No. 23-____

IN THE

Supreme Court of the United States

JOHN PACILIO and EDWARD BASES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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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QUESTION PRESENTED

In the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress created new civil and criminal liability for the trading practice of "spoofing," defined by Congress as "bidding or offering with the intent to cancel the bid or offer before execution." 7 U.S.C. § 6c(a)(5)(C); *see id.* § 13(a)(5). In doing so, Congress determined that violation of the new criminal anti-spoofing provision should be punishable as a "[d]isruptive practice[]," *id.* § 6c(a)(5)(C), subject to a maximum term of imprisonment of 10 years and a 5-year statute of limitations. *Id.* § 13(a); 18 U.S.C. §§ 3282(a).

All parties agree that under Dodd-Frank, spoofing is now prohibited as a disruptive practice. Since Dodd-Frank's enactment, however, the government has also started prosecuting spoofing under the general criminal fraud statutes. And it has brought such prosecutions for conduct that occurred both before and after Dodd-Frank's passage, exposing defendants to as much as 30 years' imprisonment per violation—three times the amount available under Dodd-Frank—and doubling the statute of limitations period to 10 years. *See* 18 U.S.C. §§ 1341, 1343, 1348, 3282(a), 3293(2).

The question presented is whether spoofing violates the federal fraud statutes where a trader places a genuine, valid, fully executable order.

RELATED PROCEEDINGS

United States v. Pacilio and Bases, Nos. 23-1528, 23-1530 (7th Cir. Judgment entered Oct. 23, 2023)

United States v. Pacilio and Bases, No. 18-cr-48 (N.D. Ill. Judgment entered Mar. 20, 2023)

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INTRODUCTION

This case is the latest example of the government stretching the criminal fraud statutes beyond their breaking point. In recent years, this Court has intervened time after time to stop overzealous federal prosecutors from wielding those statutes as an all-purpose tool for punishing whatever conduct prosecutors deem unethical. *See*, *e.g.*, *Percoco v. United States*, 598 U.S. 319 (2023); *Ciminelli v. United States*, 598 U.S. 306 (2023); *Kelly v. United States*, 140 S. Ct. 1565 (2020). But the government has refused to get the message.

Here, prosecutors are using the federal fraud statutes to impose criminal liability for a commodities trading practice known as "spoofing." In modern futures trading, computer algorithms can place and cancel orders within milliseconds. Manual traders have various strategies to compete with these algorithms. Spoofing is a practice by which traders place orders that they hope to cancel before they can be executed by a counter-party. Even though a trader may subjectively hope his fully executable orders will not in fact be executed, he is typically willing and able to trade should the order be executed by a counter-party before he is able to cancel it. Spoofing can be used to influence the market price of commodities, just as other trading strategies do.

Before 2014, spoofing had never been criminally prosecuted under the general fraud statutes, which do not mention spoofing. In 2010, Congress specifically addressed spoofing, but not under the fraud statutes. Congress enacted the Dodd-Frank Wall Street

Reform and Consumer Protection Act, which criminalized spoofing as a "[d]isruptive" trading practice. Pub. L. No. 111-203, § 747, 124 Stat. 1376, 1739 (2010) (codified at 7 U.S.C. § 6c(a)(5)(C)). Congress specifically defined spoofing as "bidding or offering with the intent to cancel the bid or offer before execution," 7 U.S.C. § 6c(a)(5)(C), set a maximum sentence of 10 years, *id.* § 13(a)(2), and provided a five-year statute of limitations, 18 U.S.C. § 3282(a). This prohibition became effective in July 2011. 7 U.S.C. § 6c note.

Since then, the government has not been content to prosecute spoofing only as a prohibited "disruptive practice" under Dodd-Frank. Instead, prosecutors claim that spoofing is inherently fraudulent, using the notoriously broad federal fraud statutes to charge traders engaged in spoofing. This strategy empowers prosecutors to target conduct that occurred before Dodd-Frank made spoofing unlawful in 2011, even though the fraud statutes had never previously been used that way. As to post-Dodd-Frank conduct, prosecutors now double-charge traders under both Dodd-Frank and the fraud statutes, thereby jacking up the maximum sentence by 20 years and doubling the statute of limitations from 5 to 10 years.

The government's novel theory that spoofing is inherently fraudulent is specious. The criminal fraud statutes cover schemes to defraud someone of money or property. *See* 18 U.S.C. §§ 1341, 1343, 1348. But there is nothing fraudulent about placing a fully executable "spoof" order a trader is willing and able to trade. The only representation the trader makes is through the placement of the buy or sell order, and such an order represents only that he is willing to trade if a counter-party executes the order. That order makes no promise about the trader's subjective desire to execute, or about whether or when he might later cancel the order. So long the order is fully executable and the trader is willing and able to perform, the trader is making no false or misleading statement, omission, or half-truth; the only representations implied by the order (that the trader is willing and able to perform) are true.

The Fifth Circuit has unambiguously embraced that common-sense understanding of fraud. That court squarely rejected the government's theory that placing orders a trader *hopes* will not be executed violates the fraud statutes. *United States v. Radley*, 632 F.3d 177 (5th Cir. 2011). But the Seventh Circuit has now reached the opposite conclusion. According to that court, orders are fraudulent if they are placed with intent to cancel before execution, even if a trader is willing and able to trade if a counter-party accepts the order before cancellation.

This Court's intervention is needed to resolve the circuit split and prevent the government from overextending the general fraud statutes to cover non-fraudulent conduct Congress specifically addressed elsewhere. The Seventh Circuit's decision both misinterprets the fraud statutes and violates due process, retroactively criminalizing pre-Dodd-Frank spoofing as fraud—despite the CFTC conceding as recently as 2014 that spoofing did *not* "sound in fraud." *Infra* at 14. Prosecutions like the one here are wholly improper given that the public lacked notice such conduct was fraudulent at the relevant time.

The Seventh Circuit's approach also encourages prosecutorial overreach, inviting the government to charge traders under both the fraud statutes *and* Dodd-Frank. Doing so allows the government to inflate the possible sentence and extend the statute of limitations beyond what Congress established in Dodd-Frank. By overstepping those limits, prosecutors place virtually irresistible pressure on traders to plead guilty. It also threatens broad ramifications on financial markets by casting doubt on the legality of similar (and long-accepted) trading practices, thereby retroactively transforming broad swaths of common commercial activity into criminal fraud.

This Court should grant review to shut down the government's latest power grab, resolve the clear circuit split, and confine prosecutors to the limited anti-spoofing measures actually enacted by Congress.

