No. 19-1412

IN THE

Supreme Court of the United States

MARK JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF ACI-FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

ACI-Financial Markets Association

Founded in 1955 in Paris as Association Cambiste Internationale, ACI-Financial Markets Association ("ACI," or "*amicus*") comprises 61 affiliated and independent national associations world-wide, advocating ethical conduct, best practices and effective regulation in foreign exchange ("FX") and other wholesale capital markets. ACI's global membership exceeds 9,000 individuals (and nearly twice that number inclusive of members of formerly affiliated and independent national associations). ACI members consist primarily of interbank FX dealers but also include capital market professionals from central banks, wholesale non-bank liquidity providers and major buy-side market participants.

Until the recent implementation of the Bank for International Settlements' (BIS)[2] FX Global Code (the

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1. All parties to this matter have been provided proper notice and have provided written consent to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

2. Founded in 1930, the BIS is today the global "central bank of central banks." Wholly owned by a consortium of the largest public and sovereign banks, the BIS regulates and promotes capital adequacy, reserve transparency and financial stability in the global banking system.

"BIS Global Code"),[3] the ACI Model Code was the only globally recognized code of ethical conduct for FX dealers. It has been referenced or endorsed in whole or part by the BIS, the Financial Stability Board (FSB), and the Basel Committee for Banking Supervision (BCBS); and it has been endorsed *in toto* in the Global Preamble to the regional principles cited by a number of central bank FX Committees worldwide.[4] The BIS Global Code is widely acknowledged to have been based in significant part upon the ACI Model Code.

ACI has a long history of public comment and consultation with global regulators and lawmakers. The potential impacts of Defendant-Petitioner's conviction upon FX Liquidity is of prime importance to ACI and to the integrity, efficiency and stability of US and global markets. FX is the largest financial market in the world. According to the 2019 BIS Triennial Central Bank Survey, global average daily turnover of FX was estimated at nearly $7 *trillion*—approximately triple the volume in 2007.[5] The importance of FX liquidity to cross-border

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3. BIS FX Global Code (Bank for Int'l Settlements 2018), https://www.globalfxc.org/docs/fx_global.pdf.

4. *See* Fed. Reserve Bank of N.Y., Global Preamble: Codes of Best Market Practice and Shared Global Principles, https://www.newyorkfed.org/medialibrary/microsites/fxc/files/2015/Global%20Preamble%20March30.pdf ("The Australian Foreign Exchange Committee and the [European Central Bank] Foreign Exchange Contact Group, along with a number of other regional groups, endorse the ACI Model Code.").

5. Triennial Central Bank Survey of Foreign Exchange and Over-the-Counter (OTC) Derivatives Markets, BIS (Dec. 8 2019), https://www.bis.org/statistics/rpfx19.htm.

commerce cannot be overestimated, having a direct impact on jobs, foreign direct investment, and economic growth in the United States.

For the foregoing and other reasons, this Petition raises issues of direct interest to ACI and its member market participants.

SUMMARY OF THE ARGUMENT

A reasoned analysis of the undisputed evidence before the district court makes it highly implausible that Defendant-Petitioner could have believed his bank's handling of the Cairn fix order contravened any governing contract, law, regulation or ethical market standard. On the contrary, he had every reason to believe that his actions were in accord with longstanding and widely published market codes of conduct. Defendant-Petitioner's necessary awareness of these codes, combined with the absence of any provision of governing contracts or applicable financial law and regulation proscribing his actions, is of direct relevance not only to the issue of fraudulent intent (scienter) requisite to conviction under 18 U.S.C. §§ 1343 and 1349, but to his due process right to adequate notice of the law.

Moreover, the upholding of Defendant-Petitioner's conviction for wire fraud under the Second Circuit's incongruous application of the "right to control" theory creates a minefield of unforeseeable legal outcomes for counterparties to transactions with even marginal connections in New York. This conviction, upheld upon a single "promise" uttered by Defendant-Petitioner which was explicitly disclaimed by subsequent mutual written

agreement prior to the transaction, under circumstances in which no actual *or potential* economic harm to the alleged victim can be proven, is a model presentation of the problem.

