No.

IN THE

Supreme Court of the United States

MATTHEW CLARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the undefined statutory language, "intangible right of honest services," in 18 U.S.C. § 1346 is unconstitutionally vague.

II.

Whether the undefined statutory terms, "fictitious sale" and "not a true and bona fide price," in 7 U.S.C. § 6c(a) are unconstitutionally vague.

III.

Whether the government's criminal prosecution of petitioner for insider-trading under 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1 – the first such prosecution in the United States – violates due process because ordinary people were not on fair notice at the time of the charged offense that § 9(1) and § 180.1 made insider-trading in the commodity futures context a criminal offense.

IV.

Whether the criminal prosecution of petitioner under § 9(1) and § 180.1 violates the separation-of-powers doctrine because (1) Congress may not constitutionally delegate to an executive agency the power to define what primary conduct is subject to criminal liability and (2) § 9(1) does not provide an intelligible principle for delegation of legislative authority to define criminal conduct to the Commodity Futures Trading Commission.

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. Matthew Clark*, No. 4:22-CR-55-1 (S.D. Tex.). Judgment was entered on June 17, 2024.

- *United States v. Matthew Clark*, No. 24-20271, United States Court of Appeals for the Fifth Circuit. Judgment was entered on March 13, 2025 (rehearing denied on April 8, 2025).

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OPINIONS BELOW

The decision of the Fifth Circuit affirming the district court's judgment of conviction and sentence (App. 1a) is unreported but is available at 2025 WL 801358. The written order of the district court denying petitioner's pretrial motion to dismiss (App. 13a) is unreported. The district court's amended order requiring petitioner to forfeit $6,532,360 because of his conviction of the "honest services" wire-fraud charge in Count One of the indictment (App. 10a) is unreported.

JURISDICTION

The Fifth Circuit issued its decision affirming the district court's judgment on March 13, 2025. Petitioner filed a timely petition for rehearing, which the Fifth Circuit denied on April 8, 2025 (App. 14a). This petition was filed within 90 days of the Fifth Circuit's denial of the petition for rehearing. This Court thus has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant constitutional provision, statutes, and Commodity Futures Trading Commission regulation are contained in Appendix E (App. 16a-18a).

STATEMENT OF THE CASE

A. Procedural Background

On February 3, 2022, the grand jury returned a nine-count indictment charging petitioner with one count of conspiracy to commit "honest services" wire fraud,

in violation of 18 U.S.C. §§ 1343, 1346, & 1349 (Count 1); three substantive counts of "honest services" wire fraud, in violation of 18 U.S.C. §§ 1343 & 1346 (Counts 2 through 4); one count of conspiracy to engage in prohibited commodities transactions and "insider trading," in violation of 18 U.S.C. § 371; 7 U.S.C. §§ 6c(a), 9(1), 13(a)(2) & 13(a)(5); and 17 C.F.R. § 180.1 (Count 5); two substantive counts of prohibited commodities transactions, in violation of 7 U.S.C. §§ 6c(a) & 13(a)(2) (Counts 6 and 7); and two substantive counts of "insider trading" concerning commodities futures, in violation of 7 U.S.C. §§ 9(1) & 13(a)(5) and 17 CFR § 180.1 (Counts 8 and 9). ROA.19-33.[1]

On October 5, 2023, petitioner filed a pretrial motion to dismiss all charges in the indictment. ROA.223. On March 7, 2024, the district court denied that motion. ROA.361.

On March 15, 2024, pursuant to a conditional plea agreement (which reserved petitioner's right to appeal the district court's denial of the pretrial motion), ROA.538, petitioner pleaded guilty to the charges in Counts One, Six, and Eight. ROA.485 *et seq.*

On June 7, 2024, the district court sentenced petitioner to serve 78 months in federal prison, to be followed by three years of supervised release, as well as $7,709,509 in restitution and a $300 special assessment. ROA.503 et seq.; *see also* ROA.437 (court's written judgment). The court also entered an amended money judgment forfeiting $6,532,360 of petitioner's assets, in accordance with the indictment's forfeiture allegation related to the "honest services" wire-fraud charge in Count One (ROA.32), App.10a, which the court made part of its judgment in this case. ROA.443.

1. "ROA" refers to the Fifth Circuit's record on appeal.

B. Relevant Facts

The Fifth Circuit's opinion succinctly sets forth the relevant facts:

> Clark's convictions arise from two unlawful schemes he perpetrated against his employer, Company B, from 2010 to 2019. From 2010 to 2019, . . . Clark steered Company B's trading business to a brokerage firm called Classic Energy, LLC (Classic Energy),[2] owned by broker Matthew Webb. In return, Company B paid commission fees to Classic Energy, which were split between Clark and Webb and funneled through intermediaries, including members of Clark's family. In total, Webb paid Clark $5,543,662 in illegal kickbacks [which led to the charge in Count One].
>
> The second scheme underlying Counts Six and Eight also involved dealings between Webb and Clark, this time spanning from April 2013 to September 2019. As part of his role at Company B, Clark had access to confidential proprietary information, including the company's trading strategies and intentions. During this time, Clark shared Company B's intended trades with Webb, who passed the information to

2. The Fifth Circuit's opinion erroneously stated that "*rather than find the best deal for his employer*, Clark steered Company B's trading business to [Classic Energy]." App. 2a (emphasis added). That underscored statement finds no support in the record (including the factual basis of the plea agreement, ROA.553., and presentence report, ROA.574) – but, in any event, is irrelevant to the issues raised in this case.

> their coconspirators. These coconspirators took opposite positions on the trades and made offsetting trades using Company B's confidential information. The prearranged counterparties then shared the profits from these trades with Webb and Clark.
>
> At the same time, Clark continued to take annual employee trainings, where he was reminded of the relevant statutes and industry regulations, including prohibitions on prearranging trades, insider trading, and reporting prices that were not "true and bona fide."
>
> In total, the profits from this scheme to Clark and his coconspirators exceeded $2.1 million.

App. 2a-3a.

The only additional relevant facts concern the type of commodity futures trades in which petitioner and his alleged conspirators engaged – "block trades." ROA.20, 29-30 (indictment's allegations of "block trades"). As stipulated in the factual basis of the parties' plea agreement, a block trade is a "transaction that was executed apart and away from the open outcry or electronic markets." ROA.573. Significantly, the rules of the commodities exchanges – including the Intercontinental Exchange (ICE) and the Chicago Mercantile Exchange (CME) – did not prohibit block trades when petitioner and his alleged conspirators engaged in the trades.[3]

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3. *See, e.g., ICE Futures U.S., "Block Trade – FAQs* ("A block trade is a permissible, noncompetitive, privately negotiated transaction either at or exceeding an Exchange determined minimum threshold quantity of futures or options contracts which is executed

Block trading in the commodity futures markets was rare until 2012 rule changes by the commodities exchanges after the enactment of the Dodd-Frank Act. The new rules permitted large block trades. *See* Eleni Gousgounis & Sayee Srinivasan, *Block Trades in Options Markets*, at 1 (CFTC paper published in 39 J. OF FUTURES MARKETS 985 (August 2019)).[4]

C. Petitioner's Constitutional Challenges to the Charges in the Courts Below

Petitioner's pretrial motion to dismiss the charges in the indictment made several distinct arguments: (1) the "honest services" charges are unconstitutionally vague; (2) the charges that petitioner participated in "fictitious sales" – and, thus, also caused the reporting of prices to commodities exchanges that were "not . . . true and bona fide"[5] – are unconstitutionally vague; and (3) petitioner's "insider trading" charges[6] are unconstitutionally

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apart and away from the open outcry or electronic markets."), available at https://www.ice.com/publicdocs/futures_us/exchange_notices/Block_Trade(3).pdf; *Block Trades – What is a Block Trade?*, https://www.cmegroup.com/education/courses/market-regulation/block-trades/block-trades-what-is-a-block-trade.html ("Block trades are privately and bilaterally negotiated futures, options or combination transactions that meet certain quantity thresholds and are permitted to be executed apart from the public auction market. Block trades are governed by [CME] Rule 526.").

4. Available at https://www.cftc.gov/sites/default/files/idc/groups/public/@economicanalysis/documents/file/oce_blocktradesinoptions.pdf

5. 7 U.S.C. §§ 6c(a) & 13(a)(2).

6. 7 U.S.C. §§ 9(1) & 13(a)(5) and 17 CFR § 180.1.

vague and also violate the separation-of-powers and non-delegation doctrines. ROA223-267; ROA.327-343; ROA.355-57. The district court denied the motion in a summary order without offering any reasons. App. 13a.

