No. ______

In the
Supreme Court of the United States

MICHAEL COSCIA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As part of the Dodd-Frank Act, Congress enacted a provision making it a crime punishable by ten years in prison to willfully engage in "any trading, practice or conduct" on the commodity futures markets that "is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." 7 U.S.C. §6c(a)(5)(C). Both the regulated and the regulator in "the trade" immediately identified this provision as hopelessly vague, as there *is* no practice "commonly known to" the commodity futures markets as "spoofing," and "bidding or offering with the intent to cancel the bid or offer before execution" is so common on these fast-paced markets that Congress cannot plausibly be understood to have intended to prohibit it entirely. There is thus nothing in the statute to tell market participants what line separates commonplace trading activity from the newly minted federal felony of "spoofing." That unfortunately did not stop the federal government from bringing prosecutions, or stop the Seventh Circuit from affirming the conviction underlying this petition and rejecting a vagueness challenge to the statute.

The questions presented are:

1. Whether the "anti-spoofing" provision, 7 U.S.C. §6c(a)(5)(C), is unconstitutionally vague.

2. Whether placing genuine open-market orders that could be and, in some instances, were executed can constitute commodity fraud under 18 U.S.C. §1348(1) based solely on the trader's purported intent in placing the orders.

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PETITION FOR WRIT OF CERTIORARI

Nearly eight years ago, as part of the sweeping Dodd-Frank Act, Congress enacted a provision that makes it a crime to willfully "engage in any trading, practice, or conduct" on the commodity futures exchanges that "is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." 7 U.S.C. §6c(a)(5). That inherently vague prohibition, enacted with virtually no public discussion whatsoever, has befuddled the industry ever since. While the statute suggests that "spoofing" is a concept "commonly known to the trade," the reality is that no one—not the futures exchange operators, not the regulated community, and not even the regulator—had a ready conception or shared understanding of the prohibited conduct. To this day, there is nothing approaching a consensus on what "spoofing" is.

That is in no small part owing to the unique dynamics of the futures markets, which are dominated by high-speed, high-frequency, high-volume trading conducted through complex computer algorithms programmed to place, cancel, and execute trades within a matter of milliseconds, or even microseconds. Prices and orders on the market change rapidly, even within tiny fractions of a second, and so orders are often pre-programmed to cancel rapidly as well. Indeed, more than 90% of orders are cancelled, often within milliseconds of being placed, and often after being placed with the expectation and intent that they will be cancelled. And everyone—including the Commodity Futures Trading Commission ("CFTC"),

the federal agency charged with regulating the futures markets—agrees that there can be perfectly legitimate reasons for placing an order with the intent to cancel it. The lack of consensus about "spoofing" thus cannot be remedied by the statute's parenthetical because making every order placed with the intent to cancel it a federal felony punishable by ten years in prison would cripple these exceedingly fast-paced markets.

Recognizing as much, the CFTC openly acknowledged the statute's vagueness and sought comment on how to distinguish the "legitimate" placing of orders with the intent to cancel them from whatever subset of that trading activity Congress apparently meant to prohibit. But rather than produce the clarity the statute lacks, and the commodity markets need, the comments confirmed the meaningless and vagueness of "spoofing," and the CFTC threw up its hands and issued no rule at all. Instead, it offered only equally vague, non-binding guidance on various scenarios that "may" (but may not) constitute "spoofing," and the cold comfort that the Commission will know "spoofing" when it sees it.

Amidst this pervasive industry uncertainty and confusion, the government chose to press forward with its first criminal "spoofing" prosecution, indicting petitioner Michael Coscia for using a computerized trading program that was set to place bids on one side of the market and offers on the other under certain circumstances, and then to cancel the orders upon the occurrence of any of three conditions—the passage of time, the partial filling of the large orders, or the complete filling of the small orders. Each of those

conditions is, by the government's own admission, a common and permissible feature of the cancellation protocols routinely used by the sophisticated traders who dominate the commodity futures markets, and nothing in the statute or any rule or regulation suggests that combining them is impermissible. Yet the government nonetheless managed to convince both the district court and a jury that Coscia's trading through this program constituted "spoofing."