The *amicus* supports the arguments made by Defendant-Petitioner, and underscores that his conviction, unless taken up by the Court and reversed, represents a blow to freedom of contract and legal certainty with far-reaching effects for U.S. financial markets. A recent trend of entrepreneurial prosecutions by the U.S. Department of Justice under 18 U.S.C. §§ 1343 and 1349 of financial market conduct already subject to extensive industry-specific (including criminal and anti-fraud) law, regulation, and agency enforcement is demonstrated in this and an increasing line of other cases.[6] A concurrent pattern of diminishing liquidity in U.S. money centers—and an increase in the cost of that liquidity—is already evident. Where, as here, jurisdiction hangs upon a minimal U.S. nexus with transactions otherwise conducted outside U.S. territory and solely between non-U.S. persons, Defendant-Petitioner's conviction is likely to lead banks to avoid that connection by the closing of U.S. dealing operations, driving jobs and business offshore.

Unless the Court acts to restrain the prosecutorial expansion demonstrated by this and other recent cases, the cost will continue to be borne by the U.S. economy and transactional counterparties using FX markets to

6. *See, e.g.*, *United States v. Bogucki*, No. 18-cr-00021-CRB-1, 2019 WL 1024959 (N.D. Cal. Mar. 4, 2019); *United States v. Litvak*, 889 F.3d 56 (2d Cir. 2018); *United States v. Gramins*, 939 F.3d 429 (2d Cir. 2019); *United States v. Demos*, No. 16 Cr. 220 (D. Conn.); *United States v. Weimert*, 819 F.3d 351 (7th Cir. 2016).

hedge risk. The *amicus* respectfully urges the Court to give these issues the weight they demand as it considers Defendant-Petitioner's request for certiorari.

ARGUMENT

I. DEFENDANT-PETITIONER'S WIRE FRAUD CONVICTION IMPOSED NOVEL AND AMBIGUOUS STANDARDS OF CONDUCT OF WHICH DEFENDANT-PETITIONER COULD NOT HAVE BEEN AWARE.

A. The Conviction Constituted a Retroactive Reformation of Freely Negotiated Master Contractual Standards Nearly Universal to International Banking.

The Master Agreement executed by HSBC and Cairn[7] is a contract template published in 1992 by the International Swaps and Derivatives Association ("ISDA"), which, once adopted by the parties to a given transaction, "governs the legal and credit relationship between the parties and other aspects of the agreement." *Aon Financial Products, Inc. v. Societe Generale,* 476 F.3d 90, 93 n.4 (2d Cir. 2007). The ISDA Master and its schedules govern nearly every dealing relationship between banks, their interbank counterparties, and their largest customers. Its terms have been long litigated and interpreted in multiple jurisdictions and carry substantial precedential value for global markets. Its use is all but universal in FX but also covers fixed income, over-the-counter (OTC) commodities, credit products, portfolio

7. A-351.

insurance and leverage facilities, and a vast range of swaps and option contracts, serving as "the contractual foundation for more than 90% of derivatives transactions globally." *Lehman Brothers Holdings Inc. v. Bank of American National Association*, 553 B.R. 476, 484 n.21 (Bankr. S.D.N.Y. 2016).

The controlling ISDA Master Agreement is definitive on the effect of prior oral communications, such as the one upon which the circuit court based its affirmation of Defendant-Petitioner's conviction. It provides that "[t]his Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto." C.A.App.362 (§9(a)). These integration and merger provisions, like the language disclaiming fiduciary liability,[8] are standard ISDA terms which have been interpreted extensively by federal courts in breach of contract and fraud cases. *See Eternity Global Master Fund Ltd. v. Morgan Guaranty Trust Co. of New York*, 375 F.3d 168, 175 (2nd Cir. 2004) ("Documentation of derivatives transactions has become streamlined, chiefly through industry adherence to 'Master Agreements' promulgated by the ISDA."); *Negrete v. Citibank, N.A.*, 237 F. Supp. 3d 112, 120 (S.D.N.Y. 2017) (noting a prior opinion in the case had concluded that the "parties had a

8. C.A.App.373 (making clear that HSBC "[was] not acting as fiduciary for or as an adviser to [Cairn]"); *accord, e.g.*, C.A.App.310 (stating that the agreement "shall not be regarded as creating any form of advisory or other relationship"). The ISDA also provided under a "Non-Reliance" heading that "[n]o communication (written or oral) received from the other party will be deemed to be an assurance or guarantee as to the expected results of that Transaction." C.A.App,373.

counterparty relationship as principles – not fiduciaries"). This exemplifies the wide recognition that statements made in the course of financial negotiation between sophisticated commercial counterparties cannot ordinarily constitute a basis for "fraud." Instead, such statements should be viewed as "consistent with the parties' understanding of the arms-length relationship in which they operated." *United States v. Bogucki*, No. 18-cr-00021-CRB-1, 2019 WL 1024959, at *7 (N.D. Cal. Mar. 4, 2019). This approach has been taken in a recent line of cases within the Second Circuit itself. *See, e.g.*, *United States v. Litvak*, 889 F.3d 56 (2d Cir. 2018); *United States v. Gramins*, 939 F.3d 429 (2d Cir. 2019); *United States v. Demos*, No. 16 Cr. 220 (D. Conn.).

