No. 22-402

In the

Supreme Court of the United States

JAMES VORLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This petition features all the hallmarks for certiorari. The decision below is wrong at every turn, entrenches two circuit splits, and permits prosecutorial overreach that violates principles of fair notice and due process. And the questions presented strike at the core of fundamental fairness. This Court should grant certiorari and reverse.

First, whether a "scheme or artifice to defraud" under the wire fraud statute encompasses an "implied misrepresentation" is an important question that has divided the circuits. Here, Petitioner never made a false or misleading statement. He placed tradeable orders that he was willing and able to honor if executed. Petitioner would not have been convicted in the multiple circuits that require proof of an express false or misleading statement. But Petitioner is currently serving his sentence because the Seventh Circuit, like the Ninth Circuit, wrongly permits convictions based on an "implied misrepresentation." Such a sweeping theory would permit prosecution in virtually any negotiation involving some degree of bluffing or the absence of complete candor. As this Court has repeatedly held, that is not wire fraud.

Second, whether a district court can cure a Speedy Trial Act violation through an after-the-fact finding that the ends of justice outweigh the interests of the criminal defendant presents another important question that has divided the circuits. Here, the district court admitted that it did not invoke the ends-of-justice exclusion when it granted the continuance. Instead, it excluded time based solely on a misinterpretation of an automatic exclusion. That

would have resulted in dismissal had Petitioner been prosecuted in the Second, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits because those Circuits require a district court to make the ends-of-justice finding at the time that it grants the continuance. By contrast, the Seventh Circuit's outlier precedents permit district courts to erase a Speedy Trial Act violation by making an after-the-fact finding that the ends of justice outweighed the defendant's and the public's interests in a speedy trial. If that is the law, then there is hardly anything left of the defendant's speedy trial right.

The government's opposition brief does nothing to lessen the case for certiorari. It fails to explain how the decision below correctly interprets either the wire fraud statute or the Speedy Trial Act. Nor has the government cast any legitimate doubt on the two circuit splits. And there is no question that these issues are important. Rather than endorse the government's latest attempt to stretch the wire fraud statute and the Seventh Circuit's anomalous reading of the Speedy Trial Act, this Court should grant certiorari and reverse.

ARGUMENT

I. The Decision Below Expands A Circuit Split Over The Evidence Required To Support A Conviction Under The Wire Fraud Statute.

A. The Circuits Are Divided On This Question.

The circuits are divided on the first question presented. Consistent with the text of the wire fraud statute, the Second, Sixth, and Eleventh Circuits hold

that a "scheme to defraud" requires evidence of a false statement or an omission of material fact. *See* Pet.2. By contrast, the Seventh and Ninth Circuits permit convictions based on evidence of an "implied misrepresentation," without evidence that the defendant made an express false statement or omitted a material fact that made an express statement misleading. *See* Pet.2.

The government's efforts to obscure this split are unavailing. It attempts to downplay the Eleventh Circuit's holding in *United States v. Takhalov*, 827 F.3d 1307 (2016) (Thapar, J., sitting by designation), by relying on Chief Judge Pryor's description of *Takhalov* in a later concurring opinion, Gov't.Opp.12 (citing *United States v. Feldman*, 931 F.3d 1245, 1265 (11th Cir. 2019) (Pryor, C.J., concurring)). Clearly that concurrence did not change the law of the Eleventh Circuit. And the government conspicuously ignores the numerous Eleventh Circuit decisions applying *Takhalov*'s holding. *United States v. Waters*, 937 F.3d 1344, 1352 (11th Cir. 2019); *United States v. Wheeler*, 16 F.4th 805, 820 (11th Cir. 2021) (per curiam); *United States v. Masino*, 2021 WL 3235301, at *8 (11th Cir. July 30, 2021).

Nor can the government square the Eleventh Circuit's view with the decision below. *Takhalov* unambiguously held: "That a defendant merely 'induced the victim to enter into a transaction' that he otherwise would have avoided is . . . 'insufficient' to show wire fraud." 827 F.3d at 1307 (alteration marks omitted) (quoting *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987)). Here, as in *Takhalov*, the defendants were ready, willing, and able to fulfill their

end of the bargain. The orders that Petitioner canceled were fully executable, regardless of Petitioner's subjective intentions.

