No. _____

In the Supreme Court of the United States

CEDRIC CHANU, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner traded precious metals futures contracts on the COMEX, an electronic commodities exchange regulated by the Commodities Exchange Act. The government alleged that between 2008 and 2013 Petitioner engaged in "spoofing"—*i.e.*, placed orders that he intended to cancel before a counter-party filled them. The government indicted Petitioner for wire fraud, 18 U.S.C. 1343, alleging that his spoofing "deceive[d] other traders * * * regarding supply or demand" and thereby "induce[d] such traders into trading precious metals futures contracts at prices, quantities, and times that they would not have otherwise." App.234a. The jury convicted Petitioner at a trial that did not occur until 26 months after the government indicted Petitioner.

This petition presents the following questions on which the circuits are split:

(1) Whether the federal wire fraud statute criminalizes any "implied misrepresentation" that induces another to enter into a financial transaction, even when the alleged misrepresentation relates to a fact extrinsic to the essential elements of the bargain, a question that this Court likely will address in Ciminelli v. United States, No. 21-1170.

(2) Whether the Speedy Trial Act allows a district court to enter a retroactive "ends-of-justice" exclusion of time based on after-the-fact "ends-of-justice" findings, to "cure" a Speedy Trial Act violation that already has occurred.

PARTIES TO THE PROCEEDING

Petitioner is Cedric Chanu, defendant and appellant below. James Vorley was Petitioner's co-defendant and co-appellant below.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

Vorley v. *United States*, petition for cert pending, No. 22-402 (filed Oct. 27, 2022)

United States v. *Chanu*, U.S. Court of Appeals for the Seventh Circuit, Nos. 21-2242, 21-2251, 21-2666. Judgment entered July 6, 2022

United States v. *Chanu*, U.S. District Court for the Northern District of Illinois, No. 1:18-CR-00035. Judgment entered Aug. 26, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cedric Chanu respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The decision below is reported at 40 F.4th 528 (App.1a-36a).

JURISDICTION

The court of appeals entered judgment on July 6, 2022, and denied rehearing on August 4, 2022 (App.197a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire fraud statute, 18 U.S.C. § 1343, and the Speedy Trial Act, 18 U.S.C. § 3161, are reproduced in the Appendix (App.207a-216a).

INTRODUCTION

1. This case presents an important question regarding the scope of the federal wire fraud statute on which the circuits are deeply fractured and that this Court likely will address in Ciminelli v. United States, 21-1170 (U.S.). The question is whether the federal wire fraud statute criminalizes any "implied misrepresentation" that induces another to enter into a financial transaction, even when the alleged misrepresentation relates to a fact extrinsic to the essential elements of the bargain. The Seventh Circuit—in company with the Fourth, Eighth, and Tenth circuits—says that it does. See, *e.g.*, *United States* v. *Richter*, 796 F.3d 1173, 1192 (10th Cir. 2015) (acknowledging the circuit split and collecting cases). The Sixth, Ninth, and Eleventh circuits say the opposite. See, *e.g.*, *United States* v. *Sadler*, 750 F.3d 585 (6th Cir. 2014); *United States* v. *Bruchhausen*, 977 F.2d 464 (9th Cir. 1992); *United States* v. *Takhalov*, 827 F.3d 1307 (11th Cir. 2016). This case presents an ideal vehicle for the Court to resolve this deep and mature circuit split. [1] The Seventh Circuit's decision below starkly

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[1] The Second Circuit has been inconsistent on this question. On the one hand, the Second Circuit held in *United States* v. *Regent Office Supply Co.*, 421 F.2d 1174, 1179 (1970), that "solicitation of a purchase by means of false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain," does not implicate the mail and wire fraud statutes. On the other hand, the Second Circuit essentially has allowed the

demonstrates the dangers of the expansive statutory construction that enabled the government to prosecute Petitioner's "spoofing" as wire fraud. To establish that Petitioner's "spoof" orders made any misrepresentations *at all*—let alone *materially false* ones—the government resorted to a novel "implied misrepresentation" theory that itself cannot be reconciled with the Due Process Clause's fair warning requirement.

Petitioner was a Deutsche Bank employee based overseas, who traded precious metals futures on the COMEX, an anonymous electronic commodities exchange run by the CME Group. Petitioner was convicted of wire fraud based on his "spoofing" on the COMEX gold and silver futures markets on seven days between March 2010 and December 2012. "Spoofing" is the placing of buy or sell orders with the intent to cancel the orders before they get filled. "Spoof" orders are real, at-risk orders that can—and, despite the subjective intent of the trader, sometimes do—get filled by counter-parties. As long as a "spoof" order remains on the market (*i.e.*, until it is cancelled or filled), it is real, executable liquidity and must be honored if filled by a counterparty. The principal purpose of "spoofing," however, is to induce other traders to front-run the "spoof" orders with competing orders of their own.[2]

"right to control" theory to enable mail and wire fraud prosecutions that otherwise could not succeed under *Regent Office Supply*.

[2] For example, suppose a "spoofer" has an open sell order at the $1,000 price level that he wants to get filled quickly, but the best bid has been stuck at $999 for the last several minutes. "Spoofing" would involve placing large buy orders on the COMEX's "visible order book" at the $996, $997, and $998 price levels. Because those buy

The government's wire fraud theory was entirely novel. According to the government, a "spoof" order makes an implied misrepresentation to the market that the anonymous trader who placed the order does not intend to cancel it. The government at trial showed that certain hedge funds utilizing high-frequency trading algorithms were "victimized" by Petitioner's spoofing, because their algorithms sometimes "reacted" by front-running the "spoof" orders (*i.e.*, placing a buy order at a higher bid price than a "spoof" buy order, or placing a sell order at a lower offer price than a "spoof" sell order). Those front-running orders sometimes resulted in executed trades with non-spoof orders on the opposite side of the market, including some placed by Petitioner. How did this constitute a knowing and willful "scheme to defraud"? The government's argument, in the words of the indictment, was Petitioner's "spoofing" induced the algorithms "to buy or to sell futures contracts at prices, quantities, and times that they otherwise would not have." App.234a.