The circuit court affirmed Defendant-Petitioner's conviction based solely upon the "right to control" theory, and did not address "misappropriation," or the "fiduciary" or similar relationship of "trust and confidence" that theory requires. The *amicus* would bring to the notice of this Court that banks give careful and specific consideration to the boundaries of written disclosure and fiduciary liability in assessing their service model. Standard ISDA disclaimers, upheld in most jurisdictions, are viewed by banks and dealers as essential to defining their legal risk. Given the allegations upon which Defendant-Petitioner's conviction was based, it can only be expected that banks will either avoid similar service models entirely or demand a premium on transaction costs to compensate for the implicit legal uncertainties.

B. Given the Transparency and Fairness Demonstrated, Defendant-Petitioner's Handling of the Fix Order was Compliant with Widely Recognized and Codified Global Standards.

The record references the lack of policy guidance in December 2011 that would have prohibited the manner of execution employed by HSBC.[9] In fact, conduct rules promulgated and endorsed by the FSB and global central banks (including the U.S. Federal Reserve Bank) and embodied in the ACI Model Code and BIS Global Code, provide more than tacit acceptance of HSBC's method of handling of the fix order. Under the circumstances indicated by the record, they explicitly permit "sourcing liquidity in anticipation of customer needs or hedging or mitigating exposure resulting from a client order."[10]

The rules uphold the status of banks as counterparties, not fiduciaries. "FX customers...should conduct appropriate due diligence around their foreign exchange execution, including assessing the suitability of FX

9. A-530 (Argument of Defense counsel Frank Wohl) ("Isn't it significant that these issues have been studied by regulators year after year after year, and what the Government is complaining about has never been the subject of any kind of regulation at all? There's never been any policy pronouncement that this . . . type of execution of a fix transaction by . . . pre-hedging, is in some way wrong or improper."). *See also* A-55, A-59 (Testimony of DeRosa).

10. *Global Preamble: Codes of Best Market Practice and Shared Global Principles*, Federal Reserve Bank of New York, March 30, 2015, at 6. https://www.newyorkfed.org/medialibrary/microsites/fxc/files/2015/Global%20Preamble%20March30.pdf

reference rates used…."[11] The FICC Market Standards Board (FSBC) likewise provides that because a fix order "entails a risk transfer, the liquidity provider of that risk (the Dealer) will at its discretion hedge that risk, and this hedging activity can take place before, during or after the reference time...".[12]

Finally, the ACI Model Code and the BIS Global Code agree in permitting "transacting an order over time before, during, or after its fixing calculation window, so long as not to intentionally negatively impact the market price and outcome to the Client."[13]

Examples of explicitly acceptable conduct are appended to the BIS Global Code, and several are precisely on point, e.g.:

> A bank is anticipating an order related to a potential merger and acquisition transaction on behalf of a Client that involves selling a very large amount of a specific currency. The bank recognizes [sic] that this transaction could have a sizeable impact on the market and therefore proactively engages the Client to discuss a potential execution strategy, including but not

11. *Id*. at 8.

12. FICC Markets Standards Board, *Reference Price Transactions Standard for the Fixed Income Market*s, November, 2016, at 7. https://fmsb.com/wp-content/uploads/2017/05/2016-001-FMSB-Std_ReferencePriceTransactions_FIMarkets_Final-Updated.pdf

13. BIS Global Code, Principle 9, at 13, https://www.globalfxc.org/docs/fx_global.pdf; *see also* Principal 11, Pre-Hedging, *Id*. at 17.

> limited to the matching of internal flows, the timing of the execution, the use of algorithms, and Pre-Hedging. The bank transacts in anticipation of the order in agreement with the Client and with the intent to manage the risk associated with the anticipated transaction and to seek a better outcome for the Client.[14]

While all these closely similar standards are subject to transparency and fairness, the undisputed facts show no plausible evidence that Defendant-Appellant's conduct fell short of either in such respect. Cairn was a large, sophisticated corporate customer who negotiated the deal with the benefit of intermediation and advice from Rothschild and its counsel. It elected a fix order out of several risk transfer alternatives honestly presented by HSBC. It was informed that the bank would pre-hedge the order, and earn its profit, if any, in the difference between its average buy price and the fixing rate at which it would sell to Cairn. Cairn was informed that, given the size of the buy order, the market was likely to react by moving higher before, during and possibly after the fix window, especially if Cairn did not provide at least two hours advanced notice, which they agreed, but failed, to do.[15]

C. The Conviction Misapprehends the Nature of Risk Transfer.

It is basic logic that no rational economic actor will accept the risk of substantial loss with no opportunity

14. *Id.* at 53.