The government tries to distinguish *United States v. Connolly*, 24 F.4th 821 (2d Cir. 2022), on the ground that it involved "a different type of misleading statement" in a different context. Gov't.Opp.12. No doubt, in *Connolly*, someone else said something else, but the government does not explain why such differences are material to the circuit split. In contrast with the Seventh Circuit, the Second Circuit would not uphold Petitioner's conviction based on his subjective desire to cancel a bona fide trade offer because "schemes that do no more than cause their victims to enter into transactions they would otherwise avoid . . . do not violate the mail or wire fraud statutes." *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007).

Finally, the government tries to brush aside a string of Sixth Circuit cases because the plaintiff in each "either failed to allege or failed to prove that the defendants made material misstatements or omissions." Gov't.Opp.13. That is precisely the point. Here, Petitioner did not make a material misstatement or omission either. He simply placed open orders on the exchange without disclosing his intent to cancel some of them—something he had no duty to disclose and indeed could not disclose on an anonymous exchange that reports only bids and offers. Pet.App.174. Petitioner always honored the relevant orders if they were executed before cancellation, meaning that he could not be convicted in the Sixth Circuit because it requires the government to prove

that the defendant made a false statement or omitted a material fact necessary to make a true statement not misleading to obtain a wire fraud conviction. *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984); *Walters v. First Tennessee Bank, N.A. Memphis*, 855 F.2d 267 (6th Cir. 1988).

B. The Decision Below Is Wrong And Has No Limiting Principle.

A "scheme to defraud" within the meaning of the wire fraud statute requires a false statement or the omission of material information that makes an express statement misleading. 18 U.S.C. § 1343; *Neder v. United States*, 527 U.S. 1, 4 (1999). Conduct that might influence a counterparty's decision to transact, but does not misrepresent the essential terms of the bargain, is not a scheme to defraud. The government's wire fraud theory here rests on the flawed premise that Petitioner's undisclosed intent to cancel an open order impliedly "communicate[s] false and misleading information regarding supply or demand." Pet.App.5. And the lower court endorsed that sweeping theory.

That view not only misinterprets the wire fraud statute, but it has no logical endpoint. Under this Court's precedents, in a material omission case, the accused must have made an *express* representation that is rendered misleading by what is omitted. *Pasquantino v. United States*, 544 U.S. 349 (2005). Here, on the government's theory, both the representation (the intent to trade) and the omission (the intent to cancel) were implicit. Gov't.Opp.9.

The government's own proffered examples, which may not even constitute examples of fraud in their own right, are nonetheless illustrative. An applicant who claims that he is "retired" but fails to disclose that he left his employment because of a criminal conviction has made an affirmative representation, if the applicant's half-truth falsely suggested he "retired" voluntarily. Gov't.Opp.8. Here, Petitioner put forth no half-truth. He was at all times willing and able to execute the order if a counterparty accepted, and the exchange gave him the right to cancel his order for any or no reason.

Likewise, this case bears little resemblance to a robber baron who intends to sell Union Pacific stock but falsely shouts, "I'm going to buy Union Pacific" stock. Gov't.Opp.10. If someone called the robber baron's bluff by offering to sell stock, he would not accept the offer. Here, by contrast, Petitioner made no affirmative statement but entered an order on an electronic exchange that he would honor if accepted. Indeed, Petitioner "intended to, and did, fill any of [his] orders that were accepted while open on the market." Pet.App.195. He did not declare his intentions except through the performative action of placing his order; he said nothing else about his intent. Anyone—especially the sophisticated high-frequency trading firms that were the alleged victims of his offer—could have executed on the trades that Petitioner hoped to cancel. Pet.App.279. The fact that those firms chose, rather than accepting Petitioner's order, to front-run and execute orders on the opposite side of the market does not make them victims. They received exactly what they bargained for. Plus, and contrary to the government's suggestion, Pet.App.4,

COMEX's rules permit traders, like Petitioner, to place "iceberg" orders, to structure large orders into smaller ones, and to otherwise conceal the full extent of their private intent to buy or sell, Pet.App.174.

