No. 15-1490

In the Supreme Court of the United States

ROBERT ALLEN STANFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an order in a Securities and Exchange Commission (SEC) civil case freezing assets tainted by criminal fraud violated petitioner's Sixth Amendment right to counsel of choice in a separate criminal proceeding.

2. Whether the contention that the SEC's civil case should have been dismissed as an impermissible extraterritorial application of federal law provides a basis for reversing the judgment in a separate criminal proceeding in which the government presented some evidence obtained from a receiver appointed in the civil case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 805 F.3d 557.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2015. A petition for rehearing was denied on January 8, 2016 (Pet. App. 33-34). On March 2, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 6, 2016, and the petition was filed on June 1, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on four counts of wire fraud, in violation of 18 U.S.C. 1343; five counts of mail fraud, in viola-

tion of 18 U.S.C. 1341; mail- and wire-fraud conspiracy, in violation of 18 U.S.C. 1349; obstruction of a Securities and Exchange Commission (SEC) investigation, in violation of 18 U.S.C. 1505; conspiracy to obstruct an SEC investigation, in violation of 18 U.S.C. 1505 and 371; and money-laundering conspiracy, in violation of 18 U.S.C. 1956(h). Judgment 1-2. The district court sentenced petitioner to 110 years of imprisonment, to be followed by three years of supervised release, and imposed a $5.9 billion forfeiture in the form of a personal money judgment. *Id.* at 3-4, 7; see 09-CR-342 Docket entry (Criminal Docket) No. 862 (June 1, 2012). The court of appeals affirmed. Pet. App. 1-22.

1. In 1985, petitioner opened Guardian International Bank (Guardian) on the island of Montserrat in the Caribbean. Pet. App. 2; see Presentence Investigation Report (PSR) ¶ 9. That enterprise was a massive fraud: petitioner induced investors to purchase certificates of deposit (CDs) by means of false representations, including invented profit numbers, while diverting the investors' money for his own personal purposes. See Pet. App. 3-4; Gov't C.A. Br. 8-12 (citing record evidence).

In 1990, Montserrat stated its intent to revoke Guardian's banking license because of the bank's use of an unapproved auditor and its lack of reporting and transparency. See Pet. App. 2-3; Gov't C.A. Br. 12. The imminent revocation spurred petitioner to move the bank to another island—but he falsely told depositors and employees, citing a nonexistent board of directors meeting, that a 1989 hurricane was the reason for the move. See Gov't C.A. Br. 13.

In 1990, petitioner opened Stanford International Bank, Ltd. (SIB) in the Caribbean nation of Antigua,

once again offering CDs for sale and claiming that they would yield higher rates of return than investors could obtain in the United States. See Pet. App. 3. Petitioner simultaneously founded the Stanford Group Company (SGC) in Texas as a registered securities broker-dealer to market SIB CDs. *Ibid.*

Petitioner's new ventures established an enormous Ponzi scheme, using methods and fraudulent conduct that he had previously carried out through Guardian. See Pet. App. 4 & n.1; PSR ¶ 87; see generally *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1064-1065 (2014). For instance, while SGC represented in its marketing materials that the SIB CDs were invested in "secure, conservative" ways, in fact most of the money went to finance petitioner's "personal business ventures and opulent lifestyle." Pet. App. 4; see *id.* at 3 (discussing petitioner's "lavish[]" spending on "boats, mansions, * * * personal aircraft," and "high-dollar cricket tournaments"). Similarly, while SIB represented that it was a stable and profitable company that was subject to independent audits, in reality SIB's financial statements were fabricated "to show fake profit numbers to investors" and petitioner was bribing both the company's auditor and Antiguan regulators. *Id.* at 4; see PSR ¶ 23.

By 2008, petitioner "was bilking approximately $1 million a day from investors to finance his personal endeavors while simultaneously providing false assurances regarding the strength and solvency of the organization." Pet. App. 4. The scheme imploded when investors seeking to liquidate their investments in late 2008 and early 2009 were unable to recoup their money. *Id.* at 4-5.

2. In February 2009, the SEC filed a complaint in the Northern District of Texas against petitioner, SIB, SGC, and several other executives and related companies. See 09-CV-298 Docket entry (Civil Docket) No. 1 (Feb. 17, 2009). The complaint alleged violations of Section 17(a) of the Securities Act of 1933, Section 206(1) and (2) of the Investment Advisers Act of 1940 (Advisers Act), Section 7(d) of the Investment Company Act of 1940, and Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 implementing that provision. Civil Docket No. 1; see Civil Docket No. 48 (Feb. 27, 2009) (amended complaint).

