No. 22-419

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

REPLY BRIEF FOR PETITIONER

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This Court repeatedly has constrained federal prosecutors' attempts to expand the outer boundaries of the federal fraud statutes. In *McNally* v. *United States*, 483 U.S. 350 (1987)—and again in *Skilling* v. *United States*, 561 U.S. 358 (2010), and *United States* v. *McDonnell*, 136 S. Ct. 2355 (2016)—the Court squashed novel "honest services fraud" prosecutions. In *Cleveland v. United States*, 531 U.S. 12 (2000), and *Kelly* v. *United States*, 140 S. Ct. 554 (2019), the Court squashed novel "money or property fraud" prosecutions. And in *Ciminelli* v. *United States*, No. 21-1170, the Court appears poised to squash the "right to control" theory of "money or property fraud."

The core principle that ties together *McNally*, *Skilling*, *Cleveland*, *Kelly*, and Ciminelli—and that also lies

at the heart of Petitioner's petition—is the Due Process Clause's fair notice requirement. The Court has made clear, time and again, that if the mail and wire fraud statutes do not provide an ordinary person fair notice that particular conduct violates the statutes, then those statutes cannot be used to prosecute such conduct. Federal prosecutors, however, continue to ignore this fundamental principle, instead inventing academic theories that seek to justify novel applications of the mail and wire fraud statutes to whatever conduct the prosecutors deem unethical.

The question in this case is not whether "spoofing" has positive or negative effects on futures markets, a question that is hotly debated in the academic literature. See, *e.g.*, Kasim Khorasanee, *Spoof, Bluff, Go for It: A Defence of Spoofing*, J. Bus. Ethics 1-15 (Dec. 2022), https://link.springer.com/content/pdf/10.1007/s10551-022-05296-7.pdf?pdf=button%20sticky (arguing that "spoofing" is a form of "bluffing" that helps to shift power beneficially away from "speculators" using high-frequency trading algorithms and toward "hedgers" who have an "economic interest" in the underlying asset). Nor is the question whether Congress possesses the authority to prohibit "spoofing." Congress certainly does, and it validly exercised that authority when it enacted the Dodd-Frank Act's specific anti-spoofing provision.[1] The question in this case is whether "spoofing" can be prosecuted as a *scheme to defraud* under the wire fraud statute consistent with the Due Process Clause's fair notice requirement. The answer to that question is no.

[1] That Congress felt the need to include such a provision in the Dodd-Frank Act strongly suggests that Congress did not consider "spoofing" to be prohibited by the general fraud statutes.

First, reduced to its essence, the wire fraud theory that the prosecutors pursued at trial and that the United States advances in its brief in opposition is simply a version of the "right to control" theory that the United States disavowed and refused to defend at oral argument in Ciminelli. See Oral Argument Tr. at 51-52, *Ciminelli* v. *United States*, No. 21-1170. As Justice Sotomayor concisely put it at that oral argument, the "core of the right to control theory" is that the "deprivation of economically valuable information is enough to prove fraud." *Ibid.* Here, Petitioner's wire fraud conviction rests on the notion that he deprived high-frequency traders of information that their trading algorithms would have considered economically valuable in deciding whether to front-run Petitioner's large visible orders—namely, that Petitioner placed those large visible orders with the intent to cancel them.[2] At a minimum, the Court should hold the petition for Ciminelli and, if the Court in Ciminelli strikes down the "right to control" theory, grant the petition, vacate the decision below, and remand to the Seventh Circuit for further proceedings.

Second, as the United States concedes in its brief (at 9) in opposition, the prosecution's wire fraud theory relies on the premise that a real, at-risk order placed on the COMEX either (1) carries a "tacit representation" that the trader does not intend to cancel the order, or (2)

[2] An algorithm's decision whether to front-run a large visible order is based on the algorithm's statistical prediction about the direction that price will trend over the next few minutes or seconds. Viewed in the light most favorable to the government, the evidence at trial showed that, if Citadel's and Quantlab's trading algorithms had known that Petitioner intended to cancel his large visible orders if and when his iceberg orders on the other side of the market got filled, the algorithms would have discounted those orders in their predictive calculations.

makes an "express representation[] 'of an intent to trade,'" which is rendered false when the trader fails to disclose that he actually hopes to cancel the order. This premise—that a COMEX order makes representations (tacit or express) beyond the order's terms—is a *post hoc* invention of the prosecutors to justify their prosecution of Petitioner. It is not something of which the law placed Petitioner on notice at the time of his trading at issue.