The Seventh Circuit has now rejected petitioner's vagueness challenge to the "anti-spoofing" statute. According to the panel, it is sufficient that the statute contains *some* definition of "spoofing" in the form of its illustrative parenthetical—even though the term itself has no accepted industry meaning, and even though all concede that the parenthetical as written sweeps far too broadly and would prohibit all manner of legitimate trading activity. The Seventh Circuit thus has effectively given the government carte blanche to decide which "bidding or offering with the intent to cancel the bid or offer before execution" qualifies as a federal felony.

The Seventh Circuit's decision not only is wrong, but is particularly problematic because the country's largest futures exchanges are all operated by a single entity that runs its electronic trading platform out of the Chicago area, meaning Seventh Circuit law will largely control the market. Indeed, the government has brought almost all of its "spoofing" prosecutions in the Northern District of Illinois—even when defendants were not based in that jurisdiction—and that trend undoubtedly will continue now that the government has procured a favorable decision from

the Seventh Circuit excusing the glaring due process problem that even the CFTC itself has candidly acknowledged inheres in the "anti-spoofing" provision. The Court should intervene now before this inherently vague statute further distorts the nation's futures markets.

The Court's intervention is all the more imperative because the decision below not only gives the government a green light to prosecute under an unconstitutionally vague statute, but also embraces a fundamentally flawed conception of commodity fraud under 18 U.S.C. §1348. According to the Seventh Circuit, bona fide orders that are subject to genuine risk of being filled—indeed, were in fact executed in some instances—can nonetheless be "deceptive" if they were placed with the intent to impact the market. That sweeping, solely intent-based theory of fraud has been rejected by courts in both the commodity fraud and the securities fraud context—and for good reason, as every order inevitably has *some* impact on the market. The Seventh Circuit's decision deepens the division and confusion among the lower courts about what kind of trading activity can qualify as "fraud." Accordingly, left standing, the decision below will subject market participants to crippling uncertainty, as they will not even know what conduct does or does not constitute "fraud," let alone what conduct does or does not constitute "spoofing." This Court should grant certiorari and restore to the futures exchanges the clarity and certainty that they require.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 866 F.3d 782 and reproduced at App.1-42. The district court's memorandum opinion and order denying petitioner's post-trial motions is reported at 177 F. Supp. 3d 1087 and reproduced at App.60-75.

JURISDICTION

The Seventh Circuit issued its opinion on August 7, 2017 and denied rehearing on September 5, 2017. On November 14, 2017, Justice Kagan extended the time for filing this petition to January 3, 2018. On December 13, 2017, Justice Kagan further extended the time for filing this petition to February 2, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause states: "No person shall … be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The relevant provisions of the Commodity Exchange Act ("CEA"), 7 U.S.C. §1 *et seq.*, and the federal commodity fraud statute, 18 U.S.C. §1348, are reproduced at App.76-85.

STATEMENT OF THE CASE

A. The Commodity Future Markets

Commodity futures trading is a form of trading in which market participants agree to complete a transaction in the future. The transaction may entail the physical delivery of an actual commodity (*e.g.*, grains, metals, fuels) on a specified date, or it may entail the settlement of a financial instrument on a

specified date, such as a cash payment indexed to the price of particular commodity. Orders to buy or sell on the futures markets are known, respectively, as "bids" and "offers," and an order is "filled" when a bid and an offer are matched. Chicago-based CME Group is the world's largest futures exchange operator, operating the Chicago Mercantile Exchange, the Chicago Board of Trade, the New York Mercantile Exchange, and Commodity Exchange, Inc. CME handles an enormous volume of trading—on average, more than 3 billion contracts worth more than $1 quadrillion each year.