Shortly after the complaint was filed, the district court appointed a receiver to oversee the corporate defendants and entered a temporary restraining order enjoining further fraud and freezing the defendants' assets. See Civil Docket No. 8, at 5-7 (Feb. 17, 2009); Civil Docket No. 10 (Feb. 17, 2009); see also Civil Docket Nos. 7, 12 (Feb. 17, 2009) (evidence submitted by SEC in support of request for temporary restraining order). In March 2009, after a hearing, the court converted the temporary restraining order into a preliminary injunction, finding that petitioner had "engaged in fraudulent conduct" that included "misappropriating investor funds[] and making material misrepresentations and omissions" and that petitioner's assets were "in imminent jeopardy of dissipation or loss." Civil Docket No. 159, at 3 (Mar. 12, 2009); see, *e.g.*, *id.* at 4-5 (finding that petitioner made "materially false and misleading" representations about SIB's finances and returns, that SIB's financial statements were "fictional," and that petitioner used "significant portions of the bank's portfolio * * * to acquire private equity and real estate" for his own purposes); *id.*

at 6 (finding that petitioner "violated this [c]ourt's order requiring him to provide information regarding his assets" and to "repatriate any assets located abroad"). Both the temporary restraining order and the preliminary injunction mandated that petitioner account for his assets. See *id.* at 9-10; Civil Docket No. 8, at 6-7.

On April 19, 2009, petitioner asked the district court to release $10 million of the frozen assets for purposes of retaining counsel in the civil case. See Civil Docket No. 319, at 9-10. In July 2009, the court denied the motion because petitioner had not complied with the requirement to account for his assets and because it found that petitioner had "not shown that he has $10 million dollars, or any lesser amount, in personal assets untainted by potential fraud." Civil Docket No. 544, at 1 (July 1, 2009). The court offered to "entertain an amended and modest application for attorneys' and/or accountants' fees for the limited purpose" of assessing whether any untainted assets existed. *Id.* at 1-2.

Petitioner did not respond with such an application —even though the indictment in this case was returned shortly before the district court issued its decision on the asset-release motion. See Pet. App. 5. Instead, petitioner attempted to obtain coverage for his defense fees under a $5 million Lloyd's of London Directors and Officers Liability and Company Indemnity Policy (D&O policy), which the receiver regarded as an asset of the receivership because it encompassed various Stanford corporate entities that were subject to civil suits. See Civil Docket No. 599, at 2 n.3, 3-4 (July 16, 2009). The court in the SEC case ruled that "its prior orders do not bar Lloyd's from disbursing

policy proceeds to fund directors' and officers' defense costs in accordance with the D&O policies' terms and conditions." Civil Docket No. 831, at 8 (Oct. 9, 2009). But petitioner (and other executives) litigated in a separate civil case in the Southern District of Texas a dispute about whether they were eligible for coverage under that policy. See *Pendergest-Holt* v. *Certain Underwriters at Lloyd's of London*, 600 F.3d 562, 565-568 (5th Cir. 2010) (chronicling some of the history of the D&O policy litigation). In that separate civil case, the district court found after a multi-day hearing that petitioner and other executives had engaged in "money laundering" as defined by the policy and therefore were not entitled to reimbursement for their defense fees. *Pendergest-Holt* v. *Certain Underwriters at Lloyd's of London*, 751 F. Supp. 2d 876, 897-900 (S.D. Tex. 2010).

In December 2010, following his loss in the insurance coverage litigation, petitioner made another attempt to access the assets that were frozen in the SEC case. He filed a motion in that case asking the district court to order the receiver to make an accounting of any untainted assets and to set aside $20 million in such assets for petitioner's defense in both the civil and criminal cases. See Civil Docket No. 1198-1, at 2, 7-15, 17 (Dec. 20, 2010). That motion alluded to petitioner's Sixth Amendment right to counsel in the criminal case. *Id.* at 14-15; see Civil Docket No. 1338, at 2-3 (May 11, 2011) (asking for funds for forensic accounting investigation). Construing the motion as a request for modification of the preliminary injunction, the court held a hearing at which counsel representing petitioner called two witnesses and put on evidence in an attempt to show that untainted funds

existed. See Civil Docket No. 1699 (Sept. 11, 2012) (transcript of hearing held Jan. 20, 2012).