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals is reported at 85 F.4th 450 and reproduced at Pet. App. 1a-30a. The district court's order denying Petitioners' post-trial motions is unreported and reproduced at Pet. App. 31a-65a. The district court's order denying Petitioners' motion to dismiss the indictment is unreported and reproduced at Pet. App. 66a-102a.

JURISDICTION

The Court of Appeals issued its opinion on October 23, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions (18 U.S.C. §§ 1343 and 1348 and 7 U.S.C. § 6c(a)(5)) are reproduced at Pet. App. 103a-105a.

STATEMENT OF THE CASE

Electronic Trading Transforms Commodities Futures Markets

This case involves the criminal conviction of two traders for placing valid, fully executable commodities futures orders on the Chicago Mercantile Exchange (CME). A commodities futures contract is a standardized agreement between a buyer and seller to exchange a set amount of a commodity on some future date.[1] Pet. App. 2a. In CME terminology, an order to buy a commodities futures contract is called a "bid," and an order to sell is called an "offer." Pet. App. 68a. Historically, CME trading took place in person on the trading floor, but since 2007, virtually all trading has moved to the CME's electronic trading platform, Globex. Pet. App. 2a.

The difference between the highest price a buyer is willing to pay and the lowest price a seller is willing to accept at a given moment is called the "bid-ask

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[1] Most commodities futures traders do not deliver the physical commodity; they "liquidate" their position with an offsetting futures contract—essentially, buying low and sell high. *See* Trial Tr.1970; *United States v. Coscia*, 866 F.3d 782, 788 (7th Cir. 2017).

spread." AA311-12.[2] If two traders place orders reflecting that they are willing to buy and sell at the same price, the Globex system matches the orders; in the parlance of the CME, such an order is "executed," "hit" or "filled." Once matched, "the trader[s] … ha[ve] no choice but to honor the terms of the order[s]." AA326.

Before an order has been accepted, it can be permissibly withdrawn at any time. Pet. App. 3a; AA323. In fact, because of the dynamic nature of the market, most CME orders are cancelled before execution. AA343; AA604. It is also common for traders to place orders to buy and sell the same futures contract at the same time. AA590. During this process, an order is "fully tradeable" and "available for execution" unless and until it is cancelled. AA325-26.

With the development of computer trading algorithms, some traders—called high-frequency traders (HFTs), algorithmic traders, or "algos"—can place and cancel orders within milliseconds (thousandths of a second). AA360. Because trading algorithms act so quickly, they often outmaneuver human traders. *See Coscia*, 866 F.3d at 786 n.6 (discussing criticism of "HFT firms us[ing] the[ir] speed [to] … force[] ordinary investors to trade at a less advantageous price").

The CME allows traders to deploy various strategies employing elements of deception to compete in fast-moving electronic markets, including:

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[2] Cites to "AA__" refer to the Appellants' Appendix below, Dkt. 25-1.

Iceberg orders. Iceberg orders allow traders to deceive other traders about the full extent of supply and demand in the market by showing only a small fraction of their order to other traders at a time. *See* Pet. App. 3a. If a trader places an iceberg order for 100 contracts, for example, the order will appear to other traders as an order for 10 contracts. Only once the first 10 contracts are filled will the next 10 be revealed, and so on. CME officials testified that while icebergs "disguise … what [traders are] doing," this strategy is nonetheless fair game. AA310; AA347-48.

One-cancels-the-other orders. It is "very common" for traders to place orders on opposite sides of the market at the same time, AA590, to profit from "price differences occurring at any given time," AA418. It is also very common to cancel orders. AA343. Combining these two common features, traders may structure opposite-market-side orders as a one-cancels-the-other order: There is a pre-set instruction that once one order executes, the other cancels automatically. AA365-66.

Fill-or-kill orders. Traders also often place orders that are set to cancel right away if not executed immediately. AA363. This tactic—a "fill-or-kill" order—may be employed as a means of "price discovery" to gain data on available supply and demand. AA357-58. A trader may place an order at a particular price just to see if it executes; whether or not the order executes, it reveals valuable information about supply and demand at that price level. *Id.*

"Spoofing" Draws The Attention Of Regulators, Who Persuade Congress To Ban The Practice

This case involves what the government refers to as "spoofing," a practice in which traders place buy or sell orders they intend to cancel before the orders are executed by a counter-party. Spoofing has been occurring at least since the advent of electronic trading in the 1960s.

Spoofing can involve four steps. First, a trader places an iceberg order he wants to execute on one side of the market. Second, the trader places a large, visible, and fully executable order on the opposite side of the market, hoping he can cancel it before execution—a so-called "spoof" order. Third, if the market moves (due to the spoof order or an unrelated cause), the iceberg order may execute at the desired price. Fourth, the trader cancels the spoof order if it has not already executed. *See* Pet. App. 3a.

Historically, the government did not prosecute spoofing as a crime, despite multiple provisions criminalizing fraud generally. *E.g.*, 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1348 (commodities fraud). Nor did the CME or its regulator—the Commodity Futures Trading Commission (CFTC)—classify spoofing as fraudulent, unlawful, or even improper.

In November 2009, however, then-CFTC Chairman Gary Gensler testified before the Senate, asking Congress to prohibit spoofing as a "disruptive" trading practice. AA97; AA102. Congress heeded the call: In 2010, in the Dodd-Frank Act, Congress enacted a provision specifically banning "spoofing" ("bidding or offering with the intent to cancel the bid or offer before execution") as a "[d]isruptive practice[]." 7 U.S.C. § 6c(a)(5)(C). Dodd-Frank made spoofing a crime, punishable by up to 10 years' imprisonment, with a five-year statute of limitations. *Id.* §§ 6c(a)(5)(C), 13(a); 18 U.S.C. § 3282(a). That new prohibition became effective July 2011.

After Dodd-Frank, the CFTC initiated rulemaking to clarify the anti-spoofing provision. 75 Fed. Reg. 67,301 (Nov. 2, 2010). In 2011, the CME submitted a comment urging the CFTC to avoid sweeping legitimate trading into the prohibition's scope. AA58-62. To that end, it explained that "submitting or cancelling multiple bids or offers" "do[es] not create an appearance of 'false market depth' as all bids and offers represent true and actionable market depth and liquidity until such time that they are withdrawn." AA61; *see also* AA68-69 (similar).