Today, most trading on CME's exchanges is done through an electronic platform (also operated out of the Chicago area) that allows traders to place orders that are then matched through an automated process. Although every trader is registered with an identifier that allows CME to track trading activity, the orders appear anonymous to the marketplace. In no small part owing to this electronic trading platform, the futures markets are increasingly dominated by high-frequency trading, which involves trading through computer algorithms that rapidly place, cancel, or execute orders based on predetermined parameters. Tr.239, 668-70, 743-44.[1] Indeed, by 2011, high-frequency trading accounted for approximately 65% of all commodity futures market activity. Tr.1143.

Two features are common to high-frequency trading on the futures markets: Orders often are fleeting, and they are cancelled at an astonishingly

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[1] "Tr." refers to the trial transcript from the district court proceedings below, available in consecutively paginated volumes at N.D.Ill.Dkt.82 at 86-92. *See also* CA7.Dkt.26.

high rate. As for the former, there is no "minimum 'time-in-force' for" orders on the CME, CA7.Dkt.25-2 at 551,[2] so they may be—and routinely are—programmed to cancel mere milliseconds after being placed. As a necessary corollary, such orders also can be executed within mere milliseconds of being placed. Those extraordinary short time frames are a reflection of the reality that futures prices often change significantly even within a second. To take just one example, according to CME data, the price of gold futures changed 89 times during a single second—and 85 times *within 30 milliseconds*. CA7.Dkt.25-6 at 4460. High-frequency traders thus often place very short time limits on their orders to try to minimize the risk that they will be filled under unanticipated or adverse market conditions. Tr.676-77.

In part because of the vanishingly short time periods for which orders are legitimately programmed to last, an extraordinarily high volume of orders are cancelled before they are filled. Indeed, "in the ordinary course, many high frequency trading firms cancel 90 percent or more of the orders they submit to the markets." CA7.Dkt.25-2 at 550. And unsurprisingly given those statistics, many orders are placed with the expectation—and often hope—that they will not be filled. In fact, many well-recognized trading strategies have developed on the futures markets that involve placing orders with the intent to cancel them before they can be (fully or partially) filled.

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[2] Citations to the record on appeal from the Seventh Circuit proceedings below, available at CA.7.Dkt.25, use pagination based on the unique "PageID" therein.

For example, "partial-fill" orders are programmed to cancel the balance of an order as soon as a specified portion of the order is filled. A trader may bid to purchase 100 contracts, but program the order to cancel as soon as two of those contracts are filled. "Good-til-date" orders are programmed to cancel within a defined period of time, often measured in terms of milliseconds. "Stop-loss" orders are placed to execute only under certain unfavorable conditions, and thus are placed with the intent and hope that they will be cancelled and never executed. "Ping" orders are small orders used to detect another common form of trading activity—"iceberg" or "hidden quantity" orders, which involve breaking up a large order into a series of smaller orders that are not visible to the market, each programmed to appear only once the previous order has filled. Tr.231-32. By placing small "ping" orders across a wide range of commodities to test (or "ping") the market and see if they are filled, traders seek to detect efforts by other traders to conceal the true extent of liquidity. But because this strategy typically involves placing several "ping" orders simultaneously, it also involves placing orders with the intent that most of them will be cancelled.

While some have questioned these and other high-frequency trading techniques, *see generally*, Gary Shorter & Rena S. Miller, Cong. Research Serv., R43608 High-Frequency Trading: Background, Concerns, and Regulatory Developments 5, 10 (2014), they are commonplace practices permitted by CME's trading platform and a critical part of how today's commodity futures markets operate. Indeed, the CFTC itself readily acknowledges that "[t]rading commodity futures and options is a volatile, complex

and risky venture that is rarely suitable for individual investors." *Futures Markets Basics*, CFTC, http://bit.ly/2E7p0la. Instead, the futures exchanges are frequented principally by professional traders using sophisticated trading techniques to try to turn a profit based as much on the constant price fluctuations that typify those markets as on any other market dynamics.

B. The "Anti-Spoofing" Provision

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010). Among other things, the Dodd-Frank Act amended the CEA to proscribe certain "disruptive practices" on the commodity futures exchanges, including:

> any trading, practice, or conduct [that] … is, is of the character of, or is commonly known to the trade as, "spoofing" (bidding or offering with the intent to cancel the bid or offer before execution).