At the conclusion of that hearing, the district court found that "[t]he overwhelming evidence in this proceeding is the Receivership contains no funds that were not tainted by the Ponzi scheme." Civil Docket No. 1699, at 90; see *id.* at 88 ("the evidence is simply overwhelming that the Receiver does not have in the Receivership estate even a nickel that wasn't effectively stolen from the Stanford investors"); *ibid.* ("[T]here's not any money there that is properly Mr. Stanford's. It was all stolen."); *id.* at 88-89 ("the Stanford investors would quite rightly be outraged that Mr. Stanford was able to steal money from them and then use their stolen money to try and stay out of jail"). Although the court did not "quarrel with" petitioner's "right for counsel and his need for funding for an effective defense," the court held that petitioner had no "right to fund those expenses with money that he stole from investors." *Id.* at 88; see *ibid.* (court's ruling is "clear answer * * * under essentially any evidentiary standard"); *id.* at 89-90 (court would reach the same result if considering the issue on a blank slate with the burden of proof resting on the receiver). The court therefore denied the request for funds. See Civil Docket No. 1526 (Jan. 20, 2012).

3. On June 18, 2009, a federal grand jury charged petitioner in the instant criminal case with mail and wire fraud; conspiracy to commit mail, wire, and securities fraud; obstruction of and conspiracy to obstruct an SEC proceeding; and conspiracy to launder money. See Pet. App. 5; see also *ibid.* (superseding indictment filed in May 2011).

The following month, petitioner asked the district court in this case to force the government to release money in the SEC case to pay for his criminal counsel. See Criminal Docket No. 58 (July 6, 2009). The government responded that the court in the SEC case had "already ruled that the remaining assets of the estate are tainted funds that can not be taken from the investors to be used for [petitioner's] defense" and that the court in the civil case was the proper forum for seeking release of any funds. Criminal Docket No. 83, at 1 (July 28, 2009); see *id.* at 8-9. The district court did not grant the motion.

In mid-2009, Michael Sydow moved to appear as counsel for petitioner "for the limited purpose of resolving whether [petitioner] will be granted access to monies to pay for his legal fees and expenses." Criminal Docket No. 89, at 1 (Aug. 4, 2009). The district court denied his appearance because the asset freeze and the availability of coverage under the D&O policy were already being litigated in separate actions. See Pet. App. 18; see also *Pendergest-Holt*, 600 F.3d at 576.

In September 2009, petitioner obtained other counsel to represent him. See Criminal Docket Nos. 122, 126, 131, 145, 147; see also, *e.g.*, Pet. App. 11 (petitioner "was represented by an extensive legal team throughout the two-and-one-half year period preceding the trial"); Criminal Docket Nos. 355, 358, 359, 360, 619; Civil Docket No. 1699, at 69-79 (petitioner was represented in the criminal case by four attorneys, several paralegals, two expert firms, and an investigation firm). He did not seek additional relief from the district court on the ground that he had been denied his coun-

sel of choice. See, *e.g.*, Criminal Docket No. 829 (Mar. 20, 2012) (motion for new trial raising other claims).

Following a multi-week trial, the jury convicted petitioner on 13 of 14 counts. See Pet. App. 5. The jury also determined that billions of dollars held in various accounts were the proceeds of petitioner's fraud and were therefore forfeitable to the United States. See Criminal Docket No. 862.

4. The court of appeals affirmed. See Pet. App. 1-22. Petitioner raised numerous issues on appeal, only two of which are relevant here. First, the court rejected petitioner's argument that the district court lacked jurisdiction over this criminal case because the SEC allegedly lacked jurisdiction over SIB in Antigua. The court of appeals explained that the district court had jurisdiction over petitioner "personally for the various federal criminal offenses with which he was charged" because 18 U.S.C. 3231 vests district courts with jurisdiction over all federal criminal offenses. Pet. App. 6; see *id.* at 5 ("It is unnecessary to determine whether the SEC had regulatory authority over SIB, as neither the SEC nor SIB are parties to this criminal case.").