In his jury addresses, Petitioner's counsel acknowledged that "spoofing" can fairly be characterized as "deceptive" (like poker). Petitioner's trial evidence, however, demonstrated that at all times he acted with an honestly held, good-faith belief that "spoofing"—like

orders are below the current best bid, they are not likely to get filled immediately. A third party might react to this increase in visible buy-side liquidity by "crossing the spread" and placing a buy order for $1,000, based on a prediction that even more demand is about to flow into the market. This $1,000 buy order would result in an executed trade with the spoofer's $1,000 sell order. The spoofer would then cancel the buy orders that he placed at the $996-$998 price levels (assuming they had not yet been filled by a counter-party, in which case the spoofer must honor the trade).

other commonly used and equally deceptive trading tactics that even the prosecution conceded are not unlawful—was permissible under the COMEX rules.[3]

After the close of evidence, the district court advised the parties that its jury instructions would define "scheme to defraud" as a "scheme to deceive *or* cheat another" to obtain money or property. C.A.App.205 (emphasis added). Just six months before Petitioner's trial, the Ninth Circuit held that this *exact instruction* misstated the law. See *United States* v. *Miller*, 953 F.3d 1095, 1098 (2020). Petitioner objected, arguing that the instruction's use of the disjunctive "deceive *or* cheat" improperly would allow the jury to find the essential "scheme to defraud" element merely upon proof that Petitioner deceived hedge funds' high-frequency trading algorithms about something that was collateral to the trades that his "spoof" orders allegedly induced the hedge fund "victims" to execute. App.217a-221a. Petitioner pointed to the Eleventh Circuit's holding in *Takhalov*, 827 F.3d at 1322-24, that a "deceive *or* cheat" instruction is a prejudicial misstatement of law where the

[3] In July 2010, Congress added to the Commodities Exchange Act (CEA) a 55-word provision specifically prohibiting "spoofing" as a "Disruptive Practice[]" (notably bifurcating it from "manipulative" practices codified in a separate section of the CEA). See 6 U.S.C. 6(a)(5)(C); 7 U.S.C. 9). The trial evidence showed that Petitioner, a French citizen based overseas, was first made aware of the new anti-spoofing provision in September 2013, as part of a Deutsche Bank compliance training—well after the trading conduct for which Petitioner stands convicted. And, in any event, the government did not charge Petitioner with any violation of the CEA, which would have been time-barred under the statute's five-year limitations period. As a fix for that tardiness, the government invoked the wire fraud statute and its 10-year limitations period.

evidence rationally can support a finding that the defendant did not lie to the "victims" about an essential element of the transactions that the defendant's "deception" induced the "victims" to enter. *Ibid.* The district court overruled Petitioner's objection and refused to modify the "deceive *or* cheat" instruction, thus allowing the jury to return a guilty verdict without finding that Petitioner misrepresented any of the essential terms of the transactions that his "spoof" orders allegedly induced (*i.e.*, the essential terms of the trades that the hedge fund "victims" executed with the non-spoof orders that Petitioner had placed on the opposite side of the market). C.A.App.205.

Even viewed in the light most favorable to the government, the evidence at Petitioner's trial proved nothing more than a scheme to deceive that would not be actionable under Sixth, Ninth, and Eleventh Circuit law. The evidence, at most, showed that (i) Petitioner sometimes engaged in "spoofing"; (ii) Petitioner's "spoof" orders sometimes induced certain hedge funds' high-frequency trading algorithms to front-run the "spoof" orders; (iii) the algorithms' front-running orders sometimes resulted in executed trades with the non-spoof orders that Petitioner had placed on the opposite side of the market; and (iv) the terms of these executed trades were always completely transparent, accurately disclosed, and fully honored.[4] The district court's instructions, however, allowed the jury to return a guilty verdict based upon a finding that Petitioner's "spoof" orders

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[4] Whenever the hedge fund "victim" was on the sell-side of the executed trade, it received an amount of money exactly equal to its offer price. And whenever it was on the buy-side, it received the exact futures contract for which it bid at the exact price that it bid.

were "deceptive" and influenced the algorithms' predictions about the direction that price would move in the next few milliseconds, seconds, or minutes, thereby causing the algorithms to place front-running orders at times, prices, or quantities that they otherwise might not have.

Had Petitioner been prosecuted in the Sixth, Ninth, or Eleventh Circuit, the trial evidence would have been deemed insufficient as a matter of law to sustain a wire fraud conviction. The Seventh Circuit, by contrast, affirmed Petitioner's conviction and prison sentence because his "spoofing" "advanced a quintessential 'half-truth' or implied misrepresentation—the public perception of an intent to trade and a private intent to cancel" that misrepresented supply or demand. App.21a.

The Seventh Circuit's decision below highlights an intolerable circuit split—one whose implications extend beyond whether "spoofing" may be prosecuted as wire fraud. This case presents an ideal vehicle for the Court finally to resolve the split. The wire fraud question is preserved, the circuit split is deep and mature, and resolving the split in Petitioner's favor would entitle him to a reversal of his conviction. Moreover, the government's novel wire fraud theory flouts the constitutional fair notice concerns that have animated the Court's wire fraud jurisprudence since *McNally* v. *United States*, 483 U.S. 350 (1987). As in almost every market for goods or services, commodities and securities traders engage in all sorts of trading strategies and tactics that seek to obfuscate "supply and demand" to their advantage. Traders such as Petitioner do not have any fair notice about which of these strategies and tactics a federal prosecutor might decide involve "implied misrepresentations" that

should be prosecuted under the Seventh Circuit's construction of the wire fraud statute.[5] These traders are left with a Hobson's choice—either risk wire fraud prosecution or eschew trading strategies that protect their clients from the predatory high-frequency trading algorithms that now dominate the exchanges. And nothing logically would prevent a federal prosecutor from taking the wire fraud theory used to prosecute Petitioner and using it to police any commercial market (not just regulated exchanges).

2. This case also implicates a separate important circuit split involving the Speedy Trial Act's provision that allows a district court to delay a criminal trial based on a finding that the "ends of justice" warrant a continuance. See 18 U.S.C. 3161(h)(7)(A). The circuits are split as to whether a district court is permitted to enter a retroactive ends-of-justice continuance based on *post hoc* ends-of-justice findings, to "cure" a Speedy Trial Act violation that already has occurred.