7 U.S.C. §6c(a)(5). Willful violation of this new "disruptive practices" provision is a crime punishable by up to 10 years in prison. *Id.* §13(a)(2).

While the Dodd-Frank Act certainly generated its fair share of congressional debate, the "disruptive practices" provision accounted for none of it. The provision appeared silently and generated not a word of discussion. Indeed, the provision has no apparent drafting or legislative history. There are no previous versions or committee reports addressing it, and it produced neither any testimony by any witness during committee proceedings nor any mention during congressional floor debates. The sole reference to the

provision is a single statement from one Senator noting that "[t]he CFTC requested, and received, enforcement authority with respect to … disruptive trading practices." 156 Cong. Rec. S5922 (daily ed. July 15, 2010).

Although Members of Congress may have been silent about the "disruptive practices" provision, the regulated community was not. The provision in general, and its "anti-spoofing" provision in particular, generated widespread confusion and criticism from the start. Although "spoofing" is a term sometimes used in the securities markets, even there is it far from clear exactly what it encompasses. But in the very different commodity futures markets, the term is not commonly used *at all*, in part because the overwhelming majority of orders in those markets are cancelled—often within mere fractions of a second—and many legitimate trading techniques entail placing orders with the expectation and intent that they will be cancelled. As applied to the commodity futures markets, the concept has no accepted industry definition. And defining it to prohibit *all* "bidding or offering with the intent to cancel the bid or offer before execution" is a non-starter, as that would render large swathes of trading activity heretofore considered lawful and legitimate a federal crime. Market participants, including CME, thus immediately criticized the statute as simultaneously vague and overbroad.

The CFTC itself acknowledged these problems, initiating a rulemaking in November 2010 in which it recognized that the statute's parenthetical cannot be read as a literal definition of "spoofing" and sought

comment on "ways to more clearly distinguish the practice of spoofing from the submission, modification, and cancellation of orders that may occur in the normal course of business." 75 Fed. Reg. 67,301-02 (Nov. 2, 2010). The CFTC further asked how to "distinguish 'spoofing' … from legitimate trading activity," such as "where an individual enters an order larger than necessary with the intention to cancel part of the order to ensure that his or her order is filled," and also asked whether various practices, such as "[s]ubmitting or cancelling multiple bids or offers to cause a material price movement," or "[s]ubmitting or cancelling multiple bids or offers to create an appearance of market depth that is false," should "be considered a form of 'spoofing.'" *Id.*

The CFTC hosted a roundtable discussion the following month to discuss, among other things, what is and is not "spoofing." The panelists tellingly could not arrive at a common definition of "spoofing"; to the contrary, every panelist who even attempted to define the term had something different to offer, prompting a representative from one of the world's largest futures brokerage firms to aptly observe, "I'm not sure [i]f the definition of spoofing can be agreed upon by the ten people around this table." CA7.Dkt.25-2 at 160; *see also, e.g.*, CA7.Dkt.25-2 at 272-73 ("[It's] [h]ard to imagine how [spoofing] even applies to the futures world or how it should be applied."). A former CFTC director of enforcement candidly admitted, "I'm not quite sure I know what spoofing is," and predicted that courts ultimately would conclude, as they had in the past when confronted with a similarly amorphous provision of the CEA, that "the statute is unconstitutionally vague." CA7.Dkt.25-2 at 267-68.

And in the meantime, he warned, "the vagueness is going to chill legitimate trading." CA7.Dkt.25-2 at 266.

