No. 25-8

In the Supreme Court of the United States

MATTHEW CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the phrase "intangible right of honest services" in 18 U.S.C. 1346 is unconstitutionally vague.

2. Whether the phrases "fictitious sale" and "not a true bona fide price" in 7 U.S.C. 6c(a) are unconstitutionally vague.

3. Whether petitioner had fair notice that his conduct could be prosecuted under 7 U.S.C. 9(1) and 17 C.F.R. 180.1.

4. Whether petitioner's conviction for insider trading under 7 U.S.C. 9(1) and 17 C.F.R. 180.1 violates the separation of powers or nondelegation doctrine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported but is available at 2025 WL 801358.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2025. A petition for rehearing was denied on April 8, 2025 (Pet. App. 14a). The petition for a writ of certiorari was filed on June 30, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346, and 1349; one count of engaging in prohibited commodities transactions, in violation of 7 U.S.C. 6c(a)(2) and 13(a)(2); and one count of insider trading, in violation of

7 U.S.C. 9(1) and 13(a)(5), and 17 C.F.R. 180.1. Judgment 1-2. The district court sentenced petitioner to 78 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-9a.

1. Petitioner perpetrated two unlawful schemes against his employer, Company B, an energy company that traded natural-gas futures contracts. Pet. App. 2a. In the first scheme, which lasted from 2010 to 2019, petitioner steered Company B's trading business to a brokerage firm called Classic Energy, LLC. *Ibid.* Classic Energy did not offer the best deal for Company B, but its owner, Matthew Webb, was willing to pay kickbacks to petitioner in exchange for sending matters their way. See *ibid.* Over the span of almost ten years, Webb paid petitioner $5,543,662 in illicit kickbacks. *Ibid.*

In the second scheme, which lasted from 2013 to 2019, petitioner shared Company B's confidential trading strategies and intentions with Webb, who passed the information to coconspirators preselected by the two men. Pet. App. 2a. The coconspirators would take the opposite side of Company B's trades, and make offsetting trades using Company B's confidential information. *Ibid.*; Plea Agreement 18-20. The prearranged counterparties then shared the profits from those trades with petitioner and Webb. *Ibid.*

In addition to acknowledging his obligation to use their information and resources only for Company B's interests when he joined the company, Plea Agreement 12, petitioner received annual employee trainings on relevant statutes and industry regulations, Pet. App. 2a. As a result, while engaged in his schemes, he was annually reminded of prohibitions on prearranging trades, insider trading, and reporting prices that were not

"true and bona fide." Pet. App. 2a-3a; Plea Agreement 14-16.

2. A grand jury in the Southern District of Texas returned an indictment charging petitioner with one count of conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346, and 1349; three counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; one count of conspiring to engage in prohibited commodities transactions and insider trading, in violation of 18 U.S.C. 371; two counts of engaging in prohibited commodities transactions, in violation of 7 U.S.C. 6c(a)(2) and 13(a)(2); and two counts of insider trading, in violation of 7 U.S.C. 9(1) and 13(a)(5), and 17 C.F.R. 180.1. Indictment 1-14. Petitioner moved to dismiss all counts of the indictment on vagueness grounds. Pet. App. 3a; D. Ct. Doc. 75 (Oct. 5, 2023). The district court denied the motion. D. Ct. Doc. 92 (Mar. 7, 2024).

Petitioner then pleaded guilty to one count of conspiring to commit honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346, and 1349; one count of engaging in prohibited commodities transactions, in violation of 7 U.S.C. 6c(a)(2) and 13(a)(2); and one count of insider trading, in violation of 7 U.S.C. 9(1) and 13(a)(5), and 17 C.F.R. 180.1. Judgment 1-2. He reserved the right to appeal (1) whether the honest-services fraud statute is "unconstitutionally void for vagueness"; (2) whether 7 U.S.C. 6c, 9(1), and 13(a) and 17 C.F.R. 180.1 are "unconstitutionally void for vagueness"; and (3) whether 7 U.S.C. 6c, 9(1), and 13(a), and 17 C.F.R. 180.1 "unconstitutionally delegate legislative power to the Commodity Futures Trading Commission" (CFTC). Plea Agreement 1-2.