The Speedy Trial Act requires trial to commence within 70 days of the defendant's arraignment. The Speedy Trial Act also includes a number of provisions that allow a district court to "stop" the 70-day clock. See 18 U.S.C. 3161(h)(1)-(8). These stoppage periods are known as "exclusions of time." Some stoppages are automatic. Others, such as Section 3161(h)(1)(7)'s "ends-of-

[5] Some of these deceptive strategies and tactics are expressly allowed by the private rules promulgated by the exchanges; but many others are either not addressed by those private rules at all or not addressed with any specificity (as was the case with "spoofing" prior to amendments that the CME Group made to the COMEX rules in 2014, long after Petitioner left Deutsche Bank).

justice" provision, require the district court to make detailed factual findings.

Petitioner was arraigned on September 15, 2018. On November 15, 2018, Petitioner filed a motion to dismiss the indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3) for failure to state a cognizable violation of the wire fraud statute. At a status conference held that same day, the district court entered an order excluding time for "briefing and consideration" of the motion to dismiss. App.301a. The district court's minute order stated, "Time will be excluded through briefing and ruling on the defendants' motion to dismiss the indictment pursuant to 18 U.S.C. § 3161(h)(1)(D)." App.292a. By statute, this exclusion ran only through March 26, 2019, the date on which briefing on the motion to dismiss was completed. An additional 30 days were automatically excluded pursuant to Section 3161(h)(1)(H), while the district court had the motion to dismiss "under advisement." By statute, the 70-day clock restarted on April 27, 2019. Another 189 days then elapsed without the government requesting or the district court entering any new exclusion of time order. App.291a.

Facing a potentially indefinite delay of trial due to the then-raging COVID-19 pandemic, Petitioner moved to dismiss the indictment based on the clear Speedy Trial Act violation that had occurred. The district court denied the motion. Relying on Seventh Circuit precedent holding "that ends-of-justice findings required by 3161(h)(7) need only be made by the time that the [district court] rules on a motion to dismiss based on a violation of the Speedy Trial Act," the district court entered an ends-of-justice continuance retroactive to November

15, 2019, on the basis of *post hoc* ends-of-justice findings. App.137a. On appeal, the Seventh Circuit affirmed the district court's denial, doubling down on prior circuit precedent holding that "the district court is not required to make the ends of justice findings contemporaneously with its continuance order." App.33a (quoting *United States* v. *Rollins*, 544 F.3d 820 (7th Cir. 2008)).

The decision below further entrenches a well-developed circuit split as to whether the Speedy Trial Act permits a district court to enter a retroactive "ends-of-justice" continuance based on *post hoc* "ends-of-justice" findings to "cure" a Speedy Trial Act violation that already has occurred. At least five circuits have held in precedential decisions that the Speedy Trial Act does not permit this. See, *e.g.*, *United States* v. *Williams*, 511 F.3d 1044, 1055 (10th Cir. 2007); *United States* v. *Suarez-Perez*, 484 F.3d 537, 542 (8th Cir. 2007); *United States* v. *Jones*, 56 F.3d 581, 585 n.9 (5th Cir. 1995); *United States v. Kelly*, 45 F.3d 45 (2d Cir. 1995); *United States* v. *Moran*, 998 F.2d 1368, 1372 (6th Cir. 1993). The Seventh Circuit, however, holds the opposite. See, *e.g.*, *United States* v. *Adams*, 625 F.3d 371 (2010). Petitioner's case presents a clean vehicle for the Court to resolve this split, as the issue is fully preserved and clearly dispositive.

STATEMENT OF THE CASE

Petitioner was a precious metals trader who traded gold and silver futures contracts on the COMEX. The wire fraud charges against Petitioner relate to a trading tactic that Petitioner used to compete with high-frequency traders. The tactic is known as "spoofing," defined as placing orders to buy or sell with the intent to cancel the orders before any counter-party fills them.

Petitioner's "spoofing" involved placing limit orders on one side of the market in order to induce high-frequency traders to execute trades with limit orders that Petitioner earlier had placed on the other side of the market. In other words, Petitioner placed buy orders to induce high-frequency traders to place their own buy orders at even higher bid prices; and Petitioner placed sell orders to induce high-frequency traders to place their own sell orders at even lower offer prices. The theory on which the government indicted Petitioner and obtained a conviction was that Petitioner's "spoofing" constituted a "scheme to defraud" under the wire fraud statute because Petitioner subjectively intended to cancel the orders after he accomplished his goal of inducing the high-frequency traders to place competing orders of their own. At trial, the government neither proved nor even argued that Petitioner's "spoof" orders induced, or were intended to induce, any third party to enter into a transaction whose terms were not completely transparent, not accurately disclosed, or not fully honored.

A. The COMEX Futures Market

1. "A futures contract, roughly speaking, is a fungible promise to buy or sell a particular commodity at a fixed date in the future. * * * Unless the parties cancel their obligations by buying or selling offsetting positions, the long must pay the price stated in the contract * * * and the short must deliver[.]" *Commodity Futures Trading Com'n* v. *Zelener*, 373 F.3d 861, 864 (7th Cir. 2004). In other words, the asset underlying a futures contract is a physical commodity whose characteristics are fixed and immutable. Thus, so long as each party to an executed trade of a futures contract is willing and able to fulfill its contractual obligations (namely, the buyer to

pay and the seller to deliver), each party receives the full terms of the transaction for which it bargained.

Many COMEX participants, including high-frequency trading firms such as Citadel Securities and Quantlab, trade futures contracts as speculative financial instruments. These speculative traders make calculated wagers that they can flip their positions for a profit after some period of time (in some instances after only a few milliseconds). The terms of an executed trade, however, do not include a guarantee that the "market price" of the contract will be higher or lower at any particular point of time in the future. Speculative traders of gold or silver futures contracts assume the risk that, after an executed trade, the "market price" will move in a direction that they did not anticipate and that is not favorable to them. In this regard, buying a gold or silver futures contract is just like buying a bar of gold or silver bullion—if you pay for a 100% pure, 400 troy ounce bullion bar of the metal and you receive exactly that, you cannot claim that you "did not get what you paid for" simply because the market price of the metal subsequently goes down. And if you are the seller of the bullion, you cannot claim that the buyer deprived you of your property simply because the market price of the metal subsequently goes up.