In affirming the district court's judgment, the Fifth Circuit addressed some of petitioner's arguments but failed to address key parts of petitioner's challenges to his convictions of the charges in Count Six[7] and Count Eight.[8]

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7. In rejecting petitioner's facial challenge to the vague statutory terms "fictitious sale" and "not a true and bona fide price," the Fifth Circuit did not mention either (1) the only prior federal court decision previously addressing whether "fictitious sale" was vague, *United States v. LaMantia*, 2 Comm. Fut. L. Rep. ¶ 20,667, 1978 U.S. Dist. LEXIS 20413 (N.D. Ill. 1978) (holding that the phrase was vague); or (2) petitioner's desuetude argument concerning §§ 6c(a) & 13(a)(2) – even after petitioner filed a rehearing petition that pointed out the Fifth Circuit's failure to have addressed the desuetude issue raised in petitioner's motion to dismiss and appellate briefs. *See* Opening Brief of Appellant, 2024 WL 4101188, at *31; Reply Brief of Appellant, 2024 WL 4929533, at *9-*10; Petition for Rehearing, at 9-10 (5th Cir. ECF No. 65; filed Mar. 26, 2025).

In addition, the Fifth Circuit entirely ignored petitioner's as-applied vagueness challenge to § 6c(a) – including petitioner's argument that the definition of "fictitious sale" in the indictment in his case is based on the Commodity Futures Trading Commission definition of "fictitious sale" in *In re Harold Collins*, Comm. Fut. L. Rep. (CCH) ¶ 22,982 (C.F.T.C. 1986), which is unconstitutionally vague as applied to the "block trades" that occurred in petitioner's case. *See* Opening Brief of Appellant, *United States v. Clark*, No. 24-20271, 2024 WL 4101188, at *26-27, *29 n.27 (filed Aug. 28, 2024); Reply Brief of Appellant, *United States v. Clark*, No. 24-20271, 2024 WL 4929533, at *14-*15 (filed Nov. 25, 2024).

8. In rejecting petitioner's vagueness challenge to the charge in Count Eight, the Fifth Circuit failed to address petitioner's argument that, years after the dates of the offenses charged in

Regarding petitioner's challenge to his conviction of the "honest services" wire-fraud charge in Count One, the Fifth Circuit held that this Court's decision in *Skilling v. United States*, 561 U.S. 358 (2010), foreclosed petitioner's argument in the lower federal courts, despite this Court's subsequent decision in *United States v. Davis*, 588 U.S. 445, 463-65 (2019). App. 5a. Regarding petitioner's challenge to his conviction of the charge under the Commodity Exchange Act (CEA) in Count Five, the Fifth Circuit held that the related terms "fictitious sale" and "not a true and bona fide price" in 7 U.S.C. § 6c are not vague because the "ordinary meaning of these terms plainly contemplate deception" and "[t]he Constitution surely does not forbid Congress from prohibiting deception." App. 6a-7a. In rejecting petitioner's vagueness challenge to his insider-trading conviction (Count 8), the Fifth Circuit held the phrase "manipulative or deceptive device or contrivance" in 7 U.S.C. § 9(1) and 17 C.F.R.

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petitioner's indictment, both the chairperson of the CFTC and a leading official in the Justice Department publicly had stated that "insider trading" in the securities context was not equivalent to "insider trading" in the commodities context – and, as a result, it is unclear the extent to which 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1 applied to conduct that would be unlawful insider trading in the securities context. *See* Opening Brief of Appellant, 2024 WL 4101188, at *37-*38; Reply Brief of Appellant, 2024 WL 4929533, at *21. Similarly, the Fifth Circuit ignored petitioner's argument that the statute and regulation are vague because, in promulgating § 180.1 in 2011, the CFTC vaguely stated that the regulation "may" apply to certain types of insider trading in the commodity futures trading context "[d]epending on the facts and circumstances." CFTC, *Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation*, 76 FR 41398-01, 41403, 2011 WL 2708211 (July 14, 2011).

§ 180.1 "is an exact transplant from section 10(b)-5 of the Securities Exchange Act" and, furthermore, that this statutory "language has a well-settled interpretation" in *United States v. O'Hagan*, 521 U.S. 642 (1997). App. 7a-8a.

Finally, concerning petitioner's separation-of-powers and non-delegation challenges to his insider-trading conviction, the Fifth Circuit held that:

> "There is no absolute rule . . . against Congress' delegation of authority to define criminal punishments." *Loving v. United States*, 517 U.S. 748, 768 (1996). All that is required is that "Congress make[] the violations of regulation a criminal offense and fix[] the punishment, and the regulations confine themselves within the field covered by the statute." *Id.* (quotation marks and citation omitted).
>
> In addition, 7 U.S.C. § 9(1) provides the CFTC with an intelligible principle to guide its rulemaking. As explained above, the term "manipulative or deceptive device or contrivance" has already received an authoritative interpretation by the Supreme Court in the Securities Exchange Act context. So we can conclude that Congress directed the CFTC to prevent commodities traders from using confidential information for their personal advantage. That is sufficient under the [Supreme] Court's current "intelligible principle" standard.

App. 9a.

REASONS FOR GRANTING THE PETITION

This petition raises several important issues concerning the void-for-vagueness doctrine and the separation-of-powers doctrine (and the related non-delegation doctrine) that potentially affect countless people in a wide variety of areas subject to congressional and administrative regulation. The issues are not merely narrow ones limited to the context of commodity futures trading. Despite the Fifth Circuit's failure to meaningfully consider all of petitioner's preserved and properly-presented arguments, petitioner's case presents this Court with an excellent vehicle to provide needed clarification about these constitutional doctrines.

I. This Court Should Grant Certiorari and Address the Irreconcilable Conflict Between this Court's 2019 Decision in *Davis* and its 2010 Decision in *Skilling*.

A. Introduction

Because the undefined statutory term "honest services" in 18 U.S.C. § 1346 is vague, this Court should "treat the law as a nullity and invite Congress to" amend it in order to make it constitutional. *Davis*, 588 U.S. at 448. The Fifth Circuit rejected this argument because it considered itself bound by this Court's pre-*Davis* decision in *Skilling* – which, to *avoid* ruling that § 1346 was unconstitutionally vague, narrowly construed § 1346 to apply only to bribes or kickbacks paid to an employee in violation of his or her fiduciary duty owed to an employer. Because *Davis* effectively overruled *Skilling*, this Court should reverse the Fifth Circuit's judgment

affirming petitioner's conviction of the "honest services" conspiracy charge in Count One and also remand with instructions for the Fifth Circuit to vacate the district court's amended forfeiture order – requiring petitioner to forfeit $6,532,360– associated solely with that conviction (which is part of the district court's judgment).[9]

B. "Intangible Right of Honest Services" Is Vague

The undefined statutory phrase, "intangible right of honest services," in § 1346 is unconstitutionally vague. *See Percoco v. United States*, 598 U.S. 319, 333-38 (2023) (Gorsuch, J., concurring in judgment, joined by Thomas, J.); *Skilling*, 561 U.S. at 415-16 (Scalia, J., concurring in judgment, joined by Kennedy & Thomas, JJ.). The undefined statutory language is unconstitutionally vague for three distinct reasons: (1) it fails to give fair notice of its meaning to ordinary people; (2) it permits arbitrary enforcement by law enforcement, prosecutors, judges, and juries; and (3) it improperly delegates to courts the legislative task of defining the meaning of a penal statute. *See* David Kwok, *Is Vagueness Choking the White-Collar Statute*, 53 Ga. L. Rev. 495, 500-01 (2019) (discussing the three bases of this Court's void-for-vagueness doctrine).

In *Skilling*, the Court "acknowledge[d] that Skilling's vagueness challenge has force" but – over the protest of the three justices who concurred in the judgment only – followed the Court's pre-*Davis* practice of "consider[ing]

9. The district court's amended forfeiture order recognizes that: "The parties agree that if the U.S. Court of Appeals for the Fifth Circuit or the U.S. Supreme Court were to reverse the Defendant's conviction of Count One on appeal, this Agreed Order Imposing Money Judgment will be vacated." App. 11a.

whether the [otherwise vague statute] is amenable to a limiting construction." *Skilling*, 561 U.S. 405-06. That is, *Skilling* applied the constitutional-avoidance canon. *Skilling*, 561 U.S. at 415-16 (Scalia, J., concurring in judgment, joined by Kennedy & Thomas, JJ.) (noting the "canon of constitutional avoidance, on which the Court so heavily relies" – citing 561 U.S. at 405-06 (majority opinion)).

In *Skilling*, a majority of this Court narrowly interpreted the statute solely to prohibit "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived" when the person receiving a bribe or kickback acted "in violation of a fiduciary duty." 561 U.S. at 404, 407. In petitioner's case, the government clearly relied on the *Skilling* majority opinion in drafting petitioner's indictment. ROA.21, 23-24 (Indictment ¶¶ 9, 27, 28-29).