Third, to the extent the United States (Br. at 9) now characterizes Petitioner's "spoofing" as involving a material omission, nothing put Petitioner on notice that nondisclosure of his "private intent to cancel," constituted a fraudulent omission that is *criminally actionable* under the wire fraud statute.[3] COMEX traders do not owe each other any fiduciary duties, and they are engaged in a financial competition in which the name of the game is disguising economically valuable information regarding one's trading intentions, strategies, and tactics.

Fourth, nothing in the law put Petitioner on notice that placing and then canceling real, at-risk orders to confuse high-frequency trading algorithms about "supply or demand" at a fleeting moment in time constitutes a scheme to defraud. Buyers and sellers are constantly seeking to deceive each other regarding supply and demand—that is what is going on every time a buyer says he will walk away if the seller does not drop his price, as well as every time a seller tells a prospective buyer that supplies are going fast or that the sale will be ending

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[3] The United States cites dictum from *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 188 (2016), for the proposition that a fraud action can be predicated on omissions. See Br. in. Opp. 8-9. The portion of *Escobar* that the United States cites, however, was discussing *civil actions* under tort and contract law. See *ibid.*

soon. The United States's theory that deception regarding supply and demand, on its own, constitutes a scheme to defraud would criminalize broad swaths of commonplace commercial behavior, both depriving ordinary persons of fair notice of what the law forbids and inviting arbitrary prosecutions targeting unpopular people (such as traders employed by big Wall Street banks).

Tellingly, the United States's brief in opposition does not mention the Due Process Clause at all. This is because the United States has no good answer to the Due Process Clause problem with its prosecution theory. In seeking to persuade the Court that prosecuting "spoofing" as a wire fraud violation comports with well-established common law, the United States cites (1) a late nineteenth-century Massachusetts Supreme Judicial Court decision addressing a civil claim for contract recission; (2) Joseph Story's late nineteenth-century treatise on civil equity jurisprudence; and (3) an off-hand comment that Justice Breyer, while posing a hypothetical, made at oral argument in a case presenting the question whether the Securities Litigation Uniform Act of 1988 precluded a civil class action claim against Allen Stanford. The reason that these are the best citations the United States can muster is because its theory that "spoofing" constitutes a scheme to defraud is a recent invention of federal prosecutors looking to expand the reach of the general fraud statutes and to prosecute trading conduct that could not be prosecuted under Dodd-Frank (either because the conduct pre-dated Dodd-Frank or is beyond Dodd-Frank's statute of limitations).

Equally flawed is the United States's attempt to elide the circuit split that the Seventh Circuit's decision below exacerbates. The United States both ignores the

Seventh Circuit's articulated basis for affirming Petitioner's wire fraud conviction and unpersuasively tries to cohere Petitioner's conviction with the Eleventh Circuit's decision in *United States* v. *Takhalov*, 827 F.3d 1307 (11th Cir. 2016). The United States takes a similar approach with respect to the Speedy Trial Act issue, brushing aside what the Seventh Circuit's decision below actually says and speculating that the Seventh Circuit must have meant something else.

ARGUMENT

I. The Prosecution's Wire Fraud Theory Conflicts with the Eleventh Circuit's Decision in *Takhalov* and Cannot Be Reconciled With the Due Process Clause's Fair Notice Requirement

The Eleventh Circuit's decision in *Takhalov* set forth a bright-line limiting principle: A "scheme to defraud" within the meaning of the mail and wire fraud statutes "refers only to those schemes in which a defendant lies about the nature of the bargain itself." 827 F.3d at 1313. The Eleventh Circuit expressly distinguished that type of scheme and "schemes that do no more than cause their victims to enter into transactions that they would otherwise avoid." *Id.* at 1314 (quoting *United States* v. *Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)).