COMEX traders jockey to receive better prices as they build, unwind, and hedge their positions. COMEX traders employ varying trading strategies and tactics in order to outwit and protect themselves from their competitors. COMEX traders are not required to reveal their strategies and tactics to the market, and no trader has a fiduciary duty to any other trader.

2. Some traders, such as Petitioner at Deutsche Bank, make decisions based on their own judgment and place orders manually (*i.e.*, by clicking a mouse). High-frequency trading firms, by contrast, rely entirely on complex software programs and lightning-fast super-computers to make automated trading decisions.

High-frequency trading involves "making large volumes of trades * * * based on trading decisions effected in fractions of a second" by "algorithms that incorporate rapid market developments and data from past trades." *United States* v. *Aleynikov*, 676 F.3d 71, 73 (2d Cir. 2012). These algorithms process in microseconds information that would take a human brain days or weeks to process, and they are able to place orders in a fraction of the time it would take a human finger to point and click a mouse. This enables the algorithms to "move in and out of * * * positions" rapidly, "mak[ing] money by arbitraging small differences in * * * prices rather than by holding [positions] for long periods of time."[6] *City of Providence* v. *Bats Global Mkts., Inc.*, 878 F.3d 36, 41 (2d Cir. 2017). In this regard, high-frequency trading is pure, unadulterated financial speculation. Each time an algorithm takes a position (*i.e.*, buys or sells a contract), it does so based on a calculated guess that it can unwind the position at a profit a few minutes or even seconds later.

The unfathomable speed at which high-frequency trading algorithms process information, make decisions,

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[6] By way of example, gold futures might open and close the day at $1,000, trading in a range of $975 to $1,025. A "buy-and-hold" investor would be completely indifferent to intraday volatility and would end the day flat. A high-frequency trader could profit by timely buying and selling throughout the day as the price fluctuates between $975 and $1,025.

and place orders gives them an inherent advantage over human traders. An algorithm's weakness, however, is that its automated decision-making can be predictable. Human traders such as Petitioner can blunt algorithms' speed advantages by exploiting their predictability.

3. High-frequency trading firms treat their algorithms as closely guarded secrets. It is known, however, that high-frequency trading algorithms are designed to consider dozens of data points in an effort to predict short-term price direction and, accordingly, to determine whether to buy, sell, or hold a position. One of the data points that high-frequency trading algorithms commonly consider is the visible liquidity on the COMEX "order book." The algorithms essentially treat this visible liquidity as an imperfect indicator of the total liquidity (*i.e.*, supply and demand) that may be in the market or may be coming into the market.

The visible liquidity on the COMEX order book, however, is an incomplete, ephemeral picture of the market's *current* total liquidity, to say nothing about its *future* liquidity. First, much of the market's current liquidity resides completely outside the order book. High-frequency traders, for example, utilize order types that either immediately result in an executed trade or are automatically cancelled, and these order types never rest on the order book.[7] Thus, even if the COMEX order book contains more resting bid (buy-side) volume than resting

[7] These include "market" orders, "fill-or-kill" orders, "immediate-or-cancel" orders, and "stop" orders (*i.e.*, hidden orders that are automatically filled once price reaches a particular level). At any given time, traders using these order types may be providing the majority of the market's total liquidity.

offer (sell-side) volume, for example, there may nevertheless be substantially greater supply than demand that is invisible to the market.[8] Second, COMEX traders can place "hidden quantity" orders—also called "iceberg" orders—on the order book. A "hidden quantity" order puts *invisible* liquidity on the order book. For example, suppose the current best bid for a gold futures contract is $999 and a trader is looking to sell 100 gold futures contracts at $1,000. The trader can place a "hidden quantity" limit order to sell 100 contracts at $1,000, where only a single contract at a time is visible on the order book. The trader, therefore, effectively conceals 99% of the sell-side liquidity that his limit order provides. At any given time, the vast majority of "on-book" liquidity may be such invisible liquidity, thereby creating a *deceptive* view of actual supply or demand that is nonetheless wholly permissible under the rules of the exchange. Third, the COMEX allows traders to cancel any order at any time for any reason. Thus, the market's liquidity—including the order book's visible liquidity—can (and usually does) change millisecond-by-millisecond. Fourth, traders are permitted to have resting orders on both sides of the market simultaneously; many traders do this as part of a hedging strategy or to take advantage of fleeting breaks of "price support" or "price resistance." Because orders placed on the COMEX order book are anonymous, market participants have no

[8] This explains why a significant increase in visible liquidity on one side of the order book can result, seemingly paradoxically, in price moving *toward*—rather than away from—that liquidity. A trader looking to buy or sell a large quantity of contracts at a certain price level may be lying in wait, refraining from placing an order until it sees that the visible liquidity on the order book is sufficient to absorb the order, at which point the trader will place a "fill-or-kill" or "immediate-or-cancel" order at that price.

way to know whether the liquidity on opposing sides of the markets is attributable to multiple unrelated traders or just a single trader.

B. The Indictment and Trial

1. The government charged Petitioner with multiple counts of wire fraud. Each count was based on a different trading "episode"—the earliest of which took place the morning of March 30, 2010, and the latest of which took place on the morning of September 14, 2012—during which Petitioner placed "spoof" orders.

The indictment's wire fraud charges rested on a novel premise—that, because "spoof" orders are subjectively intended to be cancelled before a counter-party fills them, "spoof" orders impliedly "communicate false and misleading information regarding supply and demand." App.234a. According to the indictment, this meant that Petitioner's "spoofing" constituted a scheme to defraud because it was intended "to deceive other traders" into "buy[ing] or * * * sell[ing] futures contracts at prices, quantities, and times that they otherwise would not." App.234a-235a.

The government's wire fraud theory, including the premise that a "spoof" order impliedly communicates false information about supply and demand merely because of the trader's subjective intent to cancel the orders at some point, was entirely novel. Indeed, the first time that the government criminally charged anybody for "spoofing" was October 2, 2014, well after Congress's passage of the Dodd-Frank Act. See United States v. Coscia, No. 14-551 (N.D. Ill.).