Other industry participants also urged that placing at-risk orders—i.e., orders subject to being accepted and executed—was "legitimate" and should not be treated as unlawful. 78 Fed. Reg. 31,890, 31,896 & n.71 (May 28, 2013). The CFTC ultimately abandoned its rulemaking and in 2013 issued non-binding interpretive guidance stating it would distinguish spoofing from legitimate trading "by evaluating all of the facts and circumstances of each particular case." *Id.*

Prosecutors For The First Time Claim That Spoofing Was Always Prohibited Fraudulent Conduct, Even Before Dodd-Frank

In October 2014, federal prosecutors indicted the first criminal spoofing case. *See Coscia*, 866 F.3d at 787. But the government did not merely charge the defendant (Michael Coscia) with violating Dodd-Frank's new anti-spoofing disruptive-practice prohibition. It also charged commodities fraud under 18 U.S.C. § 1348, which had been on the books since before Dodd-Frank. According to the government, although Coscia's trading occurred *after* the effective date of Dodd-Frank, what he did had been prohibited as criminal fraud all along.

The Seventh Circuit upheld Coscia's convictions for both spoofing and commodities fraud. In so ruling, the court emphasized that Coscia—an algorithmic trader—had purposefully designed his algorithm "to avoid the filling of large orders." *Id.* at 797 & n.64 (emphasis omitted). The court held that Coscia's orders were fraudulent because the algorithm's design showed he was *not* willing to trade. *Id.*

The government has since regularly prosecuted spoofing not only under Dodd-Frank's express disruptive-practice anti-spoofing prohibition, but also under the fraud statutes. *See infra* at 35 & n.13. By packaging spoofing as fraud, prosecutors expose traders to up to 30 years' imprisonment and lengthen the statute of limitation to 10 years. *See* 18 U.S.C. §§ 1341, 1343, 1348, 3293(2).[3]

Petitioners' Fraud Convictions

In 2018, after the *Coscia* decision, the government indicted Petitioners John Pacilio and Edward Bases for alleged spoofing between 2008 and 2014, charging them with commodities fraud, wire fraud, and conspiracy.[4] AA1, 42-57. Petitioners were not algorithmic traders like Coscia, but manual traders: They looked at the Globex order book on their computer screens and manually entered (or cancelled) their orders with a mouse click. The charges mostly targeted Petitioners' actions before Dodd-Frank, with only Counts 8-10 and 19-20 involving post-Dodd-Frank conduct.

Petitioners moved to dismiss the fraud charges, arguing that placing fully executable orders was not fraudulent as a matter of law. Despite numerous amici supporting their position, the district court denied the motion. Pet. App. 66a-102a.

At trial, the government presented testimony from two CME witnesses about CME rules during the relevant time. They admitted that the pertinent rule (CME Rule 432) did not mention spoofing; it instead

[3] The mail and wire fraud statutes increase the sentencing exposure from 20 to 30 years when the fraud "affects a financial institution." *Id.* § 3293(2). The commodities fraud statute provides for up to 25 years' imprisonment. *Id.* § 1348.

[4] The government also charged Petitioner Pacilio with one count of spoofing under Dodd-Frank for a discrete incident of alleged spoofing not covered by the fraud charges; he was acquitted on that count.

listed "general offenses," including broad prohibitions banning things like "conduct … inconsistent with just and equitable principles of trade." AA262-63. At times, the government's CME witnesses testified that they read Rule 432 to require traders to place only those orders they "actually genuinely want[] to" trade, AA319; at other times, they testified that the Rule more narrowly prohibited orders traders were "not willing to trade," AA383. Both witnesses conceded that their current interpretation of Rule 432—requiring traders to place orders they actually want to trade—had never been disclosed to market participants. *E.g.*, AA425-27. And they acknowledged that the CME's website defined orders in terms of "willing[ness]" to trade, not by a subjective desire to have an order execute. AA294-97.

The government also presented bank compliance witnesses. They admitted that no pre-Dodd-Frank compliance documents mentioned spoofing, nor addressed placing fully executable orders with intent to cancel. *E.g.*, AA589-91. And while pre-Dodd-Frank compliance documents provided numerous specific examples of prohibited market manipulation, they did not address spoofing. AA531-32.

The defense presented testimony from Professor Daniel Fischel of the University of Chicago Law School. He explained why it made sense for manual traders to quickly cancel orders: Given how quickly algorithms can respond to orders, cancelling quickly allows time for manual orders to execute, but limits the risk of "being taken advantage of" by algorithms if the market moves quickly in the other direction. Trial Tr.1765-66, 1838.

The jury convicted Petitioner Pacilio of commodities fraud, wire fraud, and conspiracy; it convicted Petitioner Bases of wire fraud and conspiracy, but acquitted him of commodities fraud. Petitioners filed motions for a judgment of acquittal and for a new trial, which the district court denied. Pet. App. 31a-65a.

The Seventh Circuit Splits From The Fifth Circuit In Upholding The Fraud Convictions

On appeal to the Seventh Circuit, Petitioners argued that, as a matter of law, a trader's subjective intent to cancel his order before execution does not render his fully executable orders fraudulent under the criminal fraud statutes. *See* Pacilio CA7 Br. 31-52; Bases CA7 Br. 21, 25. They explained that orders placed on the CME are offers to transact, which represent only the offeror's *willingness* to transact on the stated terms. Pacilio CA7 Br. 32-36. Consequently, an order is not fraudulent so long as the offeror (the trader) is willing and able to transact on the stated terms—even if he subjectively hopes, intends, or desires *not* to so transact. *Id*. Stated otherwise, spoofing without more (e.g., unwillingness to trade) is not fraudulent. In support of this argument, Petitioners cited *Radley*, where the Fifth Circuit and district court held the defendants' orders, admittedly placed "without intending to enter into a transaction," could not support a wire fraud conviction because defendants were willing and able to execute those orders, making them "bona fide" and "genuine." 632 F.3d at 183-185; 659 F. Supp. 2d 803, 815 (S.D. Tex. 2009).

The Seventh Circuit rejected Petitioners' interpretation of the fraud statutes. Applying circuit precedent, the court held that orders are fraudulent if they are placed with "inten[t] to cancel before execution," even if a trader is willing and able to trade if the order is executed before cancellation. Pet. App. 13a-15a, 19a (citing *United States v. Chanu*, 40 F.4th 528, 540-42 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 746 (2023)).