The district court sentenced petitioner to 78 months of imprisonment, to be followed by three years of supervised release. Plea Agreement 3-4.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1a-9a. The court observed that petitioner's "lead argument"—that the honest-services fraud statute is unconstitutional—was foreclosed by *Skilling* v. *United States*, 561 U.S. 358 (2010). Pet. App. 4a-5a. The court explained that in *Skilling*, this Court interpreted the statute to be limited to bribes and kickbacks and rejected a vagueness challenge. *Id.* at 5a.

The court of appeals also found no merit in petitioner's vagueness challenge to 7 U.S.C. 6c and 13(a)(2), which make it unlawful to "offer[] to enter into, enter[] into, or confirm[] the execution of a * * * fictious sale; or * * * to cause any price to be reported, registered, or recorded that is not a true and bona fide price." Pet. App. 6a (quoting 7 U.S.C. 6c(a)(1), (2)(A)(ii) and (B) (citation and emphasis omitted)); see 7 U.S.C. 13(a)(2) (incorporating substantive prohibitions of Section 6c). The court explained that the terms "fictious sale" and "not a true and bona fide price" within 7 U.S.C. 6c "plainly contemplate deception" and were not vague. Pet. App. 6a.

The court of appeals also rejected petitioner's vagueness challenge to the phrase "manipulative or deceptive device or contrivance" in 7 U.S.C. 9(1) and 17 C.F.R. 180.1. Pet. App. 7a-8a. The court observed that the challenged language is an "exact transplant" from Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), which has a "well-settled interpretation." Pet. App. 7a-8a. And the court explained that under that interpretation, the term "deceptive device or contrivance" includes the misappropriation of confidential

information for trading purposes, which was the sort of insider-trading scheme that petitioner perpetrated here. *Id.* at 8a (citing *United States* v. *O'Hagan*, 521 U.S. 642, 653 (1997), and *Salman* v. *United States*, 580 U.S. 39, 41 (2016)).

Finally, the court of appeals rejected petitioner's argument that Congress violated the separation of powers and nondelegation doctrine by adopting criminal penalties for violations of CFTC regulations. Pet. App. 8a-9a. The court observed that this Court's separation-of-powers precedents permit Congress to delegate its authority in some measure to "define criminal punishments," so long as "Congress make[s] the violations of regulation a criminal offense and fix[es] the punishment, and the regulations confine themselves within the field covered by the statute." *Id.* at 9a (quoting *Loving* v. *United States*, 517 U.S. 748, 768 (1996)). And the court explained that Congress had followed that course here, where the statutes at issue make it unlawful to use or employ "any manipulative or deceptive device or contrivance" in violation of CFTC rules, 7 U.S.C. 9(1), and criminalize any willful violation of "any other provision of this chapter, or any rule or regulation" enacted by the CFTC, 7 U.S.C. 13(a)(5). Pet. App. 8a-9a.

The court of appeals also explained that Section 9(1) provides the CFTC with an intelligible principle to guide its rulemaking. Pet. App. 9a. The court observed that the same authoritative construction of "manipulative or deceptive device or contrivance" that controls for the Securities Exchange Act controls here. *Ibid.* (citation omitted). And the court accordingly found that "Congress directed the CFTC to prevent commodities traders from using confidential information for their personal advantage." *Ibid.*

ARGUMENT

Petitioner contends (1) that the phrase "intangible right of honest services" in 18 U.S.C. 1346 is unconstitutionally vague (Pet. 9-14); (2) that the terms "fictitious sale" and "not a true and bona fide price" in 7 U.S.C. 6c(a) are unconstitutionally vague (Pet. 14-25); (3) that he did not have adequate notice that 7 U.S.C. 9(1) and 17 C.F.R. 180.1 covered insider trading (Pet. 25-31); and (4) that Congress's delegation of regulatory authority to the CFTC violated the separation of powers and the nondelegation doctrine (Pet. 31-36). The court of appeals correctly rejected those arguments, and petitioner does not contend that the decision below conflicts with any decision of another court of appeals. No further review is warranted.