2. On November 15, 2018, Petitioner filed a motion to dismiss the indictment for failure to state a violation

of the wire fraud statute. That same day, the district court entered a minute order stating that "[t]ime will be excluded [for Speedy Trial Act purposes] through briefing and ruling on the defendants [sic] motion to dismiss pursuant to 18 U.S.C. § 3161(h)(1)(D)." App.292a. By statute, that exclusion of time lasted only through March 26, 2019, the date on which briefing on the motion to dismiss ultimately was completed. An additional 30 days, up through April 25, 2019, was automatically excluded pursuant to 18 U.S.C. 3161(h)(1)(H), while the district court had the motion to dismiss "under advisement." The district court did not enter another exclusion of time order until October 31, 2019, nor did the government request one. One-hundred-and-eighty-nine days of Speedy Trial Act time elapsed between April 25 and October 31, 2019, a clear violation of the Speedy Trial Act.

On May 20, 2020, Petitioner filed a motion to dismiss the indictment based on that Speedy Trial Act violation. On July 21, 2020, the district court denied the motion. Relying on Seventh Circuit precedent permitting the practice, the district court entered an "ends-of-justice" exclusion of time retroactive to November 15, 2018, supported by *post hoc* "ends-of-justice" findings, supposedly curing the Speedy Trial Act violation that already had occurred. App.132a.

3. Trial finally commenced in September 2020, during the height of the COVID-19 pandemic. At trial, the government introduced Petitioner's trading records from various days between 2008 and 2012. The government also called several fact and expert witnesses to discuss Petitioner's trading. The government also called corporate representatives of the high-frequency trading firms Citadel Securities and Quantlab, who testified that

Petitioner's "spoof" orders were capable of influencing their algorithms' trading decisions.

Viewed in the light most favorable to the government, the trial evidence showed that Petitioner engaged in "spoofing," that Petitioner's intent was to induce high-frequency trading algorithms to front-run his "spoof" orders, and that the "spoof" orders may have induced certain algorithms to execute trades with limit orders that Petitioner had placed on the other side of the market. The trial evidence also indisputably showed, however, that all of Petitioner's "spoof" orders were real, at-risk orders that in every instance remained on the market long enough for a counter-party to fill them. The trial evidence also indisputably showed that, in every instance that a counter-party filled one of Petitioner's orders, the counter-party knew and received the full terms of the transaction. When Petitioner's "spoof" sell orders induced a high-frequency trading firm to sell, the firm received the exact amount of money owed. When Petitioner's "spoof" buy orders induced a high-frequency trading firm to buy, the firm received the exact futures contract it bought at the exact price it agreed to pay. Accordingly, the government proved merely the indictment's allegation that Petitioner's "spoof" orders sometimes induced the high-frequency trading firms to buy or sell futures contracts at prices, quantities, or times that they "otherwise would not [have]." App.235a.

The government did not introduce at trial any evidence that Petitioner ever lied to anybody about the terms of an executed transaction. Nor did the government introduce at trial any evidence that Petitioner ever lied to anybody about his willingness to follow through with his end of the bargain in an executed trade. Over

Petitioner's objection, however, the district court provided the jury with a set of instructions that allowed the jury to find Petitioner guilty merely based on proof that Petitioner "scheme[d] to deceive" the high-frequency trading firms' algorithms by not disclosing his intent to cancel certain of the orders he had placed on the market. C.A.App.205.

4. Petitioner requested that the district court instruct the jury that "[m]isrepresentations amounting only to a deceit do not meet the definition of a scheme to defraud" and that, therefore, "[t]he wire fraud statute is not violated where the defendant's conduct does no more than cause the alleged victim to enter into a transaction that he or it may otherwise have avoided." App.220a-221a. Petitioner also requested that the district court refrain from instructing the jury that a scheme to "deceive" the victim into engaging in a financial transaction was sufficient to convict. *Ibid.* The district court refused each of those requests. The district court even refused Petitioner's request for an instruction that the government had to prove beyond a reasonable doubt that Petitioner lacked a good faith belief that "spoofing" was, just like intentionally deceptive "iceberg" orders, a form of deceptive trading permissible under COMEX rules—a refusal that is difficult to square with the logic undergirding this Court's recent decision in *Ruan* v. *United States*, 597 U.S. ___ (2022). App.222a-229a.

5. After deliberating for several days, the jury convicted Petitioner of seven counts of wire fraud. Petitioner timely moved for a judgment of acquittal, reiterating his arguments that the wire fraud statute does not criminalize *per se* the use of deception to induce another

person into entering a financial transaction that he otherwise might have avoided. The government responded that "the jury was entitled to infer that [Petitioner's] victims bargained to * * * to buy or sell a specific asset based on a view of that asset's fair value that was not distorted by a misrepresentation as to supply and demand." Gov't Resp. 24 (Dist. Ct. Dkt. 363). In this regard, the government essentially acknowledged that its theory of prosecution was no different than the "right to control" theory that this Court will be addressing in Ciminelli.

C. The Decision Below

1. On appeal to the Seventh Circuit, Petitioner continued to press his argument that the wire fraud statute does not criminalize the use of "deception in order to obtain money or property from another * * * if [the defendant] d[id] no more than induce [that other] party to enter into [a] transaction[ ] that [it] might otherwise [have] avoid[ed], but d[id] not misrepresent the 'essential elements of the bargain.' " Pet. C.A. Br. at 41. The court of appeals rejected this argument without discussion. Instead, the court held that its prior panel decision in *United States* v. *Coscia*, 866 F.3d 782 (7th Cir. 2017), deemed "spoofing" to be a "scheme to defraud" for purposes of the commodities fraud statute and that any distinctions between the commodities fraud statute and the wire fraud statute were "without a meaningful difference, at least in this case." App.20a.

2. The court of appeals also rejected Petitioner's appeal of the denial of his Speedy Trial Act motion to dismiss, relying on prior panel precedent that a district court is entitled to enter a retroactive "ends-of-justice" continuance supported by *post hoc* "ends-of-justice"

findings, in order to "cure" a Speedy Trial Act violation. App.35a.