There is an irreconcilable conflict between *Skilling*'s narrow construction of the vague statutory language (to avoid declaring it vague) and this Court's subsequent decision in *Davis*. In *Davis*, this Court *categorically* held that a vague statute cannot be judicially narrowed under any circumstances to render it constitutional:

> In our constitutional order, *a vague law is no law at all*. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional

> requirements. They hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct. *When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.*

588 U.S. at 447-48 (emphasis added).

Davis unequivocally held that, once a court makes the threshold determination that statutory language is vague, the court cannot salvage the vague statute through a narrowing judicial interpretation. Instead, a court must declare that the "vague law is no law at all" – *i.e.*, declare that it is void *ab initio*. *Davis*'s approach – which makes the separation-of-powers doctrine an integral part of the Court's void-for-vagueness doctrine, at least in cases involving congressional statutes[10] – fundamentally conflicts with this Court's approach taken nine years earlier in *Skilling*. As a commentator has correctly observed:

> [T]he Court has said that the void-for-vagueness doctrine prevents excessive delegation of legislative power to courts while at the same time . . . saying that judicial construction can

10. *See also Sessions v. Dimaya*, 584 U.S. 148, 156 (2018) (plurality op. of Kagan, J.) ("[T]he [void-for-vagueness] doctrine is a corollary of the separation of powers – requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.").

> save an otherwise vague statute. *There is an obvious inconsistency here.* Either vague statutes are unconstitutional because they excessively delegate lawmaking powers to courts, or a court can exercise that lawmaking power to narrow an otherwise vague statute, thereby saving it from unconstitutionality. *Only one of these propositions can be correct.*

Michael J. Zydney Mannheimer, *Vagueness and Impossibility*, 98 Tex. L. Rev. 1049, 1089-90 (2020) (emphasis added).

Skilling is no longer a valid precedent and should be explicitly overruled along with other prior decisions permitting judicial surgery to salvage vague statutory language.[11]

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11. Although a majority of this Court in *Percoco* – which was decided after *Davis* – did not invalidate § 1346 as vague and, instead, issued a ruling consistent with the narrow interpretation of the statute previously done in *Skilling*, *Percoco*, 598 U.S. 328-29, the petitioner in that case did not contend (as petitioner does here) that *Skilling* was overruled by *Davis*. *See* Brief for Petitioner, *Percoco v. United States*, No. 21-1158, 2022 WL 4010057 (filed Aug. 2022). Indeed, the petitioner's brief did not even cite *Davis* and explicitly relied on *Skilling* in support of the arguments that the petitioner made (that the particular application of § 1346 in his case was unconstitutional). Therefore, *Percoco* should not be interpreted as reaffirming *Skilling* after *Davis*. Instead, the Court in *Percoco* merely followed its well-established practice of deciding issues with constitutional implications as narrowly as possible and not raising different issues *sua sponte*. *See, e.g.*, *Harmon v. Brucker*, 355 U.S. 579, 581 (1958); *see also United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020).

Based on *Davis*'s reasoning, the constitutional-avoidance canon can only be applied to a merely *ambiguous* statute that permits two fair alternatives in interpretation (i.e., is fairly amenable to a limiting construction using traditional statutory interpretation principles). *See Skilling*, 561 U.S. at 415-16 (Scalia, J., concurring in judgment, joined by Kennedy & Thomas, JJ.); *see also* William W. Berry, *Criminal Constitutional Avoidance*, 104 J. Crim. L. & Criminology 105, 109-10 (2014). Section 1346 is not merely *ambiguous*; it is *vague*. It is thus "no law at all."

Because § 1346 is void for vagueness, petitioner's conviction of the "honest services" charge in Count One must be reversed, and the district court's associated forfeiture order (which is based on petitioner's conviction of the charge in Count One) must be vacated.

II. The Undefined Terms, "Fictitious Sale" and "Not a True and Bona Fide Price," in 7 U.S.C. § 6c(a) Are Void for Vagueness.

A. Introduction

In the courts below, petitioner contended that the undefined statutory terms, "fictitious sale" and "not a true and bona fide price," in 7 U.S.C. § 6c(a)(2)(A)(ii) & (B) are not only facially vague but also vague *as applied to petitioner* because the government's specific theory of how petitioner allegedly violated the statute would not have put "ordinary people"[12] on notice about incurring potential criminal liability under § 6c(a)(2) for engaging in block

12. *Johnson v. United States*, 576 U.S. 591, 595 (2015).

trades in 2017 (the date charged in Count 6, ROA.31). *See* Opening Brief of Appellant, 2024 WL 4101188, at *26-*32; Reply Brief of Appellant, 2024 WL 4929533, at *7-*20. The Fifth Circuit only briefly addressed petitioner's facial challenge – ignoring his as-applied vagueness challenge based on the government's theory of petitioner's criminal liability set forth in the indictment – and erred in its facial analysis.

B. The Fifth Circuit Erroneously Rejected Petitioner's Facial Challenge to 7 U.S.C. § 6c(a) and, in So Doing, Ignored Petitioner's Compelling Desuetude Argument.

Petitioner's facial vagueness challenge finds support in the only prior judicial decision (before the Fifth Circuit's decision in petitioner's case) addressing whether "fictitious sale" in § 6c(a) is vague. *United States v. LaMantia*, 2 Comm. Fut. L. Rep. ¶ 20,667, 1978 U.S. Dist. LEXIS 20413 (N.D. Ill. 1978) (holding that "fictitious sale" is unconstitutionally vague) – a decision not mentioned in the Fifth Circuit's opinion.

The Fifth Circuit's analysis held that the terms "fictitious sale" and "not true and bona fide price" are not facially vague because the dictionary meanings of such terms generally refer to "deception" and that petitioner thus was on fair notice that his block trades – which occurred outside the competitive commodities markets – were deceptive. App. 6a-7a. Such an analysis failed to apply this Court's well-established precedent concerning vagueness challenges. In particular, the *undefined* statutory terms "fictional trade" and "not true and bona fide price" when considered in the specific context of

commodity futures trading do not give an ordinary person fair notice of which trading practices are prohibited because the statutory terms lack "any ascertainable standard for inclusion and exclusion" of conduct within its scope. *Smith v. Goguen*, 415 U.S. 566, 578 (1974); *see also Skilling*, 561 U.S. at 415 (Scalia, J. concurring in judgment, joined by Thomas & Kennedy, JJ.) (contending that a criminal statute that fails to "clearly define the conduct [that it] proscribes" is unconstitutional).

In assessing whether "fictitious sale" and "not true and bona fide price" are void for vagueness, it is significant to consider that, since the federal district court in *LaMantia* held that "fictitious sale" was vague in 1978, there have been *no other cases* appearing in published reports or even on Westlaw or Lexis in which a defendant has been *criminally prosecuted* under 7 U.S.C. §§ 6c(a)(2) & 13(a)(2) for an allegedly "fictitious sale" or for reporting a price that was "not a true and bona fide price."[13]

Such blatant desuetude demonstrates that the undefined terms in § 6c(a), which have existed *for nearly 90 years*, do not give ordinary people fair notice. *See United States v. Elliott*, 266 F. Supp. 318, 326 (S.D.N.Y. 1967) ("[S]ome situations a desuetudinal statute could prevent serious problems of fair notice[.]"); *United States v. Jones*, 347 F. Supp.2d 626, 628 (E.D. Wisc. 2004) (same); *see also Committee on Legal Ethics of the West Virginia State Bar v. Printz*, 416 S.E.2d 720, 724-25 (W. Va. 1992) ("Closely akin to the doctrine of 'vagueness' stands the far less easily applied doctrine of 'desuetude.'") (citing Robert Bork, The Tempting of America 96 (1990), which stated:

13. In the lower courts, counsel for the government did not dispute this assertion repeatedly made by petitioner.

"It has been suggested that if anyone tried to enforce a law that had moldered in disuse for many years, the statute should be declared void by reason of desuetude or that the defendant should go free because the law had not provided fair warning."); Norman J. Singer, SUTHELAND'S STATUTORY CONSTRUCTION § 34:6 at 44 (6th ed. 2001).

For these reasons, the Fifth Circuit erred by concluding that "fictitious sale" and "not a true and bona fide price" are not facially vague. At the very least, this Court should vacate the Fifth Circuit's judgment and remand for reconsideration in view of the court's failure to address how the government's significant desuetude in criminally enforcing § 6c(a)(2)(A)(ii) & (B) affects the vagueness analysis – including after petitioner's petition for rehearing specifically noted that the Fifth Circuit had failed to address that properly-preserved and properly-briefed issue. The Fifth Circuit's failure to discuss petitioner's compelling desuetude argument "so departed from the accepted and usual course of judicial proceedings" as to warrant such a response from this Court under Supreme Court Rule 10(a) and 28 U.S.C. § 2106. *See Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam); *cf. Webster v. Cooper*, 558 U.S. 1039 (2009) (per curiam) (vacating judgment and remanding to Court of Appeals to address a relevant prior Supreme Court decision ignored by the court).