Second, the court of appeals rejected petitioner's argument that he was denied counsel of choice when the district court refused permission for Michael Sydow "to appear in the criminal case for the limited purpose of resolving whether [petitioner] will be granted access to monies to pay for his legal fees and expenses" and when "a separate attorney, Stephen Cochell * * * , was denied in-person access to [petitioner] at the detention center" where he was being held. Pet. App. 18 (internal quotation marks omitted). As to Sydow, the court of appeals stated that the denial of the

limited appearance was not an abuse of discretion because "the same issue was already being litigated in a different forum." *Ibid.* As to Cochell, the court explained that precluding him from in-person access to petitioner was not an abuse of discretion because "Cochell was representing [petitioner] in a civil case" and "was not part of the criminal defense team." *Ibid.*

5. After petitioner was convicted in the criminal case, the district court in the civil case granted summary judgment to the SEC. See Civil Docket No. 1858 (Apr. 25, 2013). Petitioner made various motions seeking to reverse the summary judgment order and filed a notice of appeal when those motions were denied, but the appeal was ultimately dismissed for want of prosecution. See Civil Docket No. 2112 (Jan. 26, 2015); *SEC* v. *Stanford*, No. 15-10066 (5th Cir. June 22, 2015) (Order).

ARGUMENT

Petitioner contends (Pet. 15-22) that the asset freeze imposed in the SEC's civil case against him violated his Sixth Amendment right to counsel of choice. He also contends (Pet. 23-28) that his conviction in the instant case is flawed because the prosecution relied on some evidence obtained from the receiver appointed in the civil case and, in his view, that case involved claims that should have been dismissed as involving an impermissibly extraterritorial application of the securities laws. Those contentions were not presented to or passed on by the court of appeals, and they lack merit. In addition, the decision below does not conflict with any decision of this Court or of any court of appeals. Most notably, this case does not implicate the holding in *Luis* v. *United States*, 136 S. Ct. 1083 (2016), barring pretrial restraint of "untainted" assets,

because the district court in the SEC case found as fact that all of the frozen assets were tainted by petitioner's extensive fraud. Accordingly, neither review by this Court nor further consideration by the court of appeals in light of *Luis* is warranted.

1. Petitioner asks (Pet. 15-22) that the Court grant, vacate, and remand in light of the decision in *Luis* or, alternatively, that the Court grant plenary review to address whether the asset freeze in the civil case was consistent with the Sixth Amendment. Petitioners' requests should be denied.

a. In *Luis*, this Court held that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice" in a criminal case "violates the Sixth Amendment." 136 S. Ct. at 1088 (opinion of Breyer, J.); *id.* at 1096 (Thomas, J., concurring in the judgment) (agreeing with the plurality on its conclusion, but rejecting its "balancing approach"). The plurality carefully distinguished between pretrial restraint of tainted assets and pretrial restraint of assets that are not obtained as a result of, involved in, or ultimately traceable to a crime. See *id.* at 1087, 1090-1093; see also *id.* at 1095 (discussing "tracing" methods that can determine whether "an asset * * * is traceable to or the product of tainted funds") (citation and internal quotation marks omitted). Restraints involving tainted assets were held constitutional in *United States* v. *Monsanto*, 491 U.S. 600 (1989), and—contrary to petitioner's assertion (Pet. 17)—*Luis* did not disturb that holding. See *Luis*, 136 S. Ct. at 1091-1092 (opinion of Breyer, J.) (discussing *Monsanto*). The plurality found only "a Sixth Amendment right to use [a defendant's] own 'innocent' property to pay a reasonable fee for the assistance of counsel." *Id.* at 1096; see

id. at 1091 (describing the distinction as "the difference between what is yours and what is mine"); *id.* at 1097 (Thomas, J., concurring in the judgment).

b. i. Because *Luis* applies only to cases involving untainted assets, it does not cast any doubt on the asset freeze that petitioner challenges. The district court in petitioner's civil case found that all of the assets that it restrained were tainted by fraud. See Civil Docket No. 1699, at 88-90 (finding that frozen assets did not include "even a nickel that wasn't effectively stolen from the Stanford investors" and that "[t]he overwhelming evidence in this proceeding is the Receivership contains no funds that were not tainted by the Ponzi scheme"); see also Civil Docket No. 544, at 1; Civil Docket No. 159, at 3. That finding was made based on the preponderance of the evidence after an evidentiary hearing that afforded petitioner all of the process to which he was constitutionally entitled. See Civil Docket 1699, at 89-90; see also *Kaley* v. *United States*, 134 S. Ct. 1090, 1095 (2014) (explaining that the Constitution permits a pretrial asset restraint on a finding of probable cause); *Monsanto*, 491 U.S. at 615 (same); *United States* v. *Farmer*, 274 F.3d 800, 803-806 (4th Cir. 2001) (requiring defendant to account for his assets and show that he has no available assets to use to hire counsel before being permitted a hearing on whether certain assets are untainted); *United States* v. *Jones*, 160 F.3d 641, 648-649 (10th Cir. 1998) (same).