Petitioners also argued that their convictions violated the Due Process Clause's guarantee of fair notice. Pacilio CA7 Br. 52-66. Prior to Dodd-Frank, the CFTC and Congress did not understand spoofing to be unlawful—thus the push to ban the practice in Dodd-Frank. *Id*. at 56-58. Even after Dodd-Frank prohibited spoofing as a disruptive practice, it was not clear spoofing was a form of *fraud*. Quite the contrary: Attorneys for the CFTC asserted in a 2014 federal-court enforcement action that placing orders with the intent to cancel them to "manipulat[e]" rates on a futures exchange—in other words, spoofing—did *not* "sound in fraud." Pl.'s Resp. 48, *U.S. CFTC v. Wilson,* No. 13-cv-7884, 2014 WL 9910640 (S.D.N.Y. Jan. 31, 2014), Dkt. 35. And of course, the Fifth Circuit in *Radley* had held that orders are "bona fide," not fraudulent, when a trader is willing but does not intend, want, or desire to trade. 632 F.3d at 183-85. From this, Petitioners argued, the public was not on notice at the time of the offense conduct that spoofing was fraudulent.

Neither the government nor the Seventh Circuit disputed that Petitioners were willing and able to trade all the orders they placed. Nonetheless, the court held that because Petitioners hoped and intended to cancel some orders before they executed, the orders amounted to criminal fraud. The court further rejected Petitioners' fair-notice argument. Pet. App. 7a-15a. In doing so, the court relied principally on its prior decisions in *Coscia* and *Chanu*—both of which postdated the offense conduct—as somehow providing the advance notice required by due process. Pet. App. 9a-15a. According to the Seventh Circuit, Petitioners were on notice that spoofing was fraudulent when they engaged in the conduct at issue (from 2008 to 2014) because *in 2017*, the court in *Coscia* attempted to distinguish *Radley*, Pet. App. 14a-15a, and *in 2021 Chanu* held spoofing to be "'a quintessential'" form of fraud. Pet. App. 11a (quoting *Chanu*, 40 F.4th at 541).

REASONS FOR GRANTING THE WRIT

This petition raises the now-familiar problem of federal prosecutors abusing the fraud statutes to empower themselves beyond the authority granted by Congress. In 2010, Congress criminalized "spoofing" as a "disruptive practice" in Dodd-Frank, providing measured penalties of up to 10 years' imprisonment. Dissatisfied with Congress's legislative judgment about the severity of punishment and length of the limitations period, prosecutors have turned to the general fraud statutes to prosecute spoofing conduct that occurred both before and after Dodd-Frank. The result is a circuit split between the Fifth and Seventh Circuits, as well as an established practice of prosecutors adding fraud charges on top of Dodd-Frank to significantly increase defendants' sentencing exposure. This Court should intervene to resolve the split and vindicate Congress's considered judgment on how to address spoofing.

I. The Circuits Are Split Over Whether The Fraud Statutes Criminalize Placing Fully Executable Orders A Trader Is Willing And Able To Trade.

In these cases, the Seventh Circuit held that a trader placing a fully executable order to buy or sell a futures contract commits criminal fraud if the trader subjectively does not intend to consummate the transaction—specifically, if the trader hopes to cancel the order before it executes. That holding criminalizes the trader's conduct even if, as here, the traders were willing and able to perform—and indeed even if the traders *did* perform, when counter-parties executed the orders before cancellation. The Fifth Circuit has taken exactly the opposite approach: In *Radley*, it held that orders "placed … without intending to enter into a transaction" are "bona fide"—and thus not "disingenuous" or fraudulent—so long as the orders are fully executable and the trader is willing and able to honor them if accepted by a counter-party. 632 F.3d at 183-84; *see also* 659 F. Supp. 2d at 815 (district court decision). This clear circuit split warrants this Court's review.

A. The Fifth Circuit rejects fraud liability for orders a trader is willing and able to execute.

In *Radley*, 632 F.3d at 179, the government charged the defendants—commodities traders specializing in propane futures—with wire fraud and criminal violations of the Commodity Exchange Act (CEA), Pub. L. No. 74-675, 49 Stat. 1491 (1936). Just as here, the trading in *Radley* was conducted on an electronic system where bids and offers are anonymous. 632 F.3d at 179. At the end of each trading day, a trade organization (OPIS) would publish the average daily trading price. *Id.*

In 2004, the defendants contracted to sell propane (the physical commodity) at the OPIS average price at the end of the month. *Id.* At the same time, the defendants began placing bids to buy propane commodities futures contracts on the electronic system, in an alleged scheme to drive up the end-of-month average price they would be paid. *Id.* at 179-80 The defendants' bids were generally "stacked" bids, meaning they were broken into multiple different orders at different prices to make it look like many different people were placing orders. *Radley*, 659 F. Supp. 2d at 815. At the same time, defendants also placed "'show' offers"—that is, offers to *sell* commodities futures contracts—"designed to falsely convey that [they] wished to sell." *Id.* at 807.

According to the government, the *Radley* defendants "placed bids … without intending to enter into a transaction … but rather for the purpose of misleading other market participants about the demand for … propane." 632 F.3d at 183. That plan was successful; the price of propane commodities futures contracts "skyrocketed," increasing the OPIS benchmark price at which the defendants were able to sell their propane. *Id.* at 180.

As relevant here, the Fifth Circuit affirmed the district court's holding that the defendants' conduct did not violate the wire fraud statute. *Id.* at 179. The district court had rejected the government's characterization of the defendants' orders as somehow representing false or misleading information about supply and demand to the market. 659 F. Supp. 2d at 808, 815. In connection with the CEA claims, the court observed that bids and offers represent only that the trader is willing and able to execute the transaction—nothing more. And "[s]ince defendants were willing and able to follow through on all of the bids, they were not misleading." *Id.* at 815; *see also id.* ("The [defendants' bids] … were actually bids, and when they were accepted, defendants actually went through with the transactions."). The district court then found the wire fraud counts failed for that reason. *Id.* at 820.

The Fifth Circuit agreed. It expressly rejected the government's argument that the defendants' orders had been "disingenuous" because they were "placed … without intending to enter into a transaction … but rather for the purpose of misleading other market participants" about supply and demand. 632 F.3d at 183. To the contrary, the Fifth Circuit explained, the defendants' bids "were real," "legitima[te]," and "bona fide," and "a counter-party could have accepted them and formed an enforceable contract at any time." *Id.* at 183-84. This fact barred both the CEA and wire fraud charges. *Id.* at 183-85.

Radley thus makes clear that, in the Fifth Circuit, placing an order a trader does not intend to trade—as with spoofing—cannot serve as the predicate for a federal fraud conviction without more (e.g., *unwillingness* to trade). Rather than deeming a trader's subjective intent impliedly communicated to the market through his orders, the Fifth Circuit recognizes that an order represents only that the trader is willing and able to execute a transaction. If this case had been brought in the Fifth Circuit, Petitioners would have prevailed.