The same theme emerged from the comments the CFTC received, which likewise expressed concern that the statute's "provisions … were vague and did not provide market participants with adequate notice of the type of trading, practices, and conduct [prohibited]." 76 Fed. Reg. 14,944-45 (Mar. 18, 2011); *see also, e.g.*, CA7.Dkt.25-2 at 348 ("The term 'spoofing' is not one that has been commonly used in the futures and derivatives markets and there is no generally understood or accepted meaning of the term in this context."); CA7.Dkt.25-2 at 376 ("'[S]poofing' is not a term that has ever been commonly used in the futures and derivatives markets. Securities markets have their own concept of 'spoofing,' but its application in the futures and derivatives markets is not at all clear."). Commenters universally implored the CFTC to provide "additional clarity and refinement in the definition of … 'spoofing.'" 76 Fed. Reg. at 14,945 & nn.21-22, 14,947 & nn.46-49. And CME urged the CFTC to criminalize only "the intent to enter *non bona fide orders* for the purpose of misleading market participants and exploiting that deception for the spoofing entity's benefit," to avoid criminalizing "the legitimate cancellation of other unfilled or partially filled orders." CA7.Dkt.25-2 at 388 (emphasis added).

Instead, the CFTC punted. Unable to divine any clear standard to distinguish "spoofing" from common and permissible trading activity, the CFTC abandoned its rulemaking effort entirely and issued only a "nonbinding" "proposed interpretive order" offering

"guidance" on the statute. 76 Fed. Reg. at 14,945. Rather than actually decide what does and does not qualify as "spoofing," the proposed guidance simply repeated the vague language of the statute, stating that a "'spoofing' violation requires that a person intend to cancel a bid or offer before execution," then offered its "nonbinding" view that "'[s]poofing' … includes, but is not limited to: (i) Submitting or cancelling bids or offers to overload the quotation system of a registered entity, (ii) submitting or cancelling bids or offers to delay another person's execution of trades; and (iii) submitting or cancelling multiple bids or offers to create an appearance of false market depth." *Id.* at 14,957. The Commission closed by stating that it would "distinguish[] between legitimate trading and 'spoofing' by evaluating all of the facts and circumstances of each particular case." *Id.* In other words, while the CFTC could not tell traders what is and is not illegal "spoofing," it promised that it would know it when it sees it based on the totality of the circumstances.

One CFTC Commissioner voted against the proposed order, expressing her "disappoint[ment]" that the Commission had failed to "remedy the vagueness" inherent in the statute or "promulgate rules to put the public and market participants on notice of what conduct [i]s prohibited." CA7.Dkt.25-2 at 416-17. As she explained, the Commission's job is not "to retain maximum flexibility for Commission staff to investigate and prosecute alleged wrongdoing," but "to provide the public and market participants with clear parameters distinguishing prohibited conduct from legitimate trading activity." CA7.Dkt.25-2 at 417-18. Yet rather than "cure" the

statute's vagueness problem, the proposed guidance "raise[d] more questions than it answer[ed]." CA7.Dkt.25-2 at 417. Indeed, even two Commissioners who voted in favor of it acknowledged the widespread vagueness concerns. CA7.Dkt.25-2 at 411, 427.

Unsurprisingly, the regulated community continued to criticize the "anti-spoofing" provision as hopelessly vague, and to "request[] additional Commission guidance on the definition of 'spoofing.'" 78 Fed. Reg. 31,890, 31,896 & nn.69-72 (May 28, 2013). In 2013 (two years after the events giving rise to this prosecution), the CFTC finally issued an official interpretive guidance and policy statement. But that guidance did not take any definitive position on what "spoofing" is (or is not). Instead, it continued to resist the conclusion that placing orders with the intent to cancel them is *always* unlawful, "provide[d] four non-exclusive examples of possible situations for when market participants are engaged in 'spoofing,'" and closed by reiterating that the answer ultimately would depend on "all of the facts and circumstances of each particular case." *Id.* at 31,895-96. Accordingly, there remains no clear or comprehensive definition, in statute or regulation, of what trading practices do and do not put a trader at risk of facing up to ten years in federal prison for "spoofing."

C. Proceedings Below

1. Petitioner Michael Coscia began his career as a commodities futures trader in 1988 and became the principal of Panther Energy Trading LLC, a high-frequency futures trading firm, in 2007. In August 2011, Coscia began using a new trading algorithm.