3. Petitioner timely filed a petition for *en banc* review, in which he urged the full court to revisit *Coscia* and adopt the construction of the wire fraud statute that the Eleventh Circuit adopted in *Takholov*, 827 F.3d at 1314 (holding that, "even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if * * * the alleged victims 'received exactly what they paid for' ") (internal citation omitted). The court of appeals denied the petition without comment.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE WIRE FRAUD QUESTION PRESENTED OR HOLD THE PETITION FOR THE DECISION IN CIMINELLI

The Court should grant the question that the petition presents regarding the scope of the wire fraud statute. Alternatively, the Court should hold the petition for the decision in Ciminelli, where the Court may address whether the wire fraud statute criminalizes *per se* any deception that induces another party to enter into a financial transaction that it otherwise might have avoided, even where the deception goes to a fact extrinsic to the essential elements of the bargain.

A. The Wire Fraud Question Is Important

The use of deception to induce a financial transaction is an everyday feature of commercial life. Consider the following scenarios:

- A couple browsing an airline's website for flights to Miami find tickets for $359. They also see the

following message in conspicuous bold-faced font: "Only two seats left at this price." This message induces them to purchase the tickets immediately. Unbeknownst to them, the airline in fact intends to put up 50 more seats at that same price after the two seats are sold.

- A real estate agent who is holding an open house calls up a dozen friends, asking them to stop by the open house and act like interested buyers. The friends agree. At the open house, the sight of these apparent competitors induces an *actual* interested buyer to make an immediate offer on the house that the buyer accepts.

- A Yankees fan in need of cash calls up a pawn shop to inquire whether it will buy her Aaron Judge autographed baseball. The shop owner tells the fan to stop by the next evening, shortly before closing time. When the fan arrives, she sees on prominent display an identical Aaron Judge autographed ball with a well-worn $200 price sticker. Seeing this, the fan reluctantly agrees to accept the shop owner's offer to buy her ball for $150. Unbeknownst to the fan, the shop owner put the $200 price sticker on the ball a few minutes before she arrived and removed it promptly after she left. In fact, the shop had been selling Aaron Judge autographed balls for $500, and they had been flying off the shelves.

- An antique store puts an old lamp up on eBay, with a reserve price of $200. With one day left in the auction, the lamp has one "watcher" but no bids. The store owner decides to create several new eBay accounts, which he uses to place bids for $160, $170, $180, and $190. These bids give the "watcher" confidence that,

> if he buys the lamp and ends up not liking it, he will be able to re-sell it for only a small loss at worst. The "watcher" thus places a bid for $200, which meets the reserve price and wins the auction.

The above scenarios all involve clear efforts to deceive potential buyers and sellers regarding supply and demand, and the deceptions clearly induced a counter-party to enter into a financial transaction that the counter-party otherwise might have avoided. Does this mean that the airline, the real estate agent, the pawn shop owner, and the eBay seller violated the federal wire fraud statute? Under the logic of the Seventh Circuit's decision below—as well as under the law of the Fourth, Eighth, and Tenth circuits—the answer is yes. Under the law of the Sixth, Ninth, and Eleventh circuits, the answer is no.

This is not an inconsequential circuit split. The theory of prosecution and the construction of the wire fraud statute that the government pursued against Petitioner cannot logically be limited to "spoofing," nor to deceptive conduct on a regulated exchange. The government's position—which the Seventh Circuit's decision below fully endorsed—is that the mail and wire fraud statutes can be used to prosecute *any* false representation, implied misrepresentation, or half-truth that was intended to cause a buyer or seller to enter into a transaction it might have avoided. This position lacks any logically coherent stopping point that comports with the Due Process Clause's fair warning requirement. It instead treats the mail and wire fraud statutes as staggeringly broad licenses that empower federal prosecutors to pursue al-

most any commercial deception that they consider unseemly, unethical, or immoral.[9] This is anathema to the due process, lenity, and separation of powers principles that have animated the Court's wire fraud jurisprudence at least since *McNally* v. *United States*, 483 U.S. 350 (1987). When the wire fraud statute is imbued with such elasticity, it is impossible for citizens engaged in commercial transactions to know *ex ante* where the line is between acceptable puffing, bluffing, and posturing, on the one hand, and federal fraud, on the other. This is especially true if, as occurred here, the government also is permitted to bring a prosecution based on a theory that the defendant's *conduct* (here, placing at-risk orders on the COMEX) carried an implied representation that was false or misleading because it failed to disclose an extrinsic fact that a buyer or seller might have wanted to know.

B. The Circuit Split On The Wire Fraud Question Is Deep And Mature

In *McNally*, the Court recognized that the congressional intent underlying the mail and wire fraud statutes is "to protect the people from schemes to deprive them of their money or property." 483 U.S. at 356. Thus, although the statutes include the phrase "for obtaining money or property," the statutes require the government to prove that the defendant's scheme was "aimed at causing *deprivation* of money or property." *Id.* at 358 (emphasis added).

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[9] It would also allow federal prosecutors to pursue under an "inducement" theory the same conduct that it currently pursues under the "right to control" theory. The United States virtually admits this in its merits brief in Ciminelli. See Resp. Br. at 21, Ciminelli v. United States, No. 21-1170 (U.S.) (Oct. 12, 2022).

The ordinary understanding of "deprivation" does not encompass a transaction with terms that are completely transparent, accurately described, and fully honored, even where the transaction was induced by a collateral deception. For example, if a moviegoer purchases a ticket for $10, one would not ordinarily say that the theater "deprived" her of money merely because the movie was not as entertaining as the theater's preview suggested it would be. The terms of the transaction were transparent—in exchange for $10, the person would receive a seat in the theater during the movie—and those terms were fulfilled. At the end of the terrible movie, the moviegoer might feel that she wasted her money, but she was not defrauded. That would be true even if the preview was specifically intended to conceal the movie's awfulness.

The same can be said of the investors who bought cryptocurrency tokens based on Kim Kardashian's promotional internet post about them.[10] Kardashian's post deceptively implied that she and her "friends" were interested in the tokens but failed to disclose that she was being paid a handsome sum to tout them to her 225 million followers. Her post undoubtedly was the but-for cause of many token purchases, some of which likely were made by sophisticated speculators betting that Kardashian's stamp of approval would swell demand for the tokens, and others of which likely were made by people who ascribed value to the tokens only because they were led to believe that Kardashian and her "friends" valued them too. While Kardashian may have violated securities regulations, it would be nonsensical to say that

[10] Kimberly Kardashian, Securities Act Release No. 11116 (ALJ Oct. 3, 2022).

her post "deprived" any investor of their money in violation of the wire fraud statute—all of the buyers received what they knew they were buying (a speculative cryptocurrency whose price could go lower or higher) at the price they agreed to pay; any implicit misrepresentation about demand for these tokens was extrinsic to the essential elements of the transaction.[11] This is the critical line between deception and fraud.