C. The Fifth Circuit Ignored Petitioner's Meritorious As-Applied Challenge.

In addition to making a facial challenge to § 6c(a)(2), petitioner also specifically challenged the statute as being unconstitutionally applied to him *based on the*

government's specific theory of petitioner's liability set forth in the indictment. The Fifth Circuit also failed to address that as-applied challenge.

The indictment charges that there were "fictitious sales" between petitioner and his associates – and, thus, "true and bona fide prices" were not reported to the commodities exchanges – because petitioner and his associates engaged in "noncompetitive, prearranged trades that negated market risk and price competition." ROA.20, 28-29. In the courts below, the government clearly articulated its position about the supposed meanings of the statutory terms *as applied in petitioner's case*:

> . . . [T]he Indictment paints a clear picture of the charged conduct. . . . Specifically, it alleges that Defendant engaged in certain [Henry Hub] block trades of natural gas futures contracts, those trades were "non-competitive," "prearranged," which "negated market risk and price competition." Id. ¶ 36(b). The Indictment also describes why this conduct is unlawful. The [block] trades "caused prices to be reported" to the [Commodity] Exchanges using sale prices that "were not true and bona fide prices." *Id.* In other words, because the conspirators decided to "prearrange" [block] trades with each other so that their offers to buy and sell were not offered to the market at large, the trades resulted in artificial non-arms' length and non bona fide prices that in turn allowed the conspirators to earn money for themselves. See Black, Henry Campbell, *Black's Law Dictionary* (2d ed. 1910) (bona fide means "In or

> with good faith; honestly, openly, and sincerely; without deceit or fraud.").

ROA.303 (response to petitioner's motion to dismiss); *see also* Appellee Brief for the United States, No. 24-20271, 2024 WL 4799253, at *23 (filed Nov. 8, 2024) ("Both phrases describe dishonest transactions disguised as legitimate ones, with 'fictitious sales' describing sales that are prearranged outside of the competitive marketplace, and transactions resulting in the reporting of prices that are 'not . . . true and bona fide' describing the reporting of prices that do not honestly reflect market competition.").

As the government's Fifth Circuit brief acknowledged, its definitions of the statutory terms were supplied by administrative decisions of the Commodity Futures Trading Commission (CFTC). *See* Appellee Brief for the United States, 2024 WL 4799253, at *28-*29 ("For its part, the CFTC has consistently interpreted Section 6c(a)'s prohibition on 'fictitious sale[s]' to include 'the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk of price competition incident to such a market.'") (quoting *In re Harold Collins*, CFTC, No. 77-15, 1986 WL 66165, at *7 (April 4, 1986)).[14] *Collins* announced the CFTC's definition of "fictitious sale" in direct response to the federal district court's 1978 decision in *United States v. LaMantia*, *supra*,

14. *In re Collins*, 1986 WL 66165 at *7 ("In our view, the common denominator of the specific abuses prohibited in Section 4c(a) – wash sales, cross trades, and accommodation trades – and the central characteristic of the general category of fictitious sales, is the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk or price competition incident to such a market.").

which had held that the term "fictitious sale" in 7 U.S.C. § 6c(a)(2) was unconstitutionally vague.[15]

Assuming *arguendo* that a federal administrative decision's definition of an undefined statutory term could be relevant in determining whether the statute gave fair notice in the criminal law context,[16] the CFTC's

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15. The CFTC stated that it was providing a definition of "fictitious sale," for purposes of administrative and civil enforcement, because the federal district court in *LaMantia*, *supra*, had held that "fictitious sale" was vague in the criminal context. *In re Collins*, 1986 WL 66165, at *6 & n.18 (noting "Respondent here does not cite *LaMantia*, or invoke the 'vagueness' doctrine, apparently recognizing that the instant case is a civil enforcement proceeding"). The CFTC provided the following definition:

> . . . [T]he central characteristic of the general category of fictitious sales, is the use of trading techniques that give the appearance of submitting trades to the open market while negating the risk or price competition incident to such a market. . . . Prearranged trading is one of the more common forms of fictitious sales not specifically denominated in Section 4c(a) [of the CEA]. By determining trade information such as price and quantity outside the pit, then using the market mechanism to shield the private nature of the bargain from public scrutiny, both price competition and market risk are eliminated. . . . [A]ll prearranged trades are, by their nature, fictitious.

Id. at *7-*8.

16. *But see Abramski v. United States*, 573 U.S. 169, 191 (2014) ("We think ATF's . . . position [about the meaning of a criminal statute that it is charged with enforcing is] not relevant at all."); *see also Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

definition of "fictitious sale" is itself vague. *See* Jerry W. Markham and Rigers Gjyshi, 13 COMMODITIES REG. § 14:2 ("Commodities Regulation: Fraud, Manipulation & Other Claims") (April 2024 update) (describing the definition in *Collins* as "completely unintelligible").

Collins's specific definition of "fictitious sale," as applied in petitioner's case, cannot be reconciled with the ordinary meanings of "fictitious," "not . . . true," and "bona fide." *See, e.g.*, *Michelson v. Merrill Lynch, Pierce, Fenner & Smith*, 669 F. Supp. 1244, 1252 n.8 (S.D.N.Y. 1987) ("The term 'fictitious sale' . . . seems to embrace situations in which a trade is reported that did not in fact take place."). Instead, the indictment's specific definitions focus on a price resulting from an agreement between a commodities buyer and a commodities seller (known to each other at the time of the sale) who reached their agreement to buy and sell *outside of the normal commodities markets* (i.e., in a prearranged "block trade") – thereby without the influence of regular market forces that affect regular commodities transactions between buyers and sellers occurring in the "open outcry" or electronic commodities markets. ROA.20, 28-29. *Collins*'s definition does not require either that a trade reported to a commodities exchange in fact never have occurred or that a reported price was different from the actual price for a trade to be deemed "fictitious" (or for the reported price involved in the trade to be deemed "not true and bona fide").[17]

17. Neither the CFTC nor the lower federal courts have ever separately defined "not a true and bona fide price." Instead, "not true and bona fide" always has been interpreted along with "fictitious sale."

The vague nature of the government's definition of "fictitious sale" in petitioner's case is evidenced by the fact that the definition in *Collins* – according to its own terms – does not even apply to the "block trades" that occurred in petitioner's case (ROA.548, 576, 609). That is because all such block trades are, by definition, prearranged noncompetitive trades occurring outside of the traditional "pit" or modern electronic commodity futures markets,[18] while the CFTC's definition of "fictitious sale" only encompasses trades that deceptively "*give the appearance of submitting trades to the open market* while negating the risk or price competition incident to such a market."[19] A block trade done in accordance with the commodities exchanges' rules since 2012 does not "give the appearance" of submitting trades on the open market, as it necessarily occurs entirely *outside* the open market (by design).

Significantly, the government's position never has been that petitioner and his associates engaged in or reported to commodities exchanges any "fictitious" block trades with prices that were "not . . . true and bona fide" in the sense that (1) the block trades *never occurred* but were falsely reported to a commodities exchange *as if they did*; or (2) the prices reported to the exchanges were *different* from the prices reflected in the actual

18. *See, e.g.*, *ICE Futures U.S., "Block Trade – FAQs* ("A block trade is a permissible, noncompetitive, privately negotiated transaction either at or exceeding an Exchange determined minimum threshold quantity of futures or options contracts which is executed apart and away from the open outcry or electronic markets."), available at https://www.ice.com/publicdocs/futures_us/exchange_notices/Block_Trade(3).pdf

19. *In re Collins*, 1986 WL 66165 at *7 (emphasis added).

block trades that occurred between petitioner and his associates. Instead, the government's theory has always been that the block trades were "fictitious" – and the reported prices thus were "not . . . true and bona fide" – *solely* because they were prearranged block trades *not subject to normal market forces*. Therefore, because the rules of the commodities exchanges expressly permitted block trades, it is fundamentally unfair to apply the *Collins* definition of "fictitious sale" to someone who engaged in a such a block trade.