Based on his observation that "lopsided" markets (*i.e.*, markets in which demand significantly outpaces supply, or vice versa) encourage trading, Coscia developed a program that would place an order on one side of the market at the best available price, and place a set of larger orders on the other side of the market at levels approaching the best price in the market. Simultaneously placing orders on both sides of the market is a common trading strategy, often used to "hedge," or offset, a trader's position. Tr.325.

Like most trading algorithms, Coscia's program included a protocol designed to automatically cancel orders upon the occurrence of certain events. Coscia's cancellation protocol combined three routine criteria: (1) passage of time, (2) partial fill, and (3) complete fill. As for the first, his protocol would cancel all orders after they had been available for a set amount of time (typically between 100 and 450 milliseconds, which is, if anything, on the long side by the standards of high-frequency futures trading). Tr.744, 768-69, 1002, 1142-43. As for the second, all orders were set to cancel if the large orders were partially filled. Tr.900-01. Finally, the large orders were set to cancel if the small orders were completely filled. Each of these criteria is common to algorithmic trading. For example, "fill-or-kill" orders are programmed to cancel if not filled immediately, and "good-til-date" orders are programmed to cancel after a defined (often vanishingly short) period of time. Likewise, "partial fill" orders are programmed to cancel the balance of an order as soon as a specified portion is filled, and "ping" orders are often programmed to cancel quickly.

Coscia began using his new program in August 2011. Although the program resulted in the cancellation of many of his large orders before they were filled, each order he placed was a real, actionable order that was subject to legitimate market risk. Indeed, more than 8,000 of the large orders were filled, in full or in part, and several were even filled by manual, "point-and-click" traders who traded without the use of a computer algorithm. Coscia consistently executed each and every order that was filled.

While nothing in the "anti-spoofing" statute, the non-binding CFTC guidance in place at the time, or CME's rules identifies Coscia's trading strategy or any of its constituent parts as unlawful, CME raised concerns about the program shortly after Coscia began using it. In response, Coscia stopped using the program immediately and fully cooperated with ensuing CME and regulatory investigations, and he ultimately agreed to disgorge profits from the trading, pay a fine, and serve a suspension. All told, Coscia used the program to trade for only 10 weeks, from August to October 2011. During that same 10-week period, more than 50% of orders placed by other market participants were open for less than one second, and 90.2% of those orders were cancelled in full. CA7.Dkt.25-4 at 3769, 3771-72.

2. Three years later, the government indicted Coscia on six counts of "spoofing," in violation of 7 U.S.C. §§6c(a)(5)(C) and 13(a)(2), and six counts of commodities fraud, in violation of 18 U.S.C. §1348(1). Coscia's indictment marked the first-ever criminal prosecution under the "anti-spoofing" provision. The indictment alleged that Coscia "entered large-volume

orders that he intended to immediately cancel before they could be filled by other traders," and that this strategy was designed "to create a false impression regarding the number of contracts available in the market, and to fraudulently induce other market participants to react to the deceptive market information that he created." CA7.Dkt.25-2 at 3. According to the government, this constituted both "spoofing" and a prohibited effort "to defraud any person in connection with any commodity for future delivery." 18 U.S.C. §1348(1). Coscia moved to dismiss the indictment, arguing that the charges were void for vagueness and failed to allege legally cognizable claims. The district court denied the motion, and the case proceeded to trial.

At trial, the evidence confirmed that all of Coscia's orders were bona fide, executable orders subject to legitimate market risk. While most of them were cancelled before they were filled, the government itself acknowledged that Coscia's large orders traded in full or in part on the CME exchanges many times. Tr.417. The government's own witnesses also testified that each of the conditions in Coscia's cancellation protocol was "routine," Tr.676-77, and that there was no meaningful expectation (let alone any rule) regarding how long orders would remain on the market, Tr.720, 769. Nonetheless, the jury convicted Coscia on all counts. Coscia moved for a judgment of acquittal, reasserting his arguments that the charges rested on unconstitutionally vague statutory provisions and failed as a matter of law. The district court denied the motion and sentenced Coscia to three years in prison.