Consistent with *McNally*'s focus on "deprivation," the Sixth, Ninth, and Eleventh circuits hold that, under the mail and wire fraud statutes, the phrase "scheme to defraud" does not include schemes that lack a deprivation. Those circuits therefore hold that the mail and wire fraud statutes do not criminalize deceptions that merely induce the other party to enter into a financial transaction that it otherwise might avoid, so long as the actual agreed-upon terms of the transaction are fully transparent and fully honored.

For example, in *Sadler*, 750 F.3d at 585, the Sixth Circuit reversed a wire fraud conviction that the government obtained against the operator of a pain management clinic based on false representations that she made to pharmaceutical distributors that supplied the clinic with FDA-approved narcotics. The evidence showed that the pain clinic was selling the narcotics to addicts for cash. The defendant, however, had ordered the narcotics from the distributors "by using a fake name * * * and by falsely telling the distributors that the drugs were being used to serve 'indigent' patients." *Id.* at 589-

[11] During the period between Kardashian's post and the SEC's Order, the tokens she promoted lost over 95% of their market value. E. Daley, *Keeping Up With Kim Kardashian's Crypto*, Nat. L. Rev. (Oct. 4, 2022), tinyurl.com/bdftk4wm.

90. On appeal, the government argued that the defendant's lies had induced the pharmaceutical distributors to sell the narcotics to the clinic—which meant she had used false representations to "deprive[ ] the distributors of their pills." *Id.* at 590. The Sixth Circuit rejected this construction of the wire fraud statute's "scheme to defraud" element and reversed. The Sixth Circuit held that the defendant "ordered pills and paid the distributors' asking price, nothing more." *Ibid.* It was not sufficient, the Sixth Circuit explained, that the defendant's "lies convinced the distributors to sell controlled substances that they would not have sold [to the clinic] had they known the truth." *Ibid.* To hold otherwise would "stretch the [wire fraud] statute to cover the right to accurate information before making an otherwise fair exchange." *Id.* at 591.

The Sixth Circuit's decision in *Sadler* accords with the Ninth Circuit's earlier decision in *Bruchhausen*, 977 F.2d at 464. That case involved the defendant's "scheme to smuggle American [weapons] technology to Soviet Bloc countries." *Id.* at 466. The government prosecuted the scheme under the wire fraud statute. The government's theory was that the defendant purchased equipment from manufacturers based on a misrepresentation that the "equipment would be used in the United States." *Ibid.* In fact, the defendant intended to ship the equipment "to West Germany and then on to the Soviet Bloc." *Ibid.* At trial, representatives from the manufacturers "testified that they would never have sold to [the defendant] had they known the truth." *Ibid.* On appeal, the Ninth Circuit held that, whatever other laws the defendant's conduct might have violated, it did not violate the wire fraud statute. Vacating the conviction, the

Ninth Circuit explained that because "[t]he manufacturers received the full sale price for their products," it was beside the point that "they may have been deceived into entering sales that they had the right to refuse."[12] *Ibid.*

The Eleventh Circuit in *Takhalov*, 827 F.3d at 1307, embraced a similar constrained reading of the wire fraud statute. In that case, the government brought a wire fraud prosecution against owners of Miami nightclubs on an especially creative theory. According to the government, the owners had hired beautiful "Eastern European women * * * to pose as tourists, locate visiting businessmen, and lure [the men] into the defendants' bars and nightclubs" by pretending to be interested in them. *Id.* at 1310. At trial, the defendants acknowledged that their intent was for the women to "trick[ ] [the] men to come into the defendants' clubs" and purchase expensive drinks. *Ibid.* The government's theory was that this alone was sufficient for the jury to "convict the defendants of wire fraud." *Id.* at 1311. The Eleventh Circuit rejected that argument. The Eleventh Circuit held that " 'scheme to defraud,' as that phrase is used in the wire-fraud statute, refers only to those schemes in which a defendant lies about the nature of the bargain itself. * * * [E]ven if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end

[12] This is not to say that the Ninth Circuit's mail and wire fraud precedents are correct across the board. As James Vorley, Petitioner's co-defendant at trial and co-appellant in the Seventh Circuit, points out in the petition for certiorari that he filed on October 27, the Ninth Circuit is among the courts of appeals that have held that the wire fraud statute does not require the government to prove that the defendant made a false representation. Pet. at 17, Vorley v. United States, No. 22-402 (Oct. 27, 2022).

in an acquittal if * * * the alleged victims 'received exactly what they paid for.' " *Id.* at 1313-1314 (internal citation omitted); see also *United States* v. *Watkins*, 42 F.4th 1278, 1282 n.5 (11th Cir. 2022) (holding that *Takhalov* "requires a defendant's 'lies [to be] about the nature of the bargain itself' " (quoting *Takhalov*) (alterations in original)).

In the decision below, the Seventh Circuit eschewed the reasoning underlying the Sixth, Ninth, and Eleventh circuit decisions discussed above. It neither required the government to have proved, nor required the jury to have found, that Petitioner's "spoof" orders constituted lies about the terms of the trades that the "spoof" orders supposedly induced the high-frequency trading firms to execute[13] Instead, without meaningful analysis, the Seventh Circuit simply fell back on its earlier panel decision in *Coscia*, which "establishes that this pattern of trading conduct is deceitful" and, the panel concluded, therefore a scheme to defraud. App.20a.