B. The Seventh Circuit permits fraud liability for orders a trader is willing and able to execute.

Although the Seventh Circuit has previously affirmed fraud convictions for spoofing, *see Coscia*, 866 F.3d at 797; *Chanu*, 40 F.4th at 538-41, its ruling here was the first to break definitively and explicitly from *Radley*. The government's theory of fraud in this case was that "an order placed without the intent to trade communicates 'false information' that 'deceive[s] the marketplace' about actual supply and demand." CA7 Gov. Br. 6; *see also* AA47 (operative indictment alleging Petitioners' spoof orders were "intended to inject false and misleading information (i.e., orders they did not intend to execute) into the market to create the false impression of increased supply or demand"). That was precisely the government's theory in *Radley*. *See* 632 F.3d at 183 (detailing the government's allegation that the defendants "placed bids … without intending to enter into a transaction based on each bid, but rather for the purpose of misleading other market participants about the demand for … propane").

Below, Petitioners explained why the government's fraud theory was wrong as a matter of law: Offers impliedly represent only willingness and ability to transact on the stated terms; thus, placing a fully executable order, which the trader is willing and able to trade, is not fraudulent as a matter of law. Pacilio CA7 Br. 32-36. Petitioners cited *Radley* in support of that argument, emphasizing that here—as in *Radley*—the orders were fully executable, and they were willing and able to perform. *Id.* at 35-36, 50. Indeed, the indictment did *not* allege Petitioners were unwilling to trade, nor did the government prove (or even attempt to prove) that they took any steps to avoid having a counter-party accept the orders before Petitioners could successfully cancel them. *Id.* at 51 & n.13.[5]

In rejecting Petitioners' arguments, the Seventh Circuit split from the Fifth Circuit. According to the Seventh Circuit, "[w]hether [Petitioners'] trade orders showed a willingness … to trade does not matter" for purposes of fraud liability. Pet. App. 19a. *Radley*, of course, held the opposite: "Since defendants were willing and able to follow through on all of the bids, they were not misleading." 659 F. Supp. 2d at 815; 632 F.3d at 183-85 (affirming the district court on this point).

The Seventh Circuit further held that Petitioners' subjective intent to cancel their trades was sufficient

[5] This reflected a deliberate choice: The government's original indictment *did* allege unwillingness to trade—but it soon amended the indictment to remove that allegation and allege instead that Petitioners did not "actually want[]" to trade, not that they were unwilling to trade. *Id.* at 20.

to render those trades fraudulent, even though Petitioners had been willing and able to trade if an order was accepted before it could be cancelled. Pet. App. 18a-19a. In particular, the Seventh Circuit concluded Petitioners' conduct was fraudulent because they placed orders they did not intend to trade (i.e., orders Petitioners hoped to cancel before execution), in order to "sen[d] misleading signals to the market that the demand for a given commodity was much higher, effecting an increase in the market price." Pet. App. 13a. Again, that squarely conflicts with *Radley*, which rejected the argument that bids placed "without intending to enter into a transaction based on each bid, but rather for the purpose of misleading other market participants about the demand for … propane" were fraudulent. 632 F.3d at 183; *supra* at 16-19.[6]

Accordingly, there is now a sharp split between the Fifth and Seventh Circuits as to whether the

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[6] The Seventh Circuit also oddly purported to distinguish *Radley* by relying on its *Coscia* decision. Pet. App. 14a-15a. There, the Seventh Circuit had distinguished *Radley* on the basis that, in designing his algorithm, Coscia had taken steps "to avoid the filling of [spoof] orders" whereas the defendants in *Radley* had not. 866 F.3d at 797 (emphasis omitted). But that purported distinction does not apply here, where the government didn't even allege—much less prove—that Petitioners were unwilling or unable to perform on their orders if accepted. *Supra* at 20 & n.5. In any event, nothing in *Radley* turned on whether the defendants had taken steps to avoid filling orders. Rather, *Radley* found dispositive that the defendants were willing and able to execute—a rule that the Seventh Circuit flatly rejected when it held that "willingness … to trade d[id] not matter" in assessing whether Petitioners' conduct was fraudulent. Pet. App. 19a; *supra* at 20.

fraud statutes make it unlawful for a trader to place a fully executable order he is willing and able to honor but does not subjectively intend to actually execute. Because of this split, spoofing is, by definition, a criminal fraud in the Seventh Circuit—but not in the Fifth Circuit. Only this Court can resolve that conflict.

II. The Seventh Circuit's Decision Is Wrong.

As detailed above, the split with the Fifth Circuit on what constitutes fraud is clear. And the Seventh Circuit was wrong to reject the Fifth Circuit's sound reasoning. Placing a live, readily executable order a trader is willing and able to trade is not fraud. And it does not become fraud simply because the trader would prefer to cancel the order before it is executed, or otherwise does not intend for the transaction to be consummated. The Seventh Circuit's contrary holding improperly expands the criminal fraud statutes. It also violates due process by retroactively criminalizing conduct that was not understood to be unlawful at all prior to Dodd-Frank—and not understood to be fraudulent even after that.

A. The fraud statutes do not criminalize "spoof" orders a trader is willing and able to trade.

The federal fraud statutes target conduct that involves criminal deception.[7] This Court has made

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[7] The wire fraud statute prohibits "any scheme or artifice to defraud … by means of false or fraudulent pretenses, representations, or promises" for the purpose of "obtaining money or property" using electronic communications. 18 U.S.C. § 1343.

clear that these fraud statutes are not all-purpose tools for criminalizing whatever conduct a prosecutor considers unethical. *See supra* at 1 (collecting cases). And here, the Seventh Circuit was wrong: The spoofing conduct at issue in this case is not fraudulent.

1. Petitioners' CME orders were binding and fully executable offers to buy or sell futures contracts. AA294-95, AA331-32.[8] An offer is "a display of willingness to enter into a contract on specified terms." *Offer*, Black's Law Dictionary (11th ed. 2019). Indeed, virtually every definition of the word "offer" is couched in terms of *willingness* to perform if the offer is accepted. *See*, *e.g.*, *id*. (further defining "offer" to include "a statement that one is willing to do something" and the "amount of money that one is willing to pay or accept for something"); *Offer*, Merriam-Webster Dictionary, https://tinyurl.com/m6jhvpae (last visited Jan. 21, 2024) ("to declare one's readiness or willingness").