3. Coscia appealed, again arguing, *inter alia*, that both his spoofing and commodity fraud convictions were unlawful. As Coscia explained, the anti-spoofing provision is inherently vague, and the commodity fraud conviction rested on a novel theory that was entirely derivative of the spoofing charge and entailed no discernable "fraud." The Seventh Circuit rejected both arguments.

As for the spoofing convictions, the court concluded that the "anti-spoofing" provision "clearly defines 'spoofing'" because it contains a parenthetical indicating that spoofing involves "(bidding or offering with the intent to cancel the bid or offer before execution)," 7 U.S.C. §6c(a)(5)(C). App.18. Although the court acknowledged that several legitimate trading practices on the commodity futures markets involve placing orders with the intent to cancel them, it attempted to distinguish those other practices from "spoofing" on the theory that "those orders are designed to be executed upon the arrival of *certain subsequent events*," whereas "[s]poofing … requires[] an intent to cancel the order *at the time it was placed*." App.23-24. In the court's view, "[t]he fundamental difference is that legal trades are cancelled only following a condition subsequent to placing the order, whereas orders placed in a spoofing scheme are never intended to be filled at all." App.24. The court did not confront the inconvenient fact that Coscia's own orders likewise were programmed to cancel *only if* one of the three conditions in the program's protocol subsequently came to pass.

As for Coscia's commodity fraud convictions, the court first rejected the argument that the orders

Coscia placed were not fraudulent because they were undisputedly bona fide orders on which market participants could and did trade. App.28. In the court's view, what mattered was not whether the orders were illusory or fraudulent, but that they purportedly were "intended to create the *illusion* of market movement." App.29. In other words, according to the court, otherwise legitimate orders become commodity fraud if they are intended to impact the market.

REASONS FOR GRANTING THE PETITION

The anti-spoofing statute is hopelessly and unconstitutionally vague. It invokes an industry consensus that does not exist, and its "clarifying" parenthetical sows only confusion by suggesting that spoofing is synonymous with common trading practices on which the modern-day commodity futures exchanges depend. Those exchanges are no ordinary markets. They are exceptionally fast-paced markets dominated by professional traders who use sophisticated technology to place, execute, or cancel high-volume orders in a matter of milliseconds. And it is both understood and accepted by the CFTC itself that many of these high-frequency traders turn a profit by designing algorithms that provide for cancellation under predetermined conditions arising in these volatile markets, where prices may fluctuate dozens of times over the course of a single second.

These unique markets, which have long been a cornerstone of the nation's economy, demand unique and precise regulations that provide real clarity about what practices cross the line between futures trading and felonies. Yet instead of clarity, Congress has

given the markets and their participants the polar opposite—an "anti-spoofing" provision that invokes a non-existent industry consensus and would parenthetically sweep in wide swaths of trading activity that the CFTC itself considers "legitimate." The Seventh Circuit nonetheless concluded that the statute is not unconstitutionally vague, reasoning that it is enough that the statute offers *some* definition of "spoofing," even though that parenthetical definition compounds the vagueness by defining spoofing to mean the one thing it cannot mean—namely, the common practice of placing an order with an intent to cancel it before execution.

That decision not only is wrong, but will have an extraordinarily disruptive impact. The vast majority of domestic commodity futures trading occurs on CME's exchanges, and the high-frequency trading that the "anti-spoofing" provision appears to target is conducted primarily on CME's electronic platform, which is operated out of the Chicago area. In other words, most commodity future trading is governed by Seventh Circuit law. Accordingly, all that will come from leaving that decision in place are more convictions (likely via plea bargains) under a statute that does not satisfy even the most basic requirements of due process.

That is all the more true given that the Seventh Circuit not only gave its imprimatur to the "anti-spoofing" statute, but also embraced a sweeping theory of commodity fraud under which otherwise-legitimate trading activity can be deemed a federal felony based on nothing more than the defendant's intent. That theory is wrong, and conflicts with

decisions from other courts recognizing that bona fide trading activity simply cannot qualify as "deceptive" based on the trader's subjective intent alone. Accordingly, this Court should grant certiorari and rescue the commodity futures markets from the crippling confusion and uncertainty that the decision below has thrust upon them.