The Seventh Circuit's decision below cannot be squared with the Sixth, Ninth, and Eleventh Circuit decisions discussed above. Instead, it joins decisions from the Fourth, Eighth, and Tenth circuits holding that the mail and wire fraud statutes can be used to prosecute a defendant who did no more than employ deception to in-

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[13] The government could not have proven such a thing. At most, Petitioner's "spoof" orders influenced high-frequency trading algorithms' probabilistic guesses about where "market price" might move over the following few milliseconds, seconds, or minutes. Regardless of its collateral importance to an algorithm's trading decisions, the probability that "market price" will move in a specific direction over some arbitrary time interval is not a term (let alone an essential term) of an executed trade.

duce a third party to enter into a transaction that it otherwise might have avoided. *Richter*, 796 F.3d at 1192 (collecting cases and acknowledging the conflict in the circuits); see also *United States* v. *Tao*, No. 19-20052, 2022 WL 4355302, at *13 n.106 (D. Kan. Sept. 20, 2022) (recognizing that *Richter* and *Takhalov* are at courts).

C. This Case Is An Ideal Vehicle To Resolve The Split

This case presents an ideal vehicle for the Court to resolve the circuit split on the wire fraud question. Petitioner sufficiently preserved the issue—first by asking the district court to give jury instructions consistent with the Eleventh Circuit's decision in *Takhalov*, next by arguing in his motion for a judgment of acquittal that the district court should adopt the rule and reasoning of *Takhalov*, and finally by arguing in his appeal briefs and *en banc* petition below that the Seventh Circuit should adopt *Takhalov* and either distinguish or overrule *Coscia*.

The issue is also dispositive. If the Court resolves the split in Petitioner's favor, Petitioner will be entitled to a reversal of his conviction.[14]

[14] Petitioner's position is that he would be entitled to entry of a judgment of acquittal, because the government's trial evidence *at most* proved that Petitioner's "spoof" orders were capable of deceiving high-frequency trading algorithms about something (*viz.*, "supply and demand") that is extrinsic to the executed trades that the "spoof" orders supposedly induced. At a minimum, Petitioner would be entitled to a new trial where the jury is properly instructed that, to find Petitioner guilty, it must find beyond a reasonable doubt that Petitioner knowingly and willfully made false representations about the essential elements of those executed trades.

II. The Circuit Split On The Speedy Trial Act Question Is Entrenched, And This Case Presents A Clean Vehicle To Resolve It

The decision below entrenches a circuit split over whether a district court may "cure" Speedy Trial Act violation that already has occurred by entering a retroactive "ends-of-justice" continuance on the basis of *post hoc* "ends-of-justice" findings. At least five circuits have held in precedential decisions that this is *not* permitted. Some of these decisions were issued after *Zedner* v. *United States*, 547 U.S. 489, 506 (2006), and none of those five circuits has suggested that *Zedner* calls its prior panel decisions into doubt. See, *e.g.*, *Williams*, 511 F.3d at 1055 (retroactive "ends-of-justice" continuance is not allowed); *Suarez-Perez*, 484 F.3d at 542 (same); *Jones*, 56 F.3d at 585 n.9 (same); *Kelly*, 45 F.3d at 45 (same); *Moran*, 998 F.2d at 1372 (same). The Seventh Circuit alone holds the opposite. *See, e.g.*, *Adams*, 625 F.3d at 371; *Rollins*, 544 F.3d at 820; *United States* v. *Larson*, 417 F.3d 741 (7th Cir. 2005). The Court should resolve this clear split.

The Second Circuit's decision in *United States* v. *Tunnessen* encapsulates the majority position: "[T]ime may not be excluded based on the ends-of-justice [provision] unless the district court indicates at the time it grants the continuance that it is doing so upon a balancing of the factors specified by [the ends-of-justice provision]." 763 F.2d 74, 78 (1985). This Court's decision in *Zedner* seemingly confirmed *Tunnessen*. As the Second Circuit had in *Tunnessen*, this Court in *Zedner* explained that, although a district court may wait to *enter on the record* the ends-of-justice findings that supported

an earlier-entered exclusion of time order, the order itself can only have prospective effect. 547 U.S. at 506 ("[T]he Act is clear that the findings must be made * * * before granting the continuance * * * .").

This is precisely how the Eighth Circuit construed *Zedner* the following year in *Suarez-Perez*, 484 F.3d 537. In that case, the district court entered on August 9, 2004 an ends-of-justice exclusion of time order excluding time through September 13, 2004. *Id.* at 541. Several months later, in order to cure a Speedy Trial Act violation that subsequently occurred, the government asked the district court to amend its August 9th order *nunc pro tunc* to exclude time beginning of June 29, 2004. The district court granted the government's request and denied the defendant's motion to dismiss the indictment based on a Speedy Trial Act violation. The Eighth Circuit reversed, holding that "the Speedy Trial Act does not provide for retroactive continuances" that would, in effect, "rewrite history and substantially change [the defendant's] Speedy Trial Act rights." *Id.* at 541-542 (citing *United States* v. *Brenna*, 878 F.2d 117, 122 (3d Cir. 1989) (holding that an ends-of-justice exclusion of time "cannot be entered *nunc pro tunc*")).

The Tenth Circuit reached the same conclusion in *Williams*, 511 F.3d at 1055-1056, holding that the district court was not permitted to enter in July 2005 an ends-of-justice exclusion of time order retroactive to February 2005. The Tenth Circuit stated, "[T]he Act does not allow a district court to retroactively grant an ends-of-justice continuance. * * * Congress intended that the decision to grant an ends-of-justice continuance be prospective, not retroactive; an order granting a continuance on that

ground must be made at the outset of the excludable period." *Id.* at 1055 (internal citation omitted).

The Seventh Circuit's contrary rule—which the Seventh Circuit has reaffirmed numerous times since *Zedner*, see, *e.g.*, *Rollins*, 544 F.3d at 830—has not been adopted by any other circuit. If the Seventh Circuit followed the rule that every other circuit to address the issue has adopted, it would have been compelled to vacate Petitioner's conviction.

The Speedy Trial Act effectuates critical Sixth Amendment rights. The government began investigating Petitioner in 2014 for conduct that occurred as early as 2008. Petitioner's trial did not occur until September 2020, 26 months after he was indicted. During this delay, potentially exculpatory evidence became unavailable or stale, and Petitioner's anxiety of being under indictment grew. As this Court recognized in *United States* v. *Marion*, 404 U.S. 307, 320 (1971), this is precisely what the Speedy Trial Act is meant to prevent.

CONCLUSION

For the reasons stated above, the petition should be granted.

Respectfully submitted,

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