Like any other offer, an order on the CME can be withdrawn "at any time, for any reason." AA400. And unless and until it is withdrawn, the offer remains binding on the offeror if timely accepted by the offeree—here another trader in the marketplace. AA325-27; *cf. Eliason v. Henshaw*, 17 U.S. (4 Wheat.)

The commodities fraud statute uses similar language in connection with securities and commodities. *Id.* § 1348.

[8] *See also* Glossary, CME Group, https://tinyurl.com/56bmwcez (last visited Jan. 21, 2024) (defining "ask price," "bid price," "demand," and "supply" in terms of "willingness").

225, 228 (1819) (explaining that an offer imposes an "obligation" to perform when "accepted by the [offeree]"). For this reason, what the government calls "intent to cancel" is really just a trader's *hope* that no one executes on his order before he can cancel it. Thus, both in general and in the context here, an offer impliedly represents the trader's *willingness and ability* to engage in the proposed transaction. It does not represent that, deep down, the trader necessarily wants or intends the offer to be accepted. Nor does it implicitly promise that the offer will not be withdrawn.

An everyday example helps illustrate the point. Imagine a wife attending a silent auction. To appease her husband, she places the opening bid on a dinner at his favorite restaurant—but she does not intend bid any higher, and she does not intend or actually want to win the auction because she doesn't like that restaurant. If her bid prevails, she may be unhappy, but there was no deception in her bid so long as she was willing and able to pay if her offer (the bid) was accepted. And if someone outbids her, she did not commit fraud by causing the winning bidder to pay a higher price.

Or imagine a father out to dinner with his adult son. When the waiter brings the check, the son offers to pay for his father's meal as well as his own—but while he is willing to pay, the son intends and hopes his offer will induce his father to insist on paying the full bill. The son may be unhappy if his offer to pay is accepted, but the offer to pay the bill was not fraudulent. His unhappiness does not alter the legal and factual reality that he was ready and willing to pay the full bill if his offer was accepted.

2. These common-sense examples track this Court's precedent, which has refused invitations to project onto commercial transactions implied representations about the parties' subjective intent beyond the intrinsic nature of the transaction. In *Williams v. United States*, for example, the Court confronted a "check kiting" scheme in which the defendant knowingly and repeatedly deposited bad checks to obtain short-term lines of credit. 458 U.S. 279, 280-81 (1982). The Court rejected the federal government's attempt to charge that scheme as involving actionable misrepresentations. The government argued that presenting a check "represent[s] that [the presenter] currently has funds on deposit sufficient to cover the face value of the check." *Id.* at 285 (quotation marks omitted). Instead of "mak[ing] a[] representation as to the state of [one's] bank balance," this Court held that checks simply "direct the drawee banks to pay the face amounts to the bearer," citing the Uniform Commercial Code. *Id.* at 284-85. In essence, the Court limited the representations implied in a financial transaction to those representations inherent in the four corners of the transaction as a matter of law.

Williams is instructive here. The instruments used in the transactions at issue in *Williams*—bank checks—do not make broad representations about objective facts in the world. There is even less reason to view the financial instruments here—CME orders—as making implicit representations about the trader's subjective intentions, hopes, and dreams, as the Seventh Circuit found.

Indeed, CME orders communicate only that an anonymous trader is willing and able to execute the order if accepted.[9] And traders know that orders can be and commonly are withdrawn. Other than knowing that a trader promised to perform, nothing is known about the anonymous trader or the trader's intent or strategies, nor if or when the order will be withdrawn.

3. Reading further implied assurances into such an anonymous order is contrary to the basic framework of the trading market. It would lead to absurd results and threaten severe disruption of the trading markets. As explained below by Professor Ronald Filler, a leading expert in financial services law and futures specifically, "trading is a competition," and "concealment of actual trading strategies … is an integral part of that competition, as is the case for nearly every other form of competition." Brief for Amicus Curiae Ronald Filler 12, *Pacilio*, No. 23-1528 (7th Cir. May 2, 2023), Dkt. 26 (hereinafter "CA7 Filler Br."). Consequently, traders regularly "'disguise their intentions like secret agents'" to "mask their trading from other market participants." *Id*. at 13 (quoting William Silber, *Volcker* 289 (2012)).

For example, as the Futures Industry Association explained below, "[i]t is not uncommon for a trader to *buy* some contracts even if its overall strategy is to take a net short position [i.e., *sell*]." Brief of Amicus Curiae Futures Industry Association 13, *Bases*,

[9] CME orders are displayed anonymously; traders' identities are not even disclosed in the electronic marketplace. Trial Tr.951.

No. 18-cr-48 (N.D. Ill. Feb. 20, 2019), Dkt. 158 (hereinafter "FIA Br.") (emphasis added). This is because "entering orders … inconsistent with [one's] overall strategy" can "prevent others from detecting [that] trading strategy," and it has long been "an accepted and legitimate phenomenon of trading in the futures markets." *Id.* Nathan Rothschild, for example, famously deployed that trading strategy in the early 1800s, entering sell orders to prevent "other traders from discovering the fact that he actually … intend[ed] subsequently to engage in large purchases." CA7 Filler Br. 14 n.24.

To take a more modern example, financial brokers often provide their clients with pricing quotes on the cost to buy or sell various financial products. A client may not want to reveal to her broker that she intends to buy the product, for fear that the broker will quote her a higher buy price if he knows her true intent. So instead, the client requests "two-way pricing" (i.e., the price to both buy and sell) to hide her true intentions from her broker—and keep the quoted prices lower. In a similar vein, "a bidder may attempt to test the market for a bankrupt entity's assets in advance of an auction for those assets by placing a so-called stalking horse bid." Brief of Amici Curiae Bank Policy Institute et al. 12, *Bases*, No. 18-cr-48 (N.D. Ill. Feb. 22, 2019), Dkt. 162-1 (hereinafter "BPI Br.").[10] "The purpose of such a bid is often to prevent lowball offers, rather than consummating a deal under the terms of the offer." *Id.* Under the Seventh Circuit's approach, these common trading practices could trigger criminal

[10] *See also* Will Kenton, Investopedia, *Stalking Horse Bid* (July 9, 2023), https://tinyurl.com/muz8uv4a.

fraud liability, if prosecutors recast such tactics as somehow communicating deceptive messages to the market.