If Petitioner had been prosecuted in the Eleventh Circuit, the prosecution could not have argued to the jury that it should find Petitioner guilty of wire fraud because, but for Petitioner's "spoofing," the high-frequency trading firms that were the supposed victims would not have executed on the non-spoof orders that Petitioner had placed on the other side of the market. That, however, is *precisely* the closing argument that

the prosecutors made to the jury in Chicago: "The defendants' [spoof] orders, their visible orders, induced other traders to fill [the defendants'] iceberg orders [resting on the other side of the market]. That was the entire point. * * * Full stop."[4] D. Ct. Trial Tr. 2061, ECF No. 346.

The Seventh Circuit's decision below made no mention of *Takhalov*. Nor did the Seventh Circuit attempt to square Petitioner's conviction with *Takhalov*'s bright-line limiting principle, notwithstanding that Petitioner expressly argued that *Takhalov*'s principle foreclosed his conviction and the Seventh Circuit should adopt it. Instead, the Seventh Circuit's decision below, in direct conflict with *Takhalov*'s bright-line limiting principle, held that "it is enough" that spoofing "is deceitful." App. 20a.

The United States does not actually dispute—and therefore effectively concedes—that *Takhalov*'s bright-line limiting principle is the subject of a circuit split. Rather, the United States seeks to convince the Court that

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[4] This argument for guilt also conflicts with *United States* v. *Sadler*, 750 F.3d 585 (6th Cir. 2014), and *United States* v. *Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). Contrary to the cramped readings that the United States gives to those cases in is brief in opposition, the outcomes in those cases did not turn on the fact that the deception was merely "about what a purchaser might do after a fair-market-value purchase was made." Br. in Opp. 13. Rather, the outcomes turned on the fact that (1) the *agreed-upon* terms of the financial transaction were fully honored, and (2) the deception merely induced the other party to enter into a transaction that it might otherwise have avoided. See, *e.g.*, *Sadler*, 750 F.3d at 585 (reversing the convictions because the defendant "ordered pills and paid the distributors' asking price, nothing more"); *Bruchhausen*, 977 F.2d at 464 (reversing the convictions because "[t]he manufacturers received the full sale price for their products").

Petitioner's conviction is consistent with *Takhalov*, and thus does not implicate the circuit split at all, because "spoofing" involves "deception" about a "key 'characteristic' of [the futures contracts that the high-frequency trading algorithms chose to buy or sell]—namely the market for [them]."[5] Br. in Opp. 12. This argument was not the basis for the Seventh Circuit's decision below, and the argument is irreconcilable with the Due Process Clause's fair notice requirement.

If "the market" for a futures contract constitutes a "key 'characteristic'" of the contract for purposes of mail or wire fraud liability, then *anything* that is intended to obscure "the market" for the contract should be subject to mail or wire fraud prosecution. Utilizing an iceberg order—which is intended to and clearly does *underrepresent* the liquidity available on the market[6]—would be fraud. Cancelling a fully visible order and replacing it with an iceberg order of equal volume—which

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[5] The United States also argues in passing that a deception about "supply and demand" constitutes a misrepresentation about "price." Br. in Opp. 10. This argument, which the United States never advanced in the district court or the Seventh Circuit below, is wrong. A misrepresentation about "price" occurs where, for example, a buyer agrees to pay the seller for goods on a cost-plus basis and the seller, in order to inflate the amount charged to the buyer, falsely represents the cost of the goods.

[6] Whereas an iceberg order purposefully under-represents the available liquidity at a particular price level, a "spoof" order neither under- nor over-represents liquidity. A "spoof" order is real liquidity that any counterparty can execute for as long as it is on the market. From a liquidity perspective, a "spoof" order that the trader intends to cancel in two seconds is indistinguishable from a non-spoof order that the trader hopes will get filled within two seconds but intends to cancel if it does not.

would create the misimpression that liquidity is suddenly drying up—would be fraud too.