1. a. Under 18 U.S.C. 1346, a "scheme or artifice to defraud" for purposes of the federal wire-fraud statute, 18 U.S.C. 1343, includes "a scheme or artifice to deprive another of the intangible right of honest services." Petitioner contends (Pet. 9-14) that the phrase "intangible right of honest services" is unconstitutionally vague. This Court's decision in *Skilling* v. *United States*, 561 U.S. 358 (2010), forecloses that argument.

In *Skilling*, the Court held that "[Section] 1346 presents no vagueness problem," because it is properly interpreted to apply only to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party." 561 U.S. at 404; see *id.* at 399-413. *Skilling* observed that such schemes reflect the "solid core" of the honest-services doctrine: "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Id.* at 407. And Congress specifically intended to codify those "core * * * applications" when it enacted Section 1346 in the

aftermath of *McNally* v. *United States*, 483 U.S. 350 (1987), which had rejected honest-services-fraud prosecutions under the previous version of the federal fraud statutes. *Skilling*, 561 U.S. at 408.

Skilling explained that Section 1346's "prohibition on fraudulently depriving another of one's honest services by accepting bribes or kickbacks" does not implicate either of the concerns animating the void-for-vagueness doctrine. 561 U.S. at 412. First, the honest-services statute, as interpreted in *Skilling*, provides "fair notice" because "it has always been 'as plain as a pikestaff that' bribes and kickbacks constitute honest-services fraud" and "the statute's *mens rea* requirement further blunts any notice concern." *Ibid.* (citation omitted). Second, the Court found "no significant risk" that "arbitrary and discriminatory prosecutions" will result, because Section 1346's "prohibition on bribes and kickbacks draws content not only from [historical honest-services prosecutions], but also from federal statutes proscribing—and defining—similar crimes." *Ibid.* "A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds." *Id.* at 413.

b. Petitioner does not dispute that his conduct falls within the very "core" preserved by *Skilling*. Instead, petitioner contends (Pet. 9-14) that *Skilling* was "effectively" overruled by this Court's decision in *United States* v. *Davis*, 588 U.S. 445 (2019). But unlike *Skilling*, the Court in *Davis* declined to apply a vagueness-avoiding construction because it deemed such a construction irreconcilable with the statute's "text, context, and history," 588 U.S. at 448, and because the suggested construction would have "*expand[ed]* the reach of [the]

criminal statute in order to save it," *id.* at 463. That approach casts no doubt on *Skilling*, which adopted a narrow interpretation of the honest-services fraud statute in a way that is consistent with its text, context, and history. 561 U.S. at 399-413.

Indeed, *Davis* explicitly distinguished *Skilling*, and approvingly cited it as an example of this Court "adopt[ing] the *narrower* construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly." 588 U.S. at 463. Moreover, even after *Davis*, this Court has continued to interpret statutes narrowly to avoid fair-notice concerns. See, *e.g.*, *Dubin* v. *United States*, 599 U.S. 110, 129-131 (2023). And as petitioner himself recognizes, even after *Davis*, this Court has continued to apply the honest-services statute. See Pet. 13 n.11.

2. Petitioner's challenge to his conviction for engaging in prohibited commodities transactions, in violation of 7 U.S.C. 6c(a)(2) and 13(a)(2), is likewise unsound. Those statutes, which prohibit certain types of cheating and deception in the commodity markets, include criminal bars on transactions that involve "fictitious sale[s]" or transactions that cause a price that is "not a true and bona fide price" to be reported, registered, or recorded. 7 U.S.C. 6c(a)(2). Although petitioner renews his contention (Pet. 14-17) that the terms "fictitious sale" and "not a true and bona fide price" in 7 U.S.C. 6c(a) are unconstitutionally vague, the court of appeals correctly recognized that their ordinary meaning "plainly contemplate[s] deception" and covers transactions like petitioner's: noncompetitive prearranged trades that are made to appear legitimate and cause a dishonest price to be recorded. Pet. App. 6a-7a.