Petitioner asserts (Pet. 9, 16-17), without any citation to evidence, that the finding of "taint" was erroneous with respect to at least some of the assets. But those assertions are simply attempts to reargue fact-bound contentions that petitioner advanced in the se-

parate civil case, which the district court in that case correctly rejected. And petitioner has not attempted to make any factual record in the instant case that his restrained assets were unrelated to the criminal fraud he perpetrated on investors through the Ponzi scheme that he called SIB.[1]

ii. Even if *Luis* were relevant to this case, further review of the asset-freeze issue would not be warranted in this Court or in the court of appeals. First, petitioner did not preserve the asset-freeze issue below. In the court of appeals, petitioner contended that he had been improperly denied counsel of choice, see Pet. C.A. Br. 117-120—but he did not assert that the asset freeze had prevented him from retaining such counsel. He argued only that the district court abused its discretion in (1) refusing to allow attorney Sydow to make a limited appearance and (2) denying attorney Cochell, who represented petitioner in the civil case, in-person access to petitioner in prison. *Ibid.* Accordingly, whether Sydow's appearance should have been permitted and whether Cochell should have had better access to petitioner were the only counsel-of-choice questions that the court of appeals addressed and decided. See Pet. App. 17-18. Because the asset-freeze issue that petitioner now raises was "not pressed or passed on below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted), and no "legal premise on which [the court of appeals] relied" is in question,

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[1] Petitioner asserts (Pet. 18) that the government somehow deprived him of counsel, apart from the asset freeze, by preventing him from accessing the D&O policy. But neither the SEC nor the government was involved in the D&O policy litigation. In any event, petitioner concedes (*ibid.*) that it was the insurers, not the government, that ultimately denied coverage under the policy.

Tyler v. *Cain*, 533 U.S. 656, 666 n.6 (2001) (citing *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)), the issue does not warrant any further consideration, see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").[2]

Second, this case is not the proper vehicle for resolution of any issue related to the asset freeze. The district court with the power to release petitioner's assets was not the court in the instant case—which took no affirmative step to freeze any assets—but the district court in the civil case. In most cases involving pretrial asset restraints, the government seeks the restraint in a criminal case. See, *e.g.*, *Kaley*, 134 S. Ct. at 1094. In some cases, however, including this one, the assets are restrained in a separate civil proceeding. When that happens, any challenge to the restraint is properly brought in that civil case, not in the context of the criminal prosecution—even when the basis for the asset-release request is the defendant's desire to retain an attorney to aid in the defense to criminal charges. *Luis* itself, for instance, was a civil case in which a defendant's assets were restrained when the

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[2] Petitioner suggests (Pet. 21-22) that his pro se status in the court of appeals (a status he requested despite the district court's appointment of appellate counsel to represent him, see Criminal Docket No. 899 (July 5, 2012); C.A. Order (Sept. 18, 2013); C.A. Order (Mar. 21, 2013)) excuses his failure to raise the asset-freeze issue. While pro se filings should be liberally construed, petitioner plainly was aware of the issue and made a conscious choice not to raise it, see Pet. C.A. Br. 2 (making sole reference in brief to asset-freeze issue by noting that the brief omitted discussion of "[h]earing to determine tainted/untainted funds")—even though the court of appeals had granted him permission to file a brief that was 16,000 words overlength, see C.A. Order (Sept. 10, 2014).

defendant was also being prosecuted in a parallel criminal proceeding. See 136 S. Ct. at 1087-1088 (opinion of Breyer, J.) (applying Sixth Amendment); U.S. Br. at 6-7, *Luis*, *supra* (No. 14-419) (explaining posture of the case). Here, although petitioner raised his Sixth Amendment argument in his civil case, the court in that case decided against him, and he has not pursued a challenge to that decision. No reason exists to revisit the issue here.