In view of the government's specific definitions given to the statutory terms in the indictment, the Fifth Circuit's rejection of petitioner's vagueness challenge – holding that, because "the ordinary meaning of these terms ['fictitious sale' and 'not a true and bona fide price'] plainly contemplate deception [and] . . . falsity," the statutory terms are not vague[20] – entirely missed the mark. As discussed above, the government's theory of petitioner's criminal liability has not defined the statutory terms to mean that they generally contemplate "deception." Instead, the government has articulated very specific definitions of the terms and applied them to the block trades that occurred in this case (by indicting petitioner in the manner set forth above). The Fifth Circuit did not address petitioner's vagueness challenge to those specific definitions as applied to the block trades that occurred in this case. Indeed, the term "block trade" does not appear even once in the Fifth Circuit's opinion despite the fact that discussion of a block trade is essential to resolving petitioner's as-applied vagueness challenge. Petitioner's counsel in the Fifth Circuit discussed the relevance of

20. App. 6a.

block trades in his briefs and at oral argument.[21] Yet the Fifth Circuit's opinion never mentioned them.

Therefore, the Fifth Circuit's rejection of petitioner's vagueness claim concerning § 6c(a)(2)(A)(ii) & (B), without addressing his as-applied challenge to the government's theory of liability concerning block trades, was erroneous and warrants reversal. At the very least, this Court should vacate the Fifth Circuit's judgment concerning this issue and remand for reconsideration because the court's failure to address petitioner's as-applied claim "so departed from the accepted and usual course of judicial proceedings." Sp. Ct. R. 10(a).

D. Alternatively, this Court Should Vacate the Fifth Circuit's Judgment and Remand for Reconsideration in View of this Court's Decision in *Thompson v. United States*, 604 U.S. ___, 145 S. Ct. 821 (Mar. 21, 2025).

Shortly after the Fifth Circuit issued its decision in petitioner's case, this Court rendered its decision in *Thompson v. United States*, 604 U.S. ___, 145 S. Ct. 821 (Mar. 21, 2025). In *Thompson*, this Court held that the term "false" in 18 U.S.C. § 1014 – which prohibits "false" statements to federally-insured financial institutions – does not include "misleading" statements that are not outright false. This Court's narrow interpretation of the statutory term "false" should guide the interpretation of the terms "fictitious" and "not . . . true and bona fide"

21. The Fifth Circuit oral argument is available at: https://www.ca5.uscourts.gov/OralArgRecordings/24/24-20271_02-04-2025.mp3. Counsel discussed "block trades" around 25:50-26:50.

in 7 U.S.C. § 6c(a)(2). *Cf. Thompson*, 145 S. Ct. at 828-29 ("In casual conversation, people use many overlapping words to describe shady statements: false, misleading, dishonest, deceptive, literally true, and more. Only one of those words appears in the statute. Section 1014 does not criminalize statements that are misleading but true."); *see also id.* at 826 (rejecting government's argument that "false" includes "misleading" or "deceptive" statements that are not in fact outright "false").

In view of the narrow meanings that must be given to the *undefined* statutory terms "fictitious" and "not . . . true and bona fide" under a proper statutory interpretation, an ordinary person would not have understood that the conduct in which petitioner and his associates engaged (i.e., their prearranged block trades, which did not involve any actual false reports of nonexistent trades or false reports about the prices involved) qualified as "fictitious" or "not . . . true and bona fide." Therefore, at the very least, this Court should vacate the Fifth Circuit's judgment and remand for it to reconsider its affirmance of petitioner's conviction under § 6c(a)(2) in Count Five in view of *Thompson*.

III. The Government's Criminal Prosecution of Petitioner for Insider-Trading under 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1d – the First Such Prosecution in the United States – Violates Due Process Because Ordinary People Were Not on Fair Notice that They Could Be Criminally Prosecuted for Insider Trading in the Commodity Futures Context in 2017.

The allegations in Count Eight – that petitioner engaged in "insider trading" in 2017 – also violate due process because the statutory and regulatory provisions

upon which they are based did not give fair notice that insider trading in the commodities market was criminal in nature. Petitioner's challenge to the insider-trading charges, like his challenge to the other CEA charges, in part is based on the unforeseeable and novel nature of the government's theory of criminal liability. Indeed, as the government acknowledged in the court below: "The United States concedes that it is not aware of another case where a defendant has been criminally charged for insider trading in the commodities market" under 7 U.S.C. §§ 9(1) & 13(a)(5). ROA.313.

Petitioner's due-process challenge also is based on the fact that understanding the legal basis for the insider-trading charge requires the peeling of layer after layer of legal authority. Nowhere in the charged statutes, 7 U.S.C. §§ 9(1) & 13(a)(5), is insider trading mentioned. Instead, to charge petitioner with insider trading, the government had to rely on the CFTC's interpretation of one of its non-criminal regulations (17 C.F.R. § 180.1) – the willful violation of which is a crime under §§ 9(1) & 13(a)(5). Yet, as discussed below, even that regulation does not mention "insider trading." Instead, only the CFTC's *interpretation* of that regulation in the administrative context offers support for the prosecution's theory of petitioner's criminal liability for insider trading.

Significantly, in the CEA, there are express prohibitions against insider trading, but such prohibitions appear in provisions related to the conduct of government officials or employees of commodity exchanges (or other trade-regulating entities) or persons who obtain inside information from such listed persons. *See* 7 U.S.C. §§ 6c(a)(3), (a)(4) & (a)(5) (violations of which are criminally

punished under 7 U.S.C. §13(e)). Petitioner was not alleged to have violated any of those provisions. The choice by Congress expressly to outlaw only certain types of insider trading in the commodities context suggests that insider-trading charges in criminal cases cannot be brought against a private commodities trader or broker who did not obtain inside information from a governmental official or employee of an exchange or trade-regulating body. *Cf. Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (discussing the *expressio unius est exclusio alterius* canon of statutory construction). The manner in which the CEA is written thus raises fair-notice concerns at the heart of the constitutional rule against vague criminal laws because it suggests only those classes of persons expressly named in the CEA are subject to criminal prosecution for insider-trading under the CEA.

Rather than rely on the CEA's explicit statutory provisions concerning insider trading, the government's basis for the insider-trading charges against petitioner is the broad language in 17 C.F.R. § 180.1 (quoted above). Yet that regulation, which was modeled on SEC Rule 10b-5, does not explicitly proscribe insider trading. In promulgating § 180.1 in 2011 – in the wake of the passage of the Dodd-Frank Act of 2010 – the CFTC noted that the regulation "may" apply to certain types of insider trading in the commodity futures trading context "[d]epending on the facts and circumstances." CFTC, *Prohibition on the Employment, or Attempted Employment, of Manipulative and Deceptive Devices and Prohibition on Price Manipulation*, 76 FR 41398-01, 41403, 2011 WL 2708211 (July 14, 2011) (emphasis added). The CFTC also stated that, "[t]o account for the differences between the securities markets and the derivatives [i.e., commodity

futures] markets, the Commission will be guided, but not controlled, by the substantial body of judicial precedent applying the comparable language of SEC Rule 10b-5." *Id.* at 41399.

It was not until late 2015 that the CFTC brought its first administrative enforcement action under § 180.1 for alleged insider trading. *In the Matter of Arya Motazedi*, CFTC Docket No. 16-02, 2015 WL 7880066 (Dec. 2, 2015). Such actions were rare until late 2020 – three years after the date charged in Count Eight (ROA.32). The paucity of insider-trading civil enforcement actions by the CFTC at least in part was explained by the fact that insider trading in the securities context (and the legal authority for outlawing it) offers an imprecise analogy to insider trading in the commodity futures context. *See* Jerry W. Markham & Rigers Gjyshi, 13A COMMODITIES REG. § 18:8 (April 2023 update); *see also* Andrew Verstein, *Insider Trading in Commodities Markets,* 102 VA. L. REV. 447, 448 (2016) ("[W]hile insider trading in securities has long been illegal, the same behavior has been entirely legal in the commodities and futures markets."); *id.* (asking "[w]hy has insider trading been severely restricted in one financial market and entirely unregulated in another?").

In January 2021, the then-Chairman of the CFTC candidly admitted that his agency's recent enforcement actions based on alleged insider trading in the commodity futures markets were breaking new ground in an area of legal uncertainty:

> In recent months, the U.S. Commodity Futures Trading Commission, the federal agency I lead and that regulates the U.S. derivatives markets,

> has brought a number of enforcement actions for misconduct known colloquially as insider trading. *This has understandably generated some discussion about what constitutes illegal trading in these markets given that inside information is used every day by market participants to hedge their business risks in a manner that is both lawful and necessary. As a result, the bar is understandably asking: Where does the CFTC draw the line between legal and illegal use of nonpublic information and why?* . . . Section 6(c)(1) and Regulation 180.1 are also where the rubber meets the road regarding insider trading in the derivatives markets. Long critical to the U.S. Securities and Exchange Commission's enforcement efforts under Section 10(b) of the Securities Exchange Act, the concept of insider trading is typically understood to mean trading based on material, nonpublic or inside information. *Only recently has the concept begun to take hold in the derivatives markets. And it has arrived with some understandable confusion: While insider stock trades harm market integrity and can produce conflicts of interest for corporate officers, derivatives regulations permit — and actually encourage — what is commonly viewed as insider trading.*

Heath Tarbert, *What Is Insider Trading In The Derivatives Markets?*, LAW360 (Jan. 12, 2021) (emphasis added).[22] Tarbert referred to § 180.1 as a "flexible toolkit

22. Available at https://www.law360.com/articles/1343854.

that can adapt to new types of misconduct." *Id.* "Flexible toolkit" and "adapt" are anathema to the Due Process Clause's requirement of fair warning of what conduct violates the criminal law.