Petitioner does not identify any circuit that has held otherwise, or has remotely cast doubt on Section 6c's constitutionality. As support for his contention that the identified terms in Section 6c are vague, petitioner cites (Pet. 15-16) only an unpublished district court opinion from nearly 50 years ago: *United States* v. *LaMantia*, 2 Comm. Fut. L. Rep. 20,667, 1978 U.S. Dist. LEXIS 20413 (N.D. Ill. 1978). In viewing the term "fictitious sale" as vague in that case, the court discounted—without explanation—common definitions of "fictitious" as "lend[ing] no clarity," and relied on the then-absence of "judicial guidance to the meaning of the term." *Ibid.*

Whatever the merit of that reasoning, the CFTC has since consistently made clear that Section 6c(a)'s prohibition on "fictitious sale[s]" includes "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." *In re Harold Collins*, CFTC No. 77-15, 1986 WL 66165, at *7 (Apr. 4, 1986); see *In re Daniel J. Collins*, CFTC No. 93-13, 2004 WL 1575579, at *3 (July 15, 2004) (consent order); *In re Absa Bank, Ltd.*, CFTC No. 14-30, 2014 WL 1575579, at *3 (July 15, 2004) (consent order). And the CFTC has identified "prearranged trade[s]" like those executed by petitioner as a "textbook" example of such an illicit sale. *In re Absa Bank*, 2014 WL 4793544, at *2. Courts, in turn, have long endorsed that view of 6c. See *Dzurka Bros., LLC* v. *Luckey Farmers, Inc.*, 712 F. Supp. 3d 979, 998-999 (E.D. Mich. 2024); *CFTC* v. *TFS-ICAP, LLC*, 432 F. Supp. 3d 320, 324-326 (S.D.N.Y. 2020); *Reddy* v. *CFTC*, 191 F.3d 109, 124-125 (2d Cir. 1999); see also *Merrill Lynch Futures, Inc.* v. *Kelly*, 585 F. Supp. 1245, 1251 n.3 (S.D.N.Y. 1984)

(Section 6c(a) "was intended generally to prevent collusive trades conducted away from the trading pits").

Petitioner's "desuetude" argument—that the statute should be declared void based on a lack of criminal prosecutions brought under it (Pet. 15-17)—was not clearly included in petitioner's preservation of his right to appeal the narrow question of whether 7 U.S.C. 6c is "unconstitutionally void for vagueness." Plea Agreement 1-2. And although the government did not itself argue preservation below, that may explain why the court of appeals did not directly address the argument. In any event, the argument lacks merit. Here as elsewhere, the "touchstone" is "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997). As explained above, it has long been clear that Section 6c covers the sort of insider-trading scheme at issue here, and the statutes are equally clear that criminal consequences might follow from such conduct. Petitioner cites no circuit holding otherwise.

For similar reasons, petitioner's argument (Pet. 17-24) that the court of appeals failed to address his as-applied vagueness challenge also lacks merit. Such an as-applied challenge amounts to an argument that his conduct did not fall within the ordinary meanings of a "fictious sale" or "not a true and bona fide price." See Pet. 22-24 (citation omitted). But that is not an argument that the statute is "void for vagueness," for preservation purposes. See Plea Agreement 1-2. It is a fact-bound argument about the statute's scope, and one that lacks merit. Petitioner cites no case holding that the sort of insider-trading scheme at issue would not fit within the plain letter of Section 6c. Nor does he explain

why such a factbound claim would merit plenary review by this Court. See Pet. 24 (arguing that the case should be remanded to the court of appeals for a further explanation for rejecting petitioner's claim).

Petitioner also errs in suggesting (Pet. 24-25) that this Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further proceedings (GVR) in light of *Thompson* v. *United States*, 604 U.S. 408 (2025). In *Thompson*, this Court held the category of "false statement[s]" punishable under 18 U.S.C. 1014 is limited to statements that are "not true," rather than those that are simply "misleading" but "not false." 604 U.S. at 410, 418 (brackets in original). *Thompson* has no effect on petitioner's case. The case did not address whether the term "false" was vague, and it therefore lends no support to petitioner's contention that the terms "fictitious" or "not a true and bona fide price" are void for vagueness. See Pet. App. 6a-7a.

3. Petitioner further contends (Pet. 25-31) that his prosecution under 7 U.S.C. 9(1) and 17 C.F.R. 180.1 violated due process because he did not have fair notice that insider trading was covered by those provisions. Petitioner appears not to have meaningfully renewed the argument he pressed below, and that was rejected by the court of appeals—*i.e.*, 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. See Pet. App. 7a. Instead, he principally argues that the application of these provisions to insider trading is novel. See Pet. 26. Like his argument on Section 6c, that argument does not clearly fit within petitioner's appeal waiver, which was limited only to a "void for

vagueness" challenge. Plea Agreement 1-2. And in any event, the argument lacks merit.