15. App. pp. 1- 2 (A-133, A-111, A-181, A-209-10).

to earn commensurate profit.[16] It is indisputable that HSBC intended to make money on the Cairn transaction. Johnson informed Cairn of this in so many words.[17] But the court below ruled Johnson's October 13, 2011 statements constituted a "promise" not to "ramp" the fix. App. at 16-18. Even though the governing contract expressly excluded the alleged promise and superseded any "oral communications," the Second Circuit found that this "promise" was "an essential element of the bargain" which "deceived Cairn with respect to both how the FX Transaction would be conducted and the price of the FX Transaction." App. at 15-18. It went further, holding that under the "right to control" doctrine as it exists in the Second Circuit, it was irrelevant whether or not the "false promise" did, or even could have, caused Cairn any economic harm.[18]

This doctrine as so broadly applied was an improbable convenience for the prosecution under the facts of this case. No actual economic harm was sustained by Cairn.[19] Indeed, very little specific evidence was presented at trial of how HSBC's conduct around the fix window *could* have exposed Cairn to economic damage. On the contrary, Cairn's own actions in the handling and passing of its

16. ACI.Amicus.C.A.Br. at 17-20.

17. C.A.App.387.

18. "'[W]hether a defendant's misrepresentation was capable of influencing a decisionmaker' in a right-to control case 'should not be conflated with [the] requirement that that misrepresentation be capable of resulting in tangible harm.'" App. at 18 (quoting *United States v. Finazzo*, 850 F.3d 94, 109 n.16).

19. App. at 2.

trade order exposed both itself and HSBC to unnecessary risk of loss.

Banks assume substantial risk when accepting large fix orders. It is impossible to lay off a large amount of currency in the short window[20] in which the fix is calculated without impacting the fix rate itself as well as market prices immediately after. For this reason, banks establish a minimum cut-off time before the fix at which they will accept an order, to permit them to execute it in a gradual and judicious manner. This policy reduces risk both to the bank and the counterparty. Abruptly flooding the market immediately prior to the fix window is likely to drive prices against the bank before it can fully cover its risk. It is equally likely to negatively impact the price of the fix itself, increasing the customer's transactional cost. As noted by the FSB,[21] "the concentration of large volumes around the fixing window, and the need for dealers to execute potentially large orders (as well as to manage the risk associated with these transactions if needed) in a short time span, has the potential to create increased volatility and price movements that may be disadvantageous to end users."

Johnson explicitly warned Cairn that passing their order to HSBC less than two hours before the fix would likely result in losses to both parties. C.A.App.387. Whether Cairn's acceptance of this risk was real or feigned, they negotiated and signed the FX Hedging

20. A one minute calculation period at the time of the Cairn transaction, since increased to five minutes.

21. Fin. Stability Bd., Final Report on Foreign Exchange Benchmarks (2014), https://www.fsb.org/2014/09/r_140930/.

Execution Bank Letter ("Mandate Letter") which required them to pass their full order amount to HSBC at least two hours prior.[22] But on the day of the transaction, Cairn breached this obligation, instead passing the order in two parts: one less than one hour before the fix and another only 35 minutes before the fix.[23] It is little wonder that the HSBC's London dealing desk purchased a large amount in the final minutes before the fix. C.A.App.399. They had little choice, given Cairn's failure to provide the agreed-upon adequate notice.

Cairn's potential economic harm was also impacted by the likelihood that, due to its handling of information, other banks and market participants knew, and traded in consideration, of the order. It is common for dealers to closely monitor pending corporate currency exposures through the financial press and other sources. News of the impending sale of Cairn's subsidiary had been reported in the financial press as early as mid-2010.[24] Key terms of the deal leaked to the media prematurely.[25] Because the transaction was in U.S. Dollars and Cairn's assets were denominated in British Pounds, it was manifest that

22. A-309 (Mandate Letter dated October 24, 2011).

23. App. at 20.

24. Chris V. Nicholson, *Vedanta to Buy Cairn India Stake in $9.6 Billion Deal*, N.Y. Times Dealbook (Aug. 16, 2010 5:11 AM), https://dealbook.nytimes.com/2010/08/16/vedanta-to-buy-cairn-india-in-9-6-billion-deal/.