Worse, the decision below would transform ordinary negotiating tactics into federal crimes. Under the government's theory, an automobile buyer commits fraud when she bluffs that she will "walk away" from a deal if the salesman does not accept her "best and final" offer. If she nonetheless is willing to go a little higher, has she committed fraud? Under the government's theory, her statement contained an "implied misrepresentation" that may have deflated the price of the sale. Yet, there is no fraud because the potential "victim" got exactly what she bargained for: a deal at the stated offer. *See United States v. Rodriguez*, 732 F.3d 1299, 1304 (11th Cir. 2013). So too here.

The government's novel theory also creates surplusage by stretching the wire fraud statute to include a "disruptive practice" that Congress expressly addressed in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Dodd-Frank, which went into effect *after* all of Petitioner's relevant conduct, outlawed "spoofing." 7 U.S.C. § 6c(a)(5)(C). When it did so, Congress did not call it "fraud" but rather a "disruptive practice," defining it as "bidding or offering with the intent to cancel the bid or offer before execution." *Id.* The anti-spoofing provision has a five-year statute of limitations and a maximum 10-year sentence, 28 U.S.C. § 2462, rather than a 10-year statute of limitations and a maximum 30-year sentence applicable to wire fraud convictions,

18 U.S.C. § 3293(2). Yet, according to the government, Congress's action was pointless because spoofing had been prohibited as wire fraud all along. As Congress recognized, but the Seventh Circuit did not, spoofing is not wire fraud. The Court should grant review.[1]

* * *

At a minimum, this Court should hold this case for the resolution of *Ciminelli v. United States*, No. 21-1170 (argued Nov. 28, 2022). The lower court's error here is akin to the flawed logic at issue in *Ciminelli*. Under the right-to-control theory, a defendant commits fraud by "depriv[ing] the victim of potentially valuable economic information" that is "necessary to make discretionary economic decisions." *United States v. Binday*, 804 F.3d 558, 570 (2d Cir. 2015). The decision below rests on the same faulty premise. Petitioner made no misrepresentations about price, quality, or performance, but at most deprived counterparties of the "potentially valuable economic information" of his intent to cancel. Thus, if this Court rejects *Ciminelli*'s expansive interpretation of the wire fraud statute, it should grant, vacate, and remand for

[1] As explained in the Petition, the government initially charged Petitioner with spoofing in violation of the CEA. Pet.App.10-11. But, to avoid relying on a tolling order obtained by misrepresentations to the district court and to reach trading conduct before the July 16, 2011 effective date of Dodd-Frank, the government dropped the CEA charges and indicted Petitioner for wire fraud, which has a 10-year statute of limitations. District Court Dkt. ECF No. 171; 18 U.S.C. § 3293(2); Pet.App.233. All three of Petitioner's convictions were based on trading that occurred before the effective date of Dodd-Frank.

the Seventh Circuit to consider the implications of that decision here.

II. The Decision Below Entrenches A Circuit Split Over When An Ends-Of-Justice Determination Under The Speedy Trial Act Must Be Made.

A. The Seventh Circuit's Outlier Position Negates The Speedy Trial Right.

The circuit split on the second question presented is clear. The Second, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits hold that district courts may enter ends-of-justice findings on the record after granting the continuance, so long as they *make* the findings before granting the continuance. *See* Pet.27-31.

The Seventh Circuit takes a conflicting stance. Here, it confirmed that "the district court is not required to make the ends of justice findings contemporaneously with its continuance order." Pet.App.33a (quoting *United States v. Rollins*, 544 F.3d 820, 830 (7th Cir. 2008)). On the Seventh Circuit's view, the "fact that in one instance the court *made* that finding (and stated the reasons for it) in retrospect rather than contemporaneously with its order granting the continuance is immaterial" under the Speedy Trial Act. *United States v. Adams*, 625 F.3d 371, 380 (7th Cir. 2010) (emphasis added).