Even worse, the United States's argument that "the market" is a "key characteristic" of an asset cannot logically be limited to regulated commodities and securities exchanges. If "the market" is a "key characteristic" of a futures contract, then "the market" logically must be a "key characteristic" of, at a minimum, *any asset* that speculators seek to buy and sell for profit (*e.g.*, coins, baseball cards, art, concert tickets, sports event tickets, classic cars, vintage watches, etc.). And if deceiving or confusing a counterparty about "the market" for such an asset is fraud *per se*, then it is fraud every single time a prospective buyer falsely claims he will walk away if the seller does not drop its price (a false statement regarding demand), as well as every time a seller falsely tells a buyer that it is unwilling to go any lower (a false statement regarding supply).

Moreover, if "the market" is a "key characteristic" of an asset that is bought and sold by speculators, why would "the market" not also be a "key characteristic" of any asset whose price is affected by supply and demand (which is to say *any asset whatsoever*)? Why would the airplane ticket, open house, Aaron Judge autograph, and antique store hypotheticals posed in Petitioner's petition for certiorari not implicate the mail and wire fraud statutes? The United States does not say.

Furthermore, if seeking to deceive others about "supply and demand" is enough to implicate the mail and wire fraud statutes—even when the deception does no more than induce a counterparty to engage in a commercial transaction at a time or at a price it otherwise might not have—why would it not implicate the mail and wire

fraud statutes to deceive others about how much an item is valued by, say, a particular athlete or celebrity? After all, athlete and celebrity endorsements impact how much someone will pay for the item being endorsed. Could Christie Brinkley have been prosecuted for wire fraud if, contrary to the claim she made in a popular commercial, she did not "really use" Prell shampoo?[7]

If the United States's retort to these overbreadth concerns is that "spoofing" constitutes the very outside edge of the mail and wire fraud statutes' prohibition on "supply and demand deception," this merely underscores the impermissible arbitrariness of the statutory construction that the United States proffers and the lack of fair notice that the law provided to Petitioner.

II. The Seventh Circuit Denied Petitioner's Speedy Trial Act Challenge Based on a Rule That Every Other Circuit to Address the Issue Has Rejected

The United States essentially concedes that a district court must make its ends-of-justice findings at the time it enters an ends-of-justice continuance order, even if it places those findings on the record later. The Seventh Circuit below, however, reaffirmed prior circuit precedent that a district court is *not* required to "make" the ends-of-justice findings contemporaneously with its continuance order and is permitted to "make" such findings retrospectively. See App. 33a. In addition to conflicting with this Court's decision in *Zedner* v. *United States*, 547 U.S. 489 (2006), the Seventh Circuit's permitting retroactive ends-of-justice findings conflicts with

[7] See Prell Shampoo Commercial (1987), https://www.youtube.com/watch?v=Q9ves5hSF_4.

precedential decisions from at least five other circuits, see Pet. 10.

The United States's only response to this is to speculate that the Seventh Circuit, both in its decision below and in the prior panel opinions on which the decision below relied, must not really have meant what it said. Such speculation is not a good reason to deny Petitioner's petition.

To be sure, in its order denying Petitioner's motion to dismiss the indictment based on a Speedy Trial Act violation, the district court asserted that it had made ends-of-justice findings "in [its] mind" on November 15, 2018. App. 136a-137a. The district court record, however, did not support the district court's *post hoc* explanation of what it had done (or found) on November 15, 2018. Specifically, the district court's November 15, 2018 minute order omitted any mention of or allusion to the Speedy Trial Act's ends-of-justice provision and instead cited 18 U.S.C. 3161(h)(1)(D). See App. 292a.

Against this district court record, the Seventh Circuit could not fairly have held, as the United States now posits, that the district court in fact made ends-of-justice findings "in its mind" contemporaneously with its November 15, 2018 continuance order. This explains why the Seventh Circuit, in its decision below, concluded its analysis by stating that a 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, 830 (7th Cir. 2008)).

CONCLUSION

For the reasons stated above and in Petitioner's petition, the petition for certiorari should be granted.

Respectfully submitted,

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