25. Cairn Apologizes to Govt for Vedanta Deal Leaking to Media, ZeeNews India (Sept. 17, 2010, 12:08 AM), https://zeenews.india.com/business/news/companies/cairn-apologises-to-govt-for-vedanta-deal-leaking-to-media_13327.html.

Cairn would need to purchase a large amount of pounds for dollars. Cairn solicited proposals from at least eight other major banks (in addition to HSBC). App. at 4. This made it a near certainty that a number of other banks would have purchased British Pounds in anticipation of the Cairn order moving prices higher, and in so doing multiplied the order's effect upon the market.

These factors bore a substantial causal relationship to the potential execution price of the order. Their actual effect is indeterminable, and impossible to prove. They were wholly within Cairn's own control, not Defendant-Petitioner's. For these reasons, they underscore the basic incongruity of the Second Circuit's "right to control" doctrine as applied here: Defendant-Petitioner could not have been convicted had the court not completely disregarded the impossibility of linking actual or potential economic harm to his conduct. Such a result defies both logic and justice.

II. JOHNSON'S CONVICTION FOR WIRE FRAUD BASED UPON BEHAVIOR NOT VIOLATIVE OF INDUSTRY-SPECIFIC STATUTE AND REGULATION IS ANTITHETICAL TO PRINCIPALS OF LEGAL CERTAINTY, DUE PROCESS AND FUNDAMENTAL FAIRNESS.

A. Defendant-Petitioner's Conviction is an Unnecessary Overriding of Industry-Specific Law and Regulation by Application of More Ambiguous General Criminal Statutes.

In defense of the liberal application of 18 U.S.C. §§ 1343 and 1349, prosecutors have challenged the capability of Congress to keep pace with novel fraudulent practices

in making industry-specific law. In doing so, they have often cited Justice Burger's dissent in *United States v. Maze*, in which he stated that

> [The mail fraud statute] has traditionally been used against fraudulent activity as a first line of defense. When a 'new' fraud develops – as constantly happens – the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with that evil.

414 U.S. 395, 405 (1974) (Burger, J., dissenting).

This notion features little applicability to the present case, however. Commodity fraud and manipulation are not new phenomena. They have been the subject of industry-specific law and regulation in the United States since as early as the 1920's.[26] Indeed, federal law providing criminal penalties for commodity fraud and manipulation pre-dates the 1952 wire fraud statute by nearly three decades.[27] The prosecution employed a number of terms to describe Defendant-Petitioner's conduct, including "trading ahead,"[28] "front-running"[29] and "ramping."[30]

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26. *See e.g.* Future Trading Act, Pub. L. No. 67-66, § 5(d), 42 Stat. 187, 188 (1921); Grain Futures Act, Pub. L. No. 67-331, § 5(d), 42 Stat. 998, 1000 (1922); Commodity Exchange Act, Pub. L. No. 74- 675, § 9, 49 Stat. 1491, 1499-1500 (1936).

27. *Compare supra* note 25, *with* 18 U.S.C. § 1343.

28. App. at 53.

29. App. at 6.

30. App. at 16. Note that these alleged practices are covered

Unlike under the wire fraud statute, these concepts have longstanding and well understood application in pre-existing U.S. commodity law and regulation. Indeed, four separate federal agencies, including the CFTC, restrict dealers from transacting their own trades in priority to *retail* client FX orders.[31]

However, Congress elected not to extend such statutes to deliverable FX dealing between banks and *non*-retail customers[32] such as Cairn, despite long consideration of the issue. Fraud sanctions under the Commodity Exchange Act (CEA) were expanded and extended to swaps (including FX-based derivatives) as part of the Dodd-Frank reforms.[33] In enacting the Dodd-Frank reforms, Congress left the question up to the U.S. Treasury Department of whether, and to what extent, deliverable

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under CFTC Rule 180.2, which is based on 7 U.S.C. § 6(c)(3) and makes it "unlawful for any person, directly or indirectly, to manipulate or attempt to manipulate the price of any swap or commodity." 17 CFR § 180.2.

31. *Compare* 17 C.F.R. §5.18 [hereinafter CFTC rule] (requiring filling of a retail customer's order that is "executable at or near the price" that the bank has "quoted to the [retail customer]" before executing a similar trade in a proprietary account); *with* 12 C.F.R. § 349.25 [hereinafter FDIC rule]; *and* 12 C.F.R. § 48.13 [hereinafter OCC rule]; *and* 12 C.F.R. 240.13 [hereinafter Fed rule].

32. Non- "Eligible Contract Participants," comprising institutions and individuals with more than $10 million in liquid assets. 7 U.S.C. § 1a(18).

33. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). *See* 17 C.F.R. §§ 180.1, 180.2. *See also* 156 Cong. Rec. S5992 (daily ed. July 15, 2010) (statement of Sen. Lincoln).

spot FX contracts (like the ones dealt by HSBC to Cairn) should be regulated in the institutional setting.[34] The Treasury Secretary rendered a considered determination to exclude such contracts from the definition of "swap" under the CEA.[35] Other categories of FX, such as options, non-deliverable forwards, cleared and exchange traded FX contracts, as well as retail FX were left fully subject to the CEA and CFTC regulation, including commodity fraud provisions.[36] Treasury's reason for limiting the applicability of these provisions in the case of deliverable FX spot and forwards with large institutions was that such contracts "already trade in a highly transparent and liquid market. Market participants have access to readily available pricing information through multiple sources."[37]

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34. 7 U.S.C. § 1a(47)(E).

35. Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69,694 (Nov. 20, 2012).

36. The statute states that

> Any foreign exchange swap and any foreign exchange forward that is listed and traded on or subject to the rules of a designated contract market or a swap execution facility, or that is cleared by a derivatives clearing organization, shall not be exempt from any provision of this chapter or amendments made by the Wall Street Transparency and Accountability Act of 2010 prohibiting fraud or manipulation.

7 U.S.C. §1a(47)(F)(i). OTC FX contracts offered to retail investors are dealt with separately in 7 U.S.C. §1a(47)(F)(ii), and also left fully subject to all provisions of the CEA. *See* 7 C.F.R. §5.18.

37. Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 Fed. Reg. 69,694, 69,697 (Nov. 20, 2012).

Defendant-Petitioner correctly argues that the Second Circuit's decision, in viewing materiality from the victim's subjective standpoint, deepens an existing Circuit split on whether mail or wire fraud materiality is assessed under an objective or subjective standard. The Petition notes that, along with the majority of Circuits, "[t]his Court has long held that in securities fraud cases, materiality is an 'objective' test." *See, e.g.*, *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976). Pet. 16-17. The *amicus* would further like to underscore that the same objective standard of materiality has widely been applied in cases of commodity fraud under the U.S. Commodity Exchange Act.

The court in *CFTC v. R.J. Fitzgerald* focused upon whether "the overall message is clearly and objectively misleading or deceptive." 310 F.3d 1321 (11th Cir. 2002) (citing *Clayton Brokerage Co. v. CFTC*, 794 F.2d 573, 580-81 (11th Cir. 1986); *JCC Inc., v. CFTC*, 63 F.3d 1557, 1565 n.23, 1569-70 (11th Cir. 1995)). The court in *CFTC v. McDonnell* likewise noted that "[w]hether a misrepresentation has been made depends on the 'overall message' and the 'common understanding' of the information conveyed." 332 F. Supp. 3d 641, 717-18 (E.D.N.Y. 2018) (citing *CFTC v. Rolando,* 589 F. Supp. 2d 159, 168 (D. Conn. 2008) (quoting *R.J. Fitzgerald,* 310 F.3d at 1328)). The representations should be viewed through the eyes of an "objectively reasonable" financial counterparty who would interpret the overall message. *R.J. Fitzgerald,* 310 F.3d at 1328-29. Defendant-Petitioner would have been acquitted (or his conviction reversed) under these standards, because, as he argues, "an extrinsic, unenforceable promise is by definition immaterial to a reasonable promisee." Pet. at 17.

In sum, the Court is urged to consider that Defendant-Petitioner was prosecuted for conduct between banks and their largest customers which Congress and the U.S. Treasury Department have determined need not be subject to the antifraud provisions of the Commodity Exchange Act. And indeed, no conviction would have resulted even had they been applied.

B. Expansive Prosecution Under the Wire Fraud Statutes Erodes the Legal and Regulatory Certainty Essential to Financial Markets.

This Court has acknowledged that it is proper for a court to consider policy considerations in construing financial law. *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 694, n.7 (1985). The broad and substantially novel application of the wire fraud statute in this case, unless considered and reversed by the Court, will have continuing detrimental consequences for U.S. FX markets and participants.

It is little wonder that 18 U.S.C. §§ 1341, 1343 and 1344 are the most commonly invoked federal criminal statutes governing financial white-collar crimes generally. As has been noted numerous times, they are the federal prosecutor's bread and butter because they offer "simplicity, adaptability, and comfortable familiarity."[38] They appear in nearly every white-collar prosecution.[39]

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38. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980).