2. Petitioner also argues (Pet. 24-28) that this criminal case presents the issue of whether the SEC's separate civil action should have failed on the grounds that it involved an extraterritorial application of the securities laws. Petitioner's chain of reasoning appears to proceed as follows: (1) interpreting the securities laws in light of the presumption against extraterritoriality is warranted in SEC enforcement actions; (2) the SEC's action against him should have been dismissed as an attempt to apply those laws in an impermissibly extraterritorial fashion; and (3) because some evidence used in the criminal case was obtained from the receiver appointed in the SEC action, the criminal case was based on evidence that was tainted in some way and therefore should be dismissed as well. See *ibid.* That chain of reasoning—presented for the first time in the petition—is fatally flawed in numerous respects, and this case implicates no issue involving the presumption against extraterritoriality warranting this Court's review.

a. As an initial matter, petitioner's current argument is a new one. It was never raised in the SEC action, which would have been the proper venue for any complaint that the relevant securities laws did not extend to the fraudulent conduct in which peti-

tioner engaged. The district court has now entered a summary-judgment order embodying the determination that petitioner did indeed violate those laws. See Civil Docket No. 1858.

Petitioner's argument also was not preserved in this criminal case or passed on by the court below. See *Williams*, 504 U.S. at 41; *Cutter*, 544 U.S. at 718 n.7. In his court of appeals brief, petitioner made a different argument than the one he is advancing now, contending that the district court lacked jurisdiction over this criminal case on the ground that the SEC lacked regulatory authority over SIB in Antigua. Pet. App. 5-6; see Pet. C.A. Br. 8-28; see also, *e.g.*, Pet. C.A. Br. 18 (contending that SIB CDs were not "covered securities" under the Securities Litigation Uniform Standards Act of 1998, which governs only private class actions). To the extent that petitioner referenced *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), and extraterritoriality, it was in service only of that jurisdictional point. See Pet. C.A. Br. 24-28. The court of appeals correctly ruled that the district court had jurisdiction over this criminal case under 18 U.S.C. 3231 and that the scope of the SEC's regulatory authority was irrelevant to criminal jurisdiction. See Pet. App. 5-6; 18 U.S.C. 3231 (giving district courts subject matter jurisdiction over all criminal cases); see also, *e.g.*, *United States* v. *Hickey*, 367 F.3d 888, 893 (9th Cir. 2004), cert. denied, 546 U.S. 872 (2005). Petitioner does not renew his jurisdictional argument here.

b. In any event, petitioner's contention that his criminal conviction must fall on the ground that the civil action involved an extraterritorial application of the securities laws is wrong, for a number of reasons.

First, the SEC's action against petitioner did not run afoul of the presumption against extraterritoriality that informs interpretation of the securities laws. In *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), this Court explained that the presumption against extraterritoriality operates in two steps: a court examines "whether the statute gives a clear, affirmative indication that it applies extraterritorially" and, if not, the court considers "whether the case involves a domestic application of the statute." *Id.* at 2101. To determine whether a statute's application is domestic, courts look to the statute's "focus"—and "[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *Ibid.*; see *Morrison*, *supra*.

The SEC's action involved securities that were fraudulently marketed in the United States, to U.S. investors, by investment professionals who were domiciled and registered in the United States and who worked for a U.S. corporation that was also domiciled and registered in this country. Thus, the action against petitioner constituted a permissible domestic application of the relevant laws. For instance, with respect to the Advisers Act, which formed the basis of some of the SEC's claims, "the focus of the [Advisers Act] is clearly on the investment adviser and its actions." *SEC* v. *Gruss*, 859 F. Supp. 2d 653, 662 (S.D.N.Y. 2012); accord *Lay* v. *United States*, 623 Fed. Appx. 790, 797 (6th Cir. 2015).[3] The SEC complaint identi-

[3] The same conduct was alleged to violate each of the securities laws that formed the basis for the SEC's claims. See Civil Docket No. 1. Thus, the SEC action and its attendant evidence-gathering

fies petitioner, SGC, and one other related company as the investment advisers whose conduct violated the Advisers Act. See Civil Docket No. 1, at ¶ 72. Their conduct in making misleading representations about SIB CDs occurred in Houston and SGC's other U.S. offices. See Civil Docket No. 159, at 3-4. Accordingly, "the conduct relevant to the statute's focus occurred in the United States," and the SEC action was "a permissible domestic application" of the Advisers Act "even if other conduct occurred abroad." *RJR Nabisco*, 136 S. Ct. at 2101.