As noted above, the "touchstone" for this type of argument is whether it was "reasonably clear" the defendant's conduct was criminal. *Lanier*, 520 U.S. at 267. Although "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," courts may apply a statute to novel conduct so long as the plain text permits. *Id.* at 266. And as the court of appeals recognized, at the time of petitioner's conduct, the relevant statutory and regulatory language had already been construed by this Court to cover insider trading. Pet. App. 7a-8a. Even in the absence of a specific judicial decision applying it to insider trading in the commodities context, petitioner was on notice that such application would be within the relevant language. Indeed, petitioner acknowledges that enforcement actions (Pet. 28) had at least begun by 2015, during the pendency of his criminal conduct here. And again, petitioner does not identify any division of authority that might warrant this Court's review.

4. Finally, petitioner renews his arguments (Pet. 31-36) that Congress violated the separation of powers and nondelegation doctrine by delegating authority to the CFTC to define regulations, violations of which are statutorily subject to criminal penalties.

Under 7 U.S.C. 9(1), it is unlawful to use or employ "any manipulative or deceptive device or contrivance" in violation of CFTC rules, and 7 U.S.C. 13(a)(5) criminalizes willful violations "of this chapter, or any rule or regulation" enacted by the CFTC. In response to Section 9(1)'s directive that the CFTC "shall promulgate"

rules implementing the statutory prohibition, the CFTC promulgated Rule 180.1 and modeled it after the SEC's rule implementing Section 10(b) of the Securities Exchange Act. See 76 Fed. Reg. 41,398, 41,399 (July 14, 2011). That rule provides that it shall be unlawful for "any person * * * in connection with any * * * contract for future delivery on or subject to the rules of any registered entity, to intentionally * * * use or employ * * * any manipulative device, scheme, or artifice to defraud." 17 C.F.R. 180.1(a).

As the court of appeals recognized, this Court has made clear that "[t]here is no absolute rule * * * against Congress' delegation of authority to define criminal punishment." Pet. App. 9a (citing *Loving* v. *United States*, 517 U.S. 748, 768 (1996). Instead, such delegations are appropriate, so long as the "agency defines by regulation what conduct will be criminal, [and] Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confin[e] themselves within the field covered by the statute.'" *Loving*, 517 U.S. at 768 (quoting *United States* v. *Grimaud*, 220 U.S. 506, 518 (1911) (brackets in original)). The provisions at issue here plainly satisfy that standard, as the court below correctly recognized. Pet. App. 9a. Petitioner does not address this Court's doctrine or identify any confusion in the court of appeals about its application.

Petitioner's contention (Pet. 32-35) that Section 9(1) does not provide an 'intelligible principle' is likewise unsound. "[T]his Court has held that a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." *Gundy* v. *United States*, 588 U.S. 128, 145 (2019) (plurality opinion) (quoting *J.W. Hampton, Jr. & Co* v.

United States, 276 U.S. 394, 409 (1924)); see *id.* at 135, 146 (discussing doctrine). And as the court of appeals observed (Pet. App. 9a), the term "manipulative or deceptive device or contrivance" has already been authoritatively interpreted by this Court in *United States* v. *O'Hagan*, 521 U.S. 642 (1997), in the context of the Securities Exchange Act. See *id.* at 650-660. That construction applies in equal force here, where Congress used the exact same text. See Pet. App. 9a. And here as there, the statute provides a clear direction from Congress to the CFTC "to prevent commodities traders from using confidential information for their personal advantage." *Ibid.* That is all that is required under this Court's precedents. See *ibid.* Petitioner contends (Pet. 35) that this Court should adopt a "stricter" standard for the intelligible-principle test, but he does not explain what standard he thinks should apply or identify confusion on the standard in the lower courts. Nor has petitioner identified any case that questions whether Congress appropriately delegated its authority in the specific circumstances here, involving a statutory term with a well-understood meaning.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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