39. K. Edward Raleigh, *Limiting Mail and Wire Fraud's Scope*, Crim. Just. Mag., Winter 2017, at 31.

It is no virtue that these statutes are comfortably familiar to *prosecutors*, however. To the contrary, federal courts have long held that criminal statutes must be written and interpreted "with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) (internal quotation omitted); *see also United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subject to them.").

The high number of cases brought under 18 U.S.C. §§ 1341, 1343 and 1344 in itself supports taking review of important questions arising under them. Overbroad application of the mail and wire fraud statutes has been noted to upset the federal-state balance, allowing the federal government to usurp the role of the states in the "exercise[] of [their] police powers." *Cleveland v. United States*, 531 U.S. 12, 23 (2000). The same reasoning must apply to federal and state financial regulatory agencies and the industry-specific statutes and regulations they enforce. Indeed, a statute can be impermissibly vague for merely "authoriz[ing] or even encourage[ing] arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Such "encouragement" has been amply attested to by the recent trend of prosecutions under 18 U.S.C. §§ 1343 and 1349. *See supra*, note 6.

This Court has repeatedly rejected the government's efforts to invoke the wire and mail fraud statutes creatively, instead confining the statutes to their "core" meaning. In *McNally v. United States*, this Court struck

down a line of cases allowing prosecution for deprivation of the intangible right to honest services, limiting the statute instead to the property crime to which "the words 'to defraud' commonly refer." 483 U.S. 350, 358 (1987). In *Neder* v. *United States*, this Court looked solely to fraud's "well-settled meaning at common law." 527 U.S. 1, 22 (1999). And in *Skilling*, this Court "pare[d]" the "honest services" doctrine "down to its core." *Skilling*, 561 U.S. at 404.

Financial markets represent "an area that demands certainty and predictability" in which undesirable results arise from decisions "made on an ad hoc basis, offering little predictive value." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994) (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)). Allowing prosecution of employees who were unaware of potential criminal consequences would have a destabilizing effect on financial markets because they eliminate predictability. *See California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042, 2053 (2017). Bank officers should not live with the fear that they "could be subject to prosecution, without fair notice, for the most prosaic interactions." *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

The Court, in long standing against creative interpretation of the wire fraud statute, has championed one of the foundational principles underlying our system of federal criminal law: that "legislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

Jurisdictional concerns also weigh heavily upon New York as an FX market center. It should be noted that in cases of actual misconduct in Defendant-Petitioner's home jurisdiction, the United Kingdom, the Financial Conduct Authority and Serious Frauds Office have typically imposed civil penalties, but not criminal sanctions.[40]

C. Market Impacts Potentially Linked to Defendant-Petitioner's Conviction are Already Observable

Bank dealers are unlikely to attempt to operate in the face of potential criminal sanctions for hedging uncompensated risk to their shareholders. Should this reticence become widespread, the implications for FX markets in the United States are substantial. Indeed, negative trends in FX liquidity, volatility and transaction costs, most dramatically in settings featuring elements of the Cairn transaction—British Pound versus U.S. Dollar trading in U.S. money centers near fix windows—have been observed and documented since this matter was publicized.

FX volume surveys published semi-annually by U.S. and U.K. central bank FX Committees show that U.S. spot FX turnover fell by 20% between April 2016 (shortly

40. *See, e.g.*, Press Release, Fin. Conduct Auth., FCA Fines Five Banks £1.1 Billion for FX Failings and Announces Industry-Wide Remediation Programme (Dec. 11, 2014), https://www.fca.org.uk/news/press-releases/fca-fines-five-banks-%C2%A311-billion-fx-failings-and-announces-industry-wide-remediation-programme (stating that the FCA imposed fines on several banks for a failure to control business practices). Note also that the FCA references the ACI Model Code in some of those cases. *See, e.g.*, *id.*

before Defendant-Petitioner's indictment) and April 2019.[41] In the UK it *rose* by 1.2% over the same period.[42]

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41. *Compare* Foreign Exch. Comm., Foreign Exchange Committee Releases FX Volume Survey Results (Apr. 2019), https://www.newyorkfed.org/medialibrary/Microsites/fxc/files/2019/Volume_Survey_Press_Release_07232019.pdf (citing Foreign Exch. Comm., Foreign Exchange Committee Semi-Annual Foreign Exchange Volume Survey (Apr. 2019), at 1, https://www.newyorkfed.org/medialibrary/Microsites/fxc/files/2019/aprfxsurvey2019.pdf [hereinafter 2019 FEC Survey Results]),

with Foreign Exch. Comm., Foreign Exchange Committee Releases FX Volume Survey Results (Apr. 2016), https://www.newyorkfed.org/medialibrary/microsites/fxc/files/2016/VolumeSurveyPressRelease07292016.pdf (citing Foreign Exch. Comm., Foreign Exchange Committee Semi-Annual Foreign Exchange Volume Survey (Apr. 2016), at 1, https://www.newyorkfed.org/medialibrary/microsites/fxc/files/2016/aprfxsurvey2016pdf.pdf [hereinafter 2016 FEC Survey Results]).