Second, even if some or all of the SEC's claims in its civil case should have been dismissed as involving impermissible extraterritorial application of the securities laws, that would not suggest that the evidence turned over to prosecutors by the receiver was "tainted," let alone that the criminal prosecution could not proceed. Parallel civil and criminal proceedings are both permissible and commonplace, see, *e.g.*, *United States* v. *Usery*, 518 U.S. 267, 274 (1996), and the receiver was properly appointed by a district court with jurisdiction to determine whether the SEC's claims were meritorious, see generally *Bell* v. *Hood*, 327 U.S. 678, 682-684 (1946). The presumption against extraterritoriality is only a principle of statutory interpretation—it is not, as petitioner seems to assume, akin to a constitutional protection that bars the government from obtaining evidence in certain circumstances, see U.S. Const. Amends. IV, V.

The single authority that petitioner cites in support of his "taint" theory—*United States* v. *Korbel*, 397 U.S. 1 (1970)—does not aid his cause. In *Korbel*, the

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would have proceeded essentially identically under any one of those claims.

Court rebuffed various challenges to a criminal prosecution that were premised on the fact that an agency had commenced a civil proceeding against the defendant's company, and had asked for and obtained discovery in that proceeding, before the prosecution began. See *id.* at 6-13. In doing so, the Court noted that "[t]he public interest in protecting consumers * * * requires prompt action by the agency charged with responsibility for administration of" the relevant federal laws, and that "[i]t would stultify enforcement of federal law to require a governmental agency * * * invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.* at 11. And while the Court stated that it was not "deal[ing] * * * with a case" involving "any * * * special circumstances that might suggest the unconstitutionality or even the impropriety of th[e] criminal prosecution," that statement does not in any way suggest that a determination that parallel civil claims fall outside the scope of the statute on which those claims are premised would amount to such a "special circumstance[]." *Id.* at 11-12. Petitioner has made no showing of any unconstitutionality or impropriety here.

c. Petitioner also does not identify any conflict in authority implicated by this case. The decision below, which did not address petitioner's current extraterritoriality argument (because he failed to raise it), does not conflict with the D.C. Circuit's decision in *SEC* v. *Securities Investor Protection Corp.*, 758 F.3d 357 (2014) (*SIPC*) (cited in Pet. 25-26). In that case, the D.C. Circuit, addressing the very fraud that petitioner perpetrated, ruled that the Securities Investor Pro-

tection Corporation could not be "ordered to proceed against SGC—rather than the Antiguan bank [SIB]—to protect the CD investors' property." *SIPC*, 758 F.3d at 358. That was so, the court of appeals explained, because "investors who purchased SIBL CDs at the suggestion of SGC employees" did not "qualify as SGC 'customers'" as that term is defined in the Securities Investor Protection Act of 1970 (SIPA). *Id.* at 358, 362; see *id.* at 359, 365 (citing 15 U.S.C. 78*lll*). Nothing in the D.C. Circuit's decision about the meaning of SIPA is contrary to anything in the decision of the court of appeals below, which did not involve interpretation of that statute.

Moreover, this case does not present any opportunity to resolve broad issues about whether and how the presumption against extraterritoriality applies to criminal statutes or to SEC enforcement actions. See Pet. 24, 28. Petitioner makes no argument in this Court (and has never made any argument) that any criminal statute involved in this case fails to encompass the charged conduct. Cf. U.S. Amicus Br. at 11-12 n.2, *RJR Nabisco*, *supra* (No. 15-138) (setting forth government's position that the presumption against extraterritoriality applies to criminal statutes but that the requisite indication of extraterritorial applicability exists with respect to criminal statutes that are enacted to defend the government, and citing *Bond* v. *United States*, 134 S. Ct. 2077, 2088 (2014)). And petitioner's extraterritoriality-related argument in this criminal case fails regardless of whether the presumption might apply differently in SEC enforcement actions than it does in private actions—an issue that is of vanishing significance in any event in the wake of the 2010 Dodd-Frank Act amendments that extended the

SEC's enforcement authority to encompass extraterritorial conduct, see Pet. 23.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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