In December 2022, the recently-retired Acting Principal Deputy Chief of DOJ's Market Integrity and Major Frauds Unit co-wrote an article seeking to educate federal prosecutors about the "options available to federal prosecutors seeking" to prosecute federal criminal defendants for alleged fraud in the commodity futures market. *See* Justin Weitz & Jennifer Farer, *Prosecutions in the Securities & Commodities Markets*, 70 DOJ J. Fed. L. & Prac. 43, 43 (Dec. 2022). Weitz admitted that only "in recent years" had civil enforcement actions been brought by the CFTC for alleged insider trading and that criminal charges for insider trading were novel. *Id.* at 57. Weitz's article specifically mentioned petitioner's then-pending criminal prosecution. *Id.* Weitz clearly cited these prosecutions as being *groundbreaking* – the very term used by the Justice Department in a press release about petitioner's case.[23] Weitz concluded by candidly advising federal prosecutors to pursue "multiple charging theories"

23. As the head of the Justice Department's Criminal Division stated in a press release after petitioner was convicted: "This groundbreaking investigation was the first to result in criminal convictions for commodities insider trading." Department of Justice, Office of Public Affairs, *Former President of Energy Company Pleads Guilty to $5.5M Illegal Kickback Conspiracy and Commodities Insider Trading Scheme* (Mar. 18, 2024), https://www.justice.gov/opa/pr/former-president-energy-company-pleads-guilty-55m-illegal-kickback-conspiracy-and#:~:text=%E2%80%9CMatthew%20Clark%20made%20millions%20trading,said%20U.S.%20Attorney%20Alamdar%20S.

under multiple federal statutes (and thus not rely solely on the 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1) "given lack of precedent in this area." *Id.* at 58.

These candid admissions by both the former CFTC chairman and the former head of DOJ's Market Integrity and Major Frauds Unit – made in 2021 and 2022 – are compelling evidence of the unconstitutionally vague nature of the insider-trading criminal charges against petitioner. At the time of the charged insider-trading offense charged in Count Eight (in early 2017, ROA.32) the law was not "sufficiently explicit to inform [him] what conduct on [his] part [would have] render[ed] [him] liable to its penalties" – and, thus, cannot be constitutionally applied against petitioner. *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964).

Therefore, the Fifth Circuit's cursory analysis and rejection of petitioner's vagueness challenge to his conviction under 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1 was erroneous.

IV. The Criminal Prosecution of Petitioner under 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1 Violates the Separation-of-Powers Doctrine Because Congress May Not Constitutionally Delegate to an Executive Agency the Power to Define What Primary Conduct is Subject to Criminal Liability.

7 U.S.C. §§ 9(1) & 13(a)(5) make it a felony offense for a person to violate certain rules and regulations promulgated by the CFTC – including 17 C.F.R. § 180.1, which the CFTC has interpreted to prohibit insider-trading by commodity futures traders and brokers. These

provisions of the Commodity Exchange Act violate the separation-of-powers doctrine because Congress cannot delegate to an administrative agency the authority to regulate "primary conduct" in a manner that subjects citizens to criminal liability for violating the agency's regulations. *See Mistretta v. United States*, 488 U.S. 361, 396 (1989) (concluding that the then-mandatory federal sentencing guidelines did not violate the separation-of-powers doctrine because they did not "regulate [citizens'] primary conduct"); *see also Davis*, 588 U.S. at 451 ("Only the people's elected representatives in Congress have the power to write new federal criminal laws."); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring) (stating that "Congress, not agencies or courts, defines crimes"). Only Congress, and not an unelected agency, may write laws that regulate primary conduct, at least when the violation of such regulations can result in criminal penalties.

V. The Government's Criminal Prosecution of Petitioner under 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1 Violates the Separation-of-Powers Doctrine Because § 9(1) Does Not Provide an Intelligible Principle for Delegation of Legislative Authority to Define Criminal Conduct to the Commodity Futures Trading Commission.

Assuming *arguendo* that the CEA does not unconstitutionally afford the CFTC authority to regulate "primary conduct," § 9(1) nevertheless fails to "sufficiently guide[] executive discretion to accord with Article I" of the Constitution under the rigorous "intelligible-principle"

standard[24] that should be applied to an agency's rules and regulations affecting citizens' potential criminal liability. *See United States v. Nichols*, 784 F.3d 666, 672 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing *en banc*) ("It's easy enough to see why a stricter [intelligible-principle] rule would apply in the criminal arena."); *Carter*, 736 F.3d at 734 (Sutton, J., concurring) (stating that "the Constitution may well . . . require Congress to state more than an 'intelligible principle' when leaving the definition of crime to the executive"); F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 Va. L. Rev. 281, 308, 340 (2021) (contending that "there are several reasons to be particularly apprehensive of delegations of the power to write criminal laws" and that federal courts should "adopt a more robust version of the intelligible principle doctrine for criminal delegations").

In *Touby v. United States*, 500 U.S. 160 (1991), this Court stated that: "Our cases are not entirely clear as to whether more specific guidance [to an agency] is in fact required [in the criminal context than in a civil context]. We need not resolve the issue today. We conclude that § 201(h) [of the Controlled Substances Act] passes muster even if greater congressional specificity is required in the criminal context." Id. at 165-66. This Court should grant certiorari in petitioner's case to resolve that issue left unresolved in *Touby*.

As Justice Thomas correctly has contended: "A law that simply stated 'it shall be unlawful to do 'X', however

24. *Gundy v. United States*, 588 U.S. 128, 145-46 (2019) (plurality op. of Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ.).

'X' shall be defined by an independent agency,' would seem to offer no 'intelligible principle' to guide the agency's discretion and would thus raise very serious delegation concerns[.]" *United States v. O'Hagan*, 521 U.S. 642, 695 n.10 (1997) (Thomas, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.).[25] That is exactly what 7 U.S.C. § 9(1) does by broadly delegating to the CFTC the authority to define "any manipulative or deceptive device or contrivance."

The Fifth Circuit erred by holding that "the term 'manipulative or deceptive device or contrivance' has already received an authoritative interpretation by the Supreme Court in the Securities Exchange Act context" – thus "conclud[ing] that Congress directed the CFTC to prevent commodities traders from using confidential information for their personal advantage" (and thereby satisfying "the [Supreme] Court's current 'intelligible principle' standard. App. 9a. As discussed above, the Fifth Circuit wrongly assumed that *O'Hagan* – a securities

25. Justice Thomas's statement was not contradicted by the majority's opinion in *O'Hagan*, which did not address whether the statute at issue in that case failed to pass muster under the intelligible-principle requirement (as that issue was not raised in the parties' briefs). *See United States v. O'Hagan*, Brief for the United States, No. 96-842, 1997 WL 86306 (filed Feb. 27, 1997); Brief for Respondent, *United States v. O'Hagan*, No. 96-842, 1997 WL 143801 (filed Mar. 28, 1997). The majority in *O'Hagan* instead was concerned with a related but distinct issue – "whether the [SEC] exceeded its rulemaking authority by adopting [SEC] Rule 14e–3(a), which proscribes trading on undisclosed information in the tender offer setting, even in the absence of a duty to disclose." 521 U.S. at 647. The word "intelligible" appears nowhere in the majority's opinion.

fraud case – can simply be imported into the commodities context (as a basis for concluding that petitioner had fair warning of his potential criminal liability and also for concluding that § 9(1) includes an "intelligible principle" for the CFTC).

A majority of this Court has expressed a desire to reconsider the "intelligible-principle" standard. *See Gundy*, 588 U.S. at 149 (2019) (Alito, J., concurring in the judgment); *id.* at 149 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of cert.); Amy Coney Barrett, *Suspension and Delegation*, 99 Cornell L. Rev. 251, 318 (2014) (noting "the notoriously lax 'intelligible principle" test); *see also Allstates Refractory Contractors, LLC v. Su*, 603 U.S. __, 144 S. Ct. 2490, 2491 (2024) (Thomas, J., dissenting from denial of cert.) ("At least five Justices have already expressed an interest in reconsidering this Court's approach to Congress's delegations of legislative power.").