42. *Compare* Bank of Eng., Results of the Semi-Annual FX Turnover Surveys in April 2019 (2019), [hereinafter 2019 BOE Results], at Data Table 1A, https://www.bankofengland.co.uk/-/media/boe/files/markets/foreign-exchange-joint-standing-committee/semi-annual-fx-turnover-survey-results/2019/april-2019-results.pdf?la=en&hash=9098BA25186F312DFDB78F76CF6A84E5E5037E27 *with* Bank of Eng., Results of the Semi-Annual FX Turnover Surveys in April 2016 (2016), at Data Table 1A, https://www.bankofengland.co.uk/-/media/boe/files/markets/foreign-exchange-joint-standing-committee/semi-annual-fx-turnover-survey-results/april-2016-results.pdf?la=en&hash=76D74E87B4DB6CB5E4C0E965ADD979CEAC86B5C6; *See* also Bank of Eng., BIS Triennial Survey of Foreign Exchange and Over-the-Counter Interest Rate Derivatives Markets in April 2016 – UK

Data - Results Summary (2016), https://www.bankofengland.co.uk/-/media/boe/files/statistics/bis-survey/2016/survey-of-2016-uk-survey-results.pdf?la=en&hash=5B494850C6623AB5FDD5ECFDEF9E8FF4BD8C8540.

The effect is even more marked with respect to British Pound versus U.S. Dollar trade volumes, which declined 37.7% in the U.S. but rose 10.7% in the UK over the same period.[43] These effects are further emphasized by triennial surveys published by the Bank for International Settlements. These show the U.S. *share* of overall global FX liquidity falling by 2.4% between the April 2016 and April 2019 reports, while the UK share rose 2.3%.[44] Referencing prior research showing increased volatility and a diminishment in volume (liquidity) around the fix window over the past several years, a recent study also showed a significant increase in transaction costs to customers whose orders are executed near late London fix windows, finding that in early 2020 "[p]articipation bears significant and systematic costs."[45]

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43. *Compare* 2019 BOE Results, *supra* note 41, at Table 1.A, *and* 2019 FEC Survey Results, *supra* note 40, at 3 *with* Bank of England FX Joint Standing Committee Report, April 2016, *id*. at 1A, *and* 2016 FEC Survey Results, *supra* note 40, at 3.

44. *Compare* Triennial Central Bank Survey of Foreign Exchange and Derivatives Market Activity in 2016, Table D11.2, BIS, https://www.bis.org/publ/rpfx16.htm (last updated December 11, 2016), *with* Triennial Central Bank Survey of Foreign Exchange and Over-the-Counter (OTC) Derivatives Markets in 2019, Table D11.2, BIS, https://www.bis.org/statistics/rpfx19.htm (last updated on Dec. 8, 2019).

45. *The Unit Cost of Volatility at the 4pm Fix*, New Change FX (May 20, 2020), https://www.newchangefx.com/the-unit-cost-of-volatility-at-the-4pm-fix/. New Change FX is the sole administrator of live spot FX benchmarks registered with the European Securities Markets Association (ESMA) and authorized by the UK Financial Conduct Authority. *Objective Data*, New Change FX, https://www.newchangefx.com/data/. *See also* Martin Evans, *Forex Trading and the WMR Fix*, 79 J. Banking & Fin. 233 (2017), unpublished

CONCLUSION

Defendant-Petitioner's conviction is based on an over-reaching application of already broad federal wire fraud statutes to conduct that, in accordance with the undisputed facts on record, Defendant-Petitioner had every reason to believe was permitted by freely-negotiated governing contract, law and regulation specific to his industry, and codified ethics standards. If permitted to stand, the conviction not only represents an individual injustice, but will leave intact a material circuit split and perpetuate a continuing market-wide negative impact upon U.S. markets and liquidity end users.

This Court should grant the Petition for Certiorari.

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manuscript available at https://mpra.ub.uni-muenchen.de/81583/index.html; *Foreign Exchange – Fixing Becomes Unpopular, at Last!*, New Change FX (Jan. 24, 2014), https://www.newchangefx.com/foreign-exchange-fixing-becomes-unpopular-at-last/.