The government attempts to elide the circuit split by focusing on the district court proceedings in *Rollins*, 544 F.3d at 830, while conceding that the Seventh Circuit's holding was "imprecise," Gov't.Opp.18. But the government fails to address *United States v. Adams*, 625 F.3d 371 (7th Cir. 2010),

which the lower court cited in this case, and which makes clear that the Seventh Circuit allows retroactive continuances based on post hoc ends-of-justice findings. The same goes for *United States v. Larson*, 417 F.3d 741 (7th Cir. 2005), which expressly held that "the district court is not required to make Speedy Trial Act findings contemporaneously with a continuance order." *Id.* at 746. *Rollins* "statement" is thus far more than mere off-hand imprecision.

By contrast, Judge Rakoff, sitting by designation on the Second Circuit, recently repudiated this no-harm-no-foul approach. In *United States v. Pikus*, 39 F.4th 39 (2d Cir. 2022), the district court "perfunctorily excluded time without explanation" and later made "retroactive statements" to justify an ends-of-justice exclusion. *Id.* at 53-54. The Second Circuit reversed because the district court could not "rehabilitate [its] inadequate complexity designations later on." *Id.* at 54. Rather, to avoid a Speedy Trial Act violation, a district court must actively "police itself." *Id.*

B. This Is An Ideal Case To Decide This Important Question.

In an attempt to slip the Seventh Circuit's clear and repeated holdings, the government argues that the district court "had in fact considered the relevant factors and made the relevant findings when it had granted the continuance." Gov't.Opp.16. That is untrue. The district court expressly and solely relied on the automatic exclusion of time triggered by the filing of the motion, Pet.App.302, which the government acknowledges, Gov't.Opp.3. Indeed, the district court's subsequent docket entry cited *only* 18

U.S.C. § 3161(h)(1)(D), which excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." It did not refer to the automatic exclusion in § 3161(h)(1)(H) or the "ends of justice" exclusion in § 3161(h)(7)(A). The district court thus made its ends-of-justice findings for the first time when it ruled on the motion to dismiss, and not at the time it granted the continuance.

The district court admitted that it did not know at the time of the continuance that § 3161(h)(1)(H) granted it a maximum of 30 days to decide the motion after taking it under advisement. Pet.App.160-161. And it further admitted that it "did not articulate the ends-of-justice provision as the basis for excluding time going forward from November 15." Pet.App.160. Indeed, the district court explicitly stated that, "had [it] appreciated that only one month of the period of the motion to dismiss was under advisement after briefing was complete was excludable under the automatic provisions of § 3161(h)(1), [it] *would have* excluded time for further consideration of the motion to dismiss based on complexity pursuant to § 3161(h)(7)(A)." Pet.App.158 n.3 (emphasis added); *accord* Pet.App.161 n.5. The district court's backward-looking fuzzy statements about its "view" at the time does not cure its failure even to invoke the ends-of-justice provision when granting the continuance. Gov't.Opp.15. The record thus refutes the government's *post hoc* effort to argue that the district court "made the necessary findings, 'if only in the judge's mind,' before granting the continuance." *Id.* (quoting *Zedner v. United States*, 547 U.S. 489, 506

(2006)). The district court admittedly did *not* rely on the ends-of-justice provision, and it explicitly *did* rely on a provision that excluded only 30 days. As the Second Circuit's recent decision in *Pikus* makes clear, and consistent with this Court's precedents, that error would have required dismissal in other circuits. *Pikus*, 39 F.4th at 54.

Finally, the government does not deny the importance of the Speedy Trial Act, which has constitutional dimensions and affects thousands of criminal defendants each year. The Speedy Trial Act is "intended 'to give effect to the sixth amendment right to a speedy trial.'" *United States v. MacDonald*, 456 U.S. 1, 7 (1982) (quoting S. Rep. No. 93-1021 at 1 (1974)). A federal court's violation of the Act's basic requirements undermines the principal mechanism that secures the presumed innocent's Sixth Amendment right to a speedy trial. This Court should bring the Seventh Circuit in line with *Zedner* and its sister circuits and reverse.

CONCLUSION

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

Respectfully submitted,

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