The Fifth Circuit's decision was explicitly based on this Court's "current 'intelligible principle' standard." App. 9a. Under a stricter standard, which this Court should adopt, § 9(1) would not pass constitutional muster. *See O'Hagan*, 521 U.S. at 695 n.10 (Thomas, J., concurring in part and dissenting in part, joined by Rehnquist, C.J.). Therefore, this Court should hold that petitioner's conviction of the charge in Count Eight is constitutionally invalid.

CONCLUSION

Because petitioner's case presents this Court with an excellent vehicle to decide several important questions concerning the void-for-vagueness doctrine and separation-of-powers doctrine (and the related non-delegation doctrine), this Court should grant the petition for writ of certiorari.

June 30, 2025

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 13, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-20271

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MATTHEW CLARK,

Defendant—Appellant.

Filed March 13, 2025

Before HIGGINBOTHAM, WILLETT, and HO, Circuit Judges.

PER CURIAM:*

Matthew Clark pleaded guilty to nine counts of conspiracy to commit honest services fraud, honest services fraud, prohibited commodities transactions, and insider trading. He appeals his convictions, arguing that his convictions were based on unconstitutionally vague statutes and violate the separation of powers and

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

nondelegation doctrines. We disagree and affirm the district court's judgment.

Background

Clark's convictions arise from two unlawful schemes he perpetrated against his employer, Company B, from 2010 to 2019. From 2010 to 2019, rather than find the best deal for his employer, Clark steered Company B's trading business to a brokerage firm called Classic Energy, LLC (Classic Energy), owned by broker Matthew Webb. In return, Company B paid commission fees to Classic Energy, which were split between Clark and Webb and funneled through intermediaries, including members of Clark's family. In total, Webb paid Clark $5,543,662 in illegal kickbacks.

The second scheme underlying Counts Six and Eight also involved dealings between Webb and Clark, this time spanning from April 2013 to September 2019. As part of his role at Company B, Clark had access to confidential proprietary information, including the company's trading strategies and intentions. During this time, Clark shared Company B's intended trades with Webb, who passed the information to their coconspirators. These coconspirators took opposite positions on the trades and made offsetting trades using Company B's confidential information. The prearranged counterparties then shared the profits from these trades with Webb and Clark.

At the same time, Clark continued to take annual employee trainings, where he was reminded of the relevant statutes and industry regulations, including prohibitions

on prearranging trades, insider trading, and reporting prices that were not "true and bona fide."

In total, the profits from this scheme to Clark and his coconspirators exceeded $2.1 million.

After the discovery of his conduct, Clark received a nine-count indictment in the Southern District of Texas charging him with:

- One count of conspiracy to commit honest services wire fraud, in violation of 18 U.S.C. §§ 1343, 1346, and 1349. (Count One)

- Three substantive counts of honest services wire fraud, in violation of 18 U.S.C. §§ 1343 and 1346. (Counts Two, Three, and Four)

- One count of conspiracy to engage in prohibited commodities transactions and insider trading, in violation of 18 U.S.C. § 371; 7 U.S.C. §§ 6c(a), 9(1), 13(a)(5); and 17 C.F.R. § 180.1. (Count Five)

- Two substantive counts of prohibited commodities transactions, in violation of 7 U.S.C. §§ 6c(a) and 13(a)(2). (Counts Six and Seven)

- Two substantive counts of insider trading, in violation of 7 U.S.C. §§ 9(1) and 13(a)(5) and 17 C.F.R. § 180.1. (Counts Eight and Nine)

Clark filed a pretrial motion to dismiss all charges in the indictment on constitutional vagueness grounds.

The district court denied the motion. Clark then pleaded guilty to Counts One, Six, and Eight of the indictment but reserved the right to appeal the denial of his motion to dismiss the indictment.

The district court then sentenced Clark to 78 months of imprisonment, followed by three years of supervised release. He was also ordered to pay $7,709,509 in restitution, a $300 special assessment, and forfeit $6,532,360.

Analysis

Clark raises three constitutional challenges to his conviction. First, he argues that 18 U.S.C. § 1346, which proscribes honest services fraud, is unconstitutionally vague. Second, he argues that the statutes and regulations criminalizing "fictitious sales," sales without a "true and bona fide price," and insider trading are also unconstitutionally vague. Third, he argues that Congress violated the separation of powers doctrine when it delegated authority to the CFTC to promulgate rules with criminal penalties. Additionally, he argues that this delegation violates the nondelegation doctrine because it lacks an intelligible principle.

We review constitutional challenges to criminal statutes de novo. *See, e.g., United States v. De Bruhl*, 118 F.4th 735, 745 (5th Cir. 2024).

I.

Clark's lead argument is that his convictions for honest services fraud and conspiracy to commit honest services

fraud under 18 U.S.C. § 1346 are invalid because 18 U.S.C. § 1346 is unconstitutionally vague.

But this argument is foreclosed by the Supreme Court's holding in *Skilling v. United States*, 561 U.S. 358, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010). In *Skilling*, the Court chose to "construe, not condemn" section 1346, by applying a "limiting construction" to save § 1346. *Id.* at 403-05. In doing so, the Court upheld section 1346's constitutionality as to kick-back schemes. *Id.* at 409.

Skilling is the Court's last word on section 1346's constitutionality. To be sure, the Court in *United States v. Davis*, 588 U.S. 445, 463-65, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019), disfavored construing a statute to avoid vagueness. And two justices have expressed doubt as to the constitutionality of honest services fraud. *See Percoco v. United States*, 598 U.S. 319, 333-35, 143 S. Ct. 1130, 215 L. Ed. 2d 305 (2023) (Gorsuch, J., concurring in the judgment). But the Court has not overruled *Skilling*. And our court is not in the business of overturning Supreme Court precedent. *See United States v. Rahimi*, 117 F.4th 331, 334 (5th Cir. 2024) (Ho, J., concurring) ("The Supreme Court can adjust or amend its own precedents at its discretion. Inferior courts have no such luxury.").

II.

Clark next raises void for vagueness challenges to 7 U.S.C. § 6c, 7 U.S.C. § 9(1), and 17 C.F.R. § 180.1. But these arguments fare no better than his lead argument.

The vagueness doctrine "rests on the twin constitutional pillars of due process and separation of powers." *Davis*,

588 U.S. at 451. Accordingly, criminal statutes must be clear enough that "ordinary people can understand what conduct is prohibited." *Beckles v. United States*, 580 U.S. 256, 262, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017) (citation omitted). They must be defined "in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.*

When evaluating vagueness, we apply the traditional rules for statutory interpretation. *See United States v. Williams*, 553 U.S. 285, 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). So we start, "as we always do, with the text." *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 671, 143 S. Ct. 1322, 215 L. Ed. 2d 579 (2023).

A.

First, Clark argues that the terms "fictitious sale" and "not a true and bona fide price" within 7 U.S.C. § 6c of the Commodity Exchange Act (CEA) are unconstitutionally vague. The CEA prohibits people from "offer[ing] to enter into, enter[ing] into, or confirm[ing] the execution of a . . . *fictitious sale*; or . . . to cause any price to be reported, registered, or recorded that is *not a true and bona fide price*." 7 U.S.C. §§ 6c(a)(1), (2)(A)(ii)–(B) (emphasis added).

But the ordinary meaning of these terms plainly contemplate deception. "Fictitious" means "[f]ounded on a fiction . . . false, feigned, or pretended . . . imaginary . . . [or] [a]rbitrarily invented and set up to accomplish an ulterior object." *Fictitious*, BLACK'S LEGAL DICTIONARY 773 (3d ed. 1933). Similarly, a price that isn't "true and bona fide" is not "honest[], open[], and sincere[], and without

deceit or fraud." *Bona Fide*, Black's Legal Dictionary 233 (3d ed. 1933).

So we do not see how these provisions are unconstitutionally vague, unless the very concept of falsity is too vague for Congress to prohibit. And Clark appears to concede as much. During oral argument, his counsel admitted that, under his theory, it would be unconstitutionally vague if Congress tried to enact any statute that said: "You cannot commit falsity about price." Oral Arg. at 29:18. But that cannot be right. The Constitution surely does not forbid Congress from prohibiting deception.

B.

Second, Clark seeks to overturn his "insider trading" convictions, arguing that the phrase "manipulative or deceptive device or contrivance" in 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1 is unconstitutionally vague.

But the Supreme Court has previously given an authoritative construction to similar language in the context of the Securities Exchange Act of 1934. And "[w]hen a statutory term is obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 587 U.S. 554, 560, 139 S. Ct. 1795, 204 L. Ed. 2d 129 (2019) (cleaned up) (citation omitted).