Indeed, the government's fraud theory—embraced by the Seventh Circuit—sweeps with exceptional breadth. It appears to criminalize any effort from a buyer or seller to hide their true intentions to the market, thereby "creat[ing] the false impression of …. supply or demand." AA47; *see also* Pet. App. 17a (spoofing injects "false information" about "demand, supply, and intent to trade" into the market (quotation marks omitted)).

As amici explained, this theory would seem to require disclosure of trader's "trading objectives [and] strategies" and "the intended purpose of its orders." FIA Br. 11-12. Stated otherwise, it "effectively places upon parties to commercial transactions a duty to disclose not just truthful information … but information sufficient to allow potential counterparties to assess the motivations and intentions underlying the party's conduct." BPI Br. 12.

This sweeping theory of liability cannot be right, as it would potentially criminalize a "breathtaking amount of commonplace" trading conduct. *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021). For example, the stalking-horse bidder could suddenly become "subject to wire fraud liability for failing to disclose its 'hidden' intention of preventing a lowball bid." BPI Br. 12. Iceberg orders—which are specifically designed to disguise a trader's intent from the market and create a misleading impression of supply and demand—could likewise be deemed illegal. *Supra* at 7.[11] So too one-cancels-the-other orders, which are simultaneously placed (often on opposite sides of the market), even though the trader does not intend for both to execute, and which create a false impression of increased supply and demand. *Supra* at 7.

None of this can be the law. Time and again, this Court has rightly rejected "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland v. United States*, 531 U.S. 12, 24 (2000). It has further emphasized the rule of lenity is "especially appropriate in construing" the federal fraud statutes, given their potentially broad scope. *Id*. at 25. These considerations reinforce that the Seventh Circuit erred. Spoofing is not inherently fraudulent.

B. The Seventh Circuit's theory of fraud retroactively criminalizes innocent conduct without sufficient pre-conduct notice.

In breaking with the Fifth Circuit's approach, the Seventh Circuit here adopted a novel and

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[11] Iceberg orders are essentially the flip side of spoofing: Spoofing, according to the government, conceals from the market that at trader *doesn't* want to trade, thereby affecting price. Iceberg orders, by contrast, conceal from the market that a trader *does* want to trade, thereby affecting price. It is not clear whether the government views iceberg orders as legitimate—and, if so, how long it will maintain this position before changing its mind. *Cf. McDonnell v. United States*, 579 U.S. 550, 576 (2016) ("[W]e cannot construe a criminal statute on the assumption that the Government will use it responsibly." (quotation marks omitted)).

extraordinary construction of the fraud statutes and then retroactively applied it to Petitioners. Doing so violated the Due Process Clause.

As explained above, in commodities trading, contract law, and common parlance, making an offer represents only the offeror's willingness to perform. Given that prevailing understanding, no reasonable person would have been on notice at the time of the charged conduct at issue in this case (2008-2014) that spoofing would be considered criminal fraud simply because a trader hopes a valid and tradeable offer he is willing and able to trade would not be accepted. In concluding otherwise, the Seventh Circuit dramatically broadened the scope of the fraud statutes. That violated the Constitution's instruction that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997).

Indeed, all signs in the relevant period pointed decidedly in the other direction. As late as 2014, the CFTC affirmatively argued in federal court that spoofing conduct did *not* "sound in fraud." *Supra* at 14. And there was good reason for the CFTC to take that view. As already described, the only on-point judicial pronouncement was the Fifth Circuit's 2011 decision in *Radley*, which affirmed the "legitimacy" of orders "a counter-party could have accepted" to "form[] an enforceable contract." 632 F.3d at 183.

The other branches were in accord: Congress did not prohibit spoofing as a disruptive practice until

2010, and even then, it did not (and still has not) deemed spoofing to be a *fraudulent* practice. *See*, *e.g.*, 7 U.S.C. § 6(b)(2)(A). As for the Department of Justice, as the Futures Industry Association explained in its amicus brief to the district court, spoofing "had never been charged as a violation of … the wire fraud statute[] or any other statute" before Dodd-Frank's enactment. FIA Br. 5.

Without any official indication that Petitioners' conduct had been deemed fraudulent, the government mainly relied on the CME's exchange rules. But this, too, was a dead end: The district court concluded that CME Rule 432—the principal rule on which the government relied—was ambiguous as a matter of law as to whether spoofing was prohibited. AA77. Then at trial, the government's own CME witnesses conceded the CME had "never provided any written guidance to market participants" interpreting the rules to require only offers that a trader *wanted* to execute. AA437; *accord* AA406-07. Tellingly, the CME issued a new Rule 575 in 2014 prohibiting spoofing for the first time. AA391-93. It did so at the CFTC's behest—because that prohibition was novel and not already established by the existing law and rules. *See* AA392. And even then, the CFTC did not label spoofing a form of *fraud*.

So across the board—from market officials to expert regulators, from Congress to the courts—the consensus at the time of the charged conduct was that spoofing was not even prohibited, much less fraudulent. Without any interpretation weighing in the other direction, no reasonable person at the time would have understood that conduct to constitute criminal fraud. As then-Judge Gorsuch observed, "if a federal criminal statute is so enigmatic that the government has experienced such difficulty settling on its meaning maybe that goes some way toward showing that ordinary citizens lack reasonable notice." *United States v. Rentz*, 777 F.3d 1105, 1114 (10th Cir. 2015) (en banc); *see also United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974) (fair notice lacking when "even co-ordinate branches of the United States Government plausibly reach[ed] directly opposing conclusions"). In such circumstances, moreover, the "rule of lenity[] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered"—unlike the conduct charged here. *Lanier*, 520 U.S. at 266.

The Seventh Circuit brushed all this aside by bending the laws of physics. It concluded that there was sufficient notice at the time of the charged conduct—ending in 2014—by pointing to decisions of that court in 2017 (*Coscia*) and 2021 (*Chanu*). *Supra* at 15. Of course, absent a time machine, no one *in 2014* was on notice of what the Seventh Circuit would say *three years later*. The only contemporaneous sources of notice identified by the Seventh Circuit established the uncontroversial proposition that misleading statements and omissions can be fraudulent. Pet. App. 11a-12a. No reasonable person could have known—contrary to *Radley*—that a trader's valid, fully executable order was misleading.

In sum, a trader who engages in spoofing—but is willing and able to honor a proposed order—does not commit fraud. The Seventh Circuit's contrary holding misinterprets the fraud statute and violates due process. It should not stand.

