case, not because it simply read those allegations differently than the district court. Indeed, the Second Circuit admitted that its conclusion "might be different were [it] faced with plaintiffs seeking to apply United States securities laws based on the happenstance that a transaction was initially processed through servers located in the United States . . . . [because] that situation would squarely implicate the comity concerns that animated *Morrison*." *Id.* at 16a–17a.

The Second Circuit's overly generous pleading standard (applied only because of its (erroneous) view that foreign regulators lacked authority over BHL) further undermines *Morrison* and will inevitably drag foreign defendants engaged in foreign transactions into U.S. courts without any concrete allegations that they engaged in domestic transactions. Certiorari is necessary to correct this significant weakening of *Morrison*.

II. This Court's Review Is Critical Given The Growing International Market For Digital Assets And The Importance Of Online Transactions To International Financial Markets Generally

Plaintiffs insist that this Court's review is premature given "lower courts' developing approach to applying *Morrison* to crypto-asset exchanges," Opp. 23, and ask the Court to allow the issue to "percolate[] further," *id.* at 24. That is exactly backwards. The emerging digital-assets market involves trillions of dollars in assets and burgeoning global efforts by foreign regulators to decide how (and whether) to regulate the industry in their respective countries. Pet. 27–29; *Crypto Market Cap*, CoinMarketCap, https://tinyurl.com/9zjwu45d (last visited Dec. 9, 2024). This Court's delay would risk significant intrusion into these efforts. The Court should step in now, before it is too late to prevent the foreign-policy problems created by the decision below from taking hold.

Further, when it comes to the securities laws, the Second Circuit is no ordinary court. In *Morrison*, this Court explained that the D.C. Circuit had deferred to the Second Circuit "'because of its 'preeminence in the field of securities law.'" 561 U.S. at 260 (quoting *Zoelsch* v. *Arthur Anderson & Co.*, 824 F.2d 27, 32 (D.C. Cir. 1987)); *see also* Pet. 26–27.

Finally, more is at stake here than just the (immense) consequences for international digital-asset markets—the Second Circuit's holding applies to other kinds of transactions, too. And under the Second Circuit's facts-and-circumstances approach to *Morrison*, virtually *any* foreign transaction involving a

U.S.-based investor could be subject to U.S. securities laws. Any plaintiff's attorney worth her salt will be able to get past a motion to dismiss simply by alleging "on information and belief" that the foreign defendant's third-party computer servers are based in the U.S., that U.S.-based investors made purchase orders on the defendant's website, and that foreign authorities are not up to the task of regulating the market. This Court should grant this Petition because that outcome is plainly contrary to *Morrison* and will cause precisely the unwarranted intrusion of U.S. courts into foreign markets that *Morrison* sought to prevent. *See supra* Section I.A.

III. This Case Is A Strong Vehicle For This Court's Review

This case is also a strong vehicle. Pet. 29. Plaintiffs point to BHL's pending "motion to compel arbitration in the district court" and suggest that proceedings in this Court could become moot if the district court grants the motion. Opp. 26. But lower courts routinely stay proceedings once a petition for a writ of certiorari has been granted by this Court on an issue that could affect the outcome of the litigation—even when, unlike here, the petition is granted in a different case. *E.g.*, *Aleisa* v. *Square, Inc.*, 493 F. Supp. 3d 806, 817 (N.D. Cal. 2020); *United States* v. *Weems*, 2010 WL 11549118, at *2 (E.D. Wash. Dec. 21, 2010); *Powers* v. *Verizon Wireless Services, LLC*, 2010 WL 11575014, at *2 (D.N.J. Oct. 15, 2010).

Nor do Plaintiffs dispute all the reasons that this case would otherwise be a clean vehicle for this Court's review—namely, this Petition comes at the motion-to-dismiss stage, and the Second Circuit's application of *Morrison* was outcome-determinative. *See* Pet. 29.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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