The operative language in 7 U.S.C. § 9(1) and 17 C.F.R. § 180.1 is an exact transplant from section 10(b)-5 of the Securities Exchange Act. And that language has a

well-settled interpretation. In *United States v. O'Hagan*, 521 U.S. 642, 117 S. Ct. 2199, 138 L. Ed. 2d 724 (1997), the Supreme Court held that the misappropriation of confidential information for trading purposes, in violation of fiduciary duties, "satisfies § 10(b)'s requirement that chargeable conduct involve a 'deceptive device or contrivance.'" *Id.* at 653 (citation omitted). The Court added that a fiduciary's undisclosed and "self-serving use of a principal's information . . . in breach of a duty of loyalty and confidentiality, defrauds the principal." *Id.* Trading on that information "involves feigning fidelity to the source of information" and so is a "deceptive device" under § 10(b). *Id.* at 655. And the Court has cited *O'Hagan* to conclude that "Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5 prohibit undisclosed trading on inside corporate information by individuals who are under a duty of trust and confidence that prohibits them from secretly using such information for their personal advantage." *Salman v. United States*, 580 U.S. 39, 41, 137 S. Ct. 420, 196 L. Ed. 2d 351 (2016) (citing *O'Hagan*, 521 U.S. at 65–52).

III.

Clark's final argument is that Congress violated the separation of powers and nondelegation doctrines because it attached criminal penalties to the violation of CFTC regulations and did not provide the CFTC with an intelligible principle to guide its rulemaking. We disagree.

7 U.S.C. § 9(1) makes it unlawful to use or employ "any manipulative or deceptive device or contrivance"

in violation of CFTC rules. Similarly, 7 U.S.C. § 13(a)(5) criminalizes willful violation of "any other provision of this chapter, or any rule or regulation" enacted by the CFTC. Under governing Supreme Court precedent, these provisions do not violate the separation of powers doctrine. "There is no absolute rule . . . against Congress' delegation of authority to define criminal punishments." *Loving v. United States*, 517 U.S. 748, 768, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996). All that is required is that "Congress make[] the violations of regulation a criminal offense and fix[] the punishment, and the regulations confine themselves within the field covered by the statute." *Id.* (quotation marks and citation omitted).

In addition, 7 U.S.C. § 9(1) provides the CFTC with an intelligible principle to guide its rulemaking. As explained above, the term "manipulative or deceptive device or contrivance" has already received an authoritative interpretation by the Supreme Court in the Securities Exchange Act context. So we can conclude that Congress directed the CFTC to prevent commodities traders from using confidential information for their personal advantage. That is sufficient under the Court's current "intelligible principle" standard.

* * *

For these reasons, we affirm.

APPENDIX B — AGREED AMENDED ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, FILED JUNE 6, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal Number 4:22-CR-55

UNITED STATES OF AMERICA

v.

MATTHEW CLARK,

Defendant.

Criminal No. 4:22-CR-55

Filed June 6, 2024

AGREED AMENDED ORDER IMPOSING MONEY JUDGMENT

Defendant MATTHEW CLARK pleaded guilty to Counts One, Six, and Eight of the Indictment, admitting to engaging in a conspiracy to commit honest services wire fraud in violation of Title 18, United States Code, Section 1349 (Count One); to engaging in prohibited commodities transactions in violation of Title 7, United States Code, Sections 6c(a)(2) and 13(a)(2) (Count Six); and engaging in insider trading in violation of Title 7, United States Code Sections 9(1) and 13(a)(5) (Count Eight).

Appendix B

The United States provided notice to the Defendant in the Indictment that pursuant to Title 18, United States Code, Section 981(a)(1)(C), the United States would seek to forfeit all property, real or personal, that constitutes or is derived from proceeds traceable to the violation charged in Count One; and that the United States would seek imposition of a money judgment.

The Defendant agreed in the Plea Agreement that he obtained at least $5,543,662 as a result of the honest services wire fraud conspiracy charged in Count One; and that the factual basis of the guilty plea supports the forfeiture of $5,543,662. The Defendant also agreed that he obtained at least $988,698 as a result of the prohibited commodities transactions and commodities insider trading charged in Counts Six and Eight; and that the factual basis of the guilty plea supports the forfeiture of $988,698. The Defendant agreed to the imposition of a personal money judgment in a total amount of $6,532,360. The Defendant consented, in accordance with FED.R.CRIM.P. 32.2(b)(4)(A), to the order of forfeiture becoming final as to the Defendant immediately following the guilty plea.

The parties agree that if the U.S. Court of Appeals for the Fifth Circuit or the U.S. Supreme Court were to reverse the Defendant's conviction of Count One on appeal, this Agreed Order Imposing Money Judgment will be vacated. The parties recognize and agree that the United States may seek enforcement of this Agreed Order Imposing Money Judgment at any time, including while the case is on appeal.

Appendix B

Having considered the plea agreement, the record and the applicable law, the Court ORDERS:

1. That Defendant Mathew Clark shall forfeit $6,532,360 to the United States, and that a personal money judgment is hereby awarded in favor of the United States and against the Defendant in the same amount.

2. That pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure, the United States may move to amend this Order at any time to forfeit the Defendant's property in substitution in accordance with Title 21, United States Code, Section 853(p).

This Order will be made part of the Defendant's sentence and included in the judgment against him.

Signed in Houston, Texas, on the 6th day of June 2024.

/s/ George C. Hanks Jr.
GEORGE C. HANKS, JR
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, FILED MARCH 7, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CR. ACTION NO. 4:22-CR-00055

UNITED STATES OF AMERICA

v.

MATTHEW CLARK,

Filed March 7, 2024

ORDER

Pending before the Court is Defendant's Motion to Dismiss and Memorandum of Law in Support (Dkt. 75). After considering the motion and the entire briefing, the motion is **DENIED**.

It is so **ORDERED**.

SIGNED at Houston, Texas on March 7, 2024.

/s/ George C. Hanks Jr.
GEORGE C. HANKS, JR
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED APRIL 8, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-20271

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

MATTHEW CLARK,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:22-CR-55-1

Filed April 8, 2025

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WILLETT, and HO, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX E — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. V

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Appendix E

7 U.S.C. § 6c(a)

It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction described in paragraph (2) involving the purchase or sale of any commodity for future delivery (or any option on such a transaction or option on a commodity) or swap if the transaction is used or may be used to –

(1) Prohibition

(A) hedge any transaction in interstate commerce in the commodity or the product or byproduct of the commodity;

(B) determine the price basis of any such transaction in interstate commerce in the commodity; or

(C) deliver any such commodity sold, shipped, or received in interstate commerce for the execution of the transaction.

(2) Transaction

A transaction referred to in paragraph (1) is a transaction that –

(A) (i) is, of the character of, or is commonly known to the trade as, a "wash sale" or "accommodation trade"; or (ii) is a fictitious sale; or

(B) is used to cause any price to be reported, registered, or recorded that is not a true and bona fide price.

Appendix E

7 U.S.C. § 9(1)

It shall be unlawful for any person, directly or indirectly, to use or employ, or attempt to use or employ, in connection with any swap, or a contract of sale of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the Commission shall promulgate by not later than 1 year after July 21, 2010. . . .

7 U.S.C. § 13(a)(2) & 13(a)(5)

(a) Felonies generally

It shall be a felony punishable by a fine of not more than $1,000,000 or imprisonment for not more than 10 years, or both, together with the costs of prosecution, for: . . .

> (2) Any person to . . . knowingly to violate the provisions of section 6, section 6b, subsections (a) through (e) of [section] 6c, section 6h, section 6o(1), or section 23 of this title [emphasis added].
>
> * * *
>
> (5) Any person willfully to violate any other provision of this chapter, or any rule or regulation thereunder [promulgated by the CFTC], the violation of which is made unlawful or the observance of which is required under the terms of this chapter . . . [emphasis added].

Appendix E

18 U.S.C. § 1343

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. . . .

18 U.S.C. § 1346

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1349

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Appendix E

17 C.F.R. § 180.1(a)

(a) It shall be unlawful for any person, directly or indirectly, in connection with any swap, or contract of sale of any commodity in interstate commerce, or contract for future delivery on or subject to the rules of any registered entity, to intentionally or recklessly:

(1) Use or employ, or attempt to use or employ, any manipulative device, scheme, or artifice to defraud;

(2) Make, or attempt to make, any untrue or misleading statement of a material fact or to omit to state a material fact necessary in order to make the statements made not untrue or misleading;

(3) Engage, or attempt to engage, in any act, practice, or course of business, which operates or would operate as a fraud or deceit upon any person . . .