III. Review Is Needed To Prevent Prosecutorial Abuse And To Preserve Congress's Calibrated Anti-Spoofing Framework.

If left undisturbed, the Seventh Circuit's decision will have significant harmful consequences beyond this case. Most importantly, it will invite prosecutorial abuse and allow the government to impose liability far beyond what Congress specifically envisioned—a problem already entrenched in the government's charging decisions. This Court should grant certiorari to rein in prosecutorial overreach and clear up the significant uncertainty created by the Seventh Circuit's decision.

Although Congress specifically prohibited spoofing as a disruptive practice in the 2010 Dodd-Frank Act, 7 U.S.C. § 6c(a)(5)(C), Congress did not categorize or punish it as fraud. Contrary to the carefully crafted statute adopted by Congress, the government now deems that same conduct fraudulent with the Seventh Circuit's approval. That interpretation enables prosecutors to manipulate the fraud statutes to capture and punish conduct well beyond the parameters Congress deliberately selected. In particular, prosecutors trigger far more severe penalties and an extended statute of limitations. Three features of the problem bear special emphasis.

First, the Seventh Circuit's approach incentivizes prosecutors to resort to the fraud statutes instead of—or worse, *on top of*—the specific statutes Congress narrowly tailored to the particular circumstances of spoofing. By invoking the wire-fraud statute, the government can deploy a ten-year limitations period, inflated to twice what Congress designated for spoofing.[12] *See* 18 U.S.C. §§ 3282(a), 3293(2). With the same tactic, the government can triple the available punishment from 10 years to 30. *See* 7 U.S.C. § 13(a); 18 U.S.C. § 1343; *supra* 10-11 & n.3.

These distortions of the fraud statute imperil individual liberty. As the Chief Justice has pointed out, overly broad interpretation of criminal statutes gives prosecutors "extraordinary leverage" to charge aggressively and extract guilty pleas. Transcript of Oral Argument 31, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451). That is especially true when—as here—the misinterpretation allows prosecutors to threaten additional charges with higher sentences, giving the government a valuable "bargaining chip" in plea negotiations. William Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 519-20 (2001).

Petitioners' concerns about prosecutorial overreach are not merely hypothetical: Double-charging defendants under the fraud statutes *and* Dodd-Frank has become the government's standard operating procedure for spoofing prosecutions. The government first took this approach in 2014 in *Coscia*, 866 F.3d 782, charging the defendant not only under Dodd-Frank's new anti-spoofing provision, but also under

[12] This case is a perfect example: The government's criminal fraud charges brought in 2018 reached back the full 10 years, to capture pre-Dodd-Frank conduct as early as 2008.

the commodities fraud statute, *see supra* at 10. The government's success in the Seventh Circuit has only prompted it to expand the practice, resulting in more and more cases charging spoofing under the fraud statutes.[13] Without this Court's intervention, this practice will continue unabated.

Second, as detailed above, the Seventh Circuit's approach encourages prosecutors to charge, as fraud, conduct that no reasonable person would understand to be fraudulent—conduct Congress has never deemed fraud and which the CFTC says does not sound in fraud. This Court has consistently warned against this danger, explaining that novel, expansive interpretations of fraud and corruption statutes may "encourage arbitrary and discriminatory enforcement." *McDonnell v. United States*, 579 U.S. 550, 576 (2016); *accord Percoco*, 598 U.S. at 331. Just so here, where many accused spoofers suffer only modest civil penalties, but an arbitrary subset face felony convictions and imprisonment for conduct they could not

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[13] *See, e.g.*, Indictment, *United States v. Sarao*, No. 15-cr-75 (N.D. Ill. Sept. 2, 2015), Dkt. 1 (charging spoofing under Dodd-Frank and federal fraud statutes); Second Superseding Indictment, *United States v. Smith*, No. 19-cr-669 (N.D. Ill. Nov. 16, 2021), Dkt. 448 (similar); Superseding Indictment, *United States v. Flotron*, No. 17-cr-220 (D. Conn. Jan. 30, 2018), Dkt. 58 (similar); Information, *United States v. Edmonds*, No. 18-cr-239 (D. Conn. Oct. 9, 2018), Dkt. 1 (similar); Complaint, *United States v. Zhao*, No. 18-cr-24 (N.D. Ill. Jan. 11, 2018), Dkt. 1 (similar); Indictment, *United States v. Mao*, No. 18-cr-606, 2018 WL 8224909 (S.D. Tex. Oct. 10, 2018), Dkt. 1 (similar); Complaint, *United States v. Mohan*, No. 18-cr-610 (S.D. Tex. Jan. 26, 2018), Dkt. 1 (similar); Indictment, *United States v. Nadarajah*, No. 23-cr-891 (D.N.J. Nov. 7, 2023), Dkt. 1 (charging spoofing under the federal fraud statutes), http://tinyurl.com/mvy67nhh.

have predicted to be criminal. *See* Ex. B to Defs.' Joint Submission 1-3, *Bases*, No. 18-cr-48 (N.D. Ill. Jan. 27, 2023), Dkt. 732-2.

Third, allowing such prosecutions erodes the separation of powers. Allowing prosecutors to use the fraud statutes to charge spoofing—conduct that Congress has expressly and more leniently addressed elsewhere—plainly contravenes Congress's intent and transfers excessive power to unaccountable prosecutors. For these reasons, the Court has rightly emphasized that "[r]espect for due process and the separation of powers" forbids courts from "constru[ing] a criminal statute to penalize conduct it does not clearly proscribe." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). These concerns are directly implicated here, where the government invented its spoofing-as-fraud theory well after Petitioners' conduct and where the conduct at issue mostly predated Dodd-Frank's anti-spoofing provision.

Finally, the consequences of the Seventh Circuit's decision will reach beyond the criminal sphere and infect civil actions, too. As the Bank Policy Institute explained, wire-fraud violations "are commonly pleaded as predicate acts in civil RICO claims"—claims which "can lead to ruinous liability … as well as the reputational risk associated with the accusation of criminal racketeering." BPI Br. 12. Just as overbroad interpretations of the fraud statutes enable prosecutorial overreach, they also encourage abusive civil claims that obstruct the efficient operation of commercial markets.

* * *

This petition presents an ideal vehicle for resolving the important issues presented. The material facts are undisputed (including that the trades were fully executable, and Petitioners were willing and able to perform), and the claimed transactions at issue occurred both before and after Dodd-Frank's spoofing prohibition became effective. Moreover, all key arguments—including the conflict with the Fifth Circuit's *Radley* decision—were thoroughly presented below. This Court should grant review to resolve the circuit split and rein in the federal government's abuse of the federal criminal fraud statutes.

CONCLUSION

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

Respectfully submitted,

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