I. This Court Should Grant Certiorari To Decide Whether The "Anti-Spoofing" Provision Is Unconstitutionally Vague.

1. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Indeed, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). That principle carries particular force in the criminal context, as "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." *Winters v. New York*, 333 U.S. 507, 515 (1948). To pass constitutional muster, a criminal statute must define the offense both "[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited, and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 402-03 (2010).

These twin constitutional constraints are inextricably intertwined, as a statute that fails to

define an offense with sufficient specificity not only deprives "the ordinary citizen" of the ability "to conform his or her conduct to the law," *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999), but also fails to "establish minimal guidelines to govern law enforcement," *Smith v. Goguen*, 415 U.S. 566, 574 (1974), thus encouraging the very "arbitrary and discriminatory application[s]" that due process forbids, *Grayned*, 408 U.S. at 108-09. Accordingly, this Court long ago admonished that the legislature may not simply "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1875). Indeed, the due process problems are particularly acute when a statute "cannot conceivably have meant to criminalize" everything that a literal reading would cover, yet provides no guidance as to "what [conduct] is covered … and what is not." *Morales*, 527 U.S. at 57; *see also, e.g.*, *Goguen*, 415 U.S. at 573-74 (striking down statute that "fail[ed] to draw reasonably clear lines between the kinds of nonceremonial treatment [of the U.S. flag] that are criminal and those that are not").

2. Those principles compel the conclusion that Coscia was convicted under an unconstitutionally vague statute. The "anti-spoofing" provision makes it unlawful "to engage in any trading, practice or conduct" that "is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)." 7 U.S.C. §6c(a)(5)(C). The statute thus purports to use not a term with an ordinary, commonly

understood meaning, but a term of art "commonly known to the trade." That odd formulation is problematic enough as a matter of statutory drafting, as defining a term by reference to what it is "commonly known to the trade" to mean raises the troubling prospect neither Congress nor the people actually know what the statute is criminalizing, and effectively delegates Article I lawmaking power to "private persons whose interests may be and often are adverse to the interests of others in the same business." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). But the due-process problems with that inherently question-begging formulation are unavoidable when the trade has no idea what Congress is referring to.

That is precisely the case here. Indeed, as many a commenter lamented during the CFTC's later-abandoned proposed rulemaking, "[t]he term 'spoofing' is not one that has been commonly used in the futures and derivatives markets and there is no generally understood or accepted meaning of the term in this context." CA7.Dkt.25-2 at 343, 345, 348; *see also, e.g.*, CA7.Dkt.25-2 at 376 ("'[S]poofing' is not a term that has ever been commonly used in the futures and derivatives markets."). At most, the term had some meaning in the securities market, but no analog in the materially different commodities markets. Thus, prohibiting the practice "commonly known to the [futures] trade as, 'spoofing'" is akin to prohibiting the practice commonly known to the baseball trade as clipping. There is no such thing. The trade is left to guess what Congress had in mind, which is hardly acceptable when the penalty for clipping in baseball is not 15 yards, but up to ten years in federal prison.

The statute's parenthetical does not solve that problem, but actually makes matters worse by suggesting that the term means the one thing it cannot mean—*viz.*, a common practice that no one wants to categorically prohibit. To belabor the analogy, Congress would not solve the vagueness problem with a clipping-in-baseball prohibition with a parenthetical reference to intentionally throwing a pitch outside the strike zone. Here, too, even the CFTC is unwilling to embrace the notion that all "bidding or offering with the intent to cancel the bid or offer before execution," 7 U.S.C. §6c(a)(5)(C), constitutes "spoofing." And with good reason, as there are plenty of legitimate reasons why someone would place orders on the futures markets with the intent to cancel them. Indeed, in markets where upwards of *90%* of orders are cancelled, often in a matter of milliseconds, and often for reasons known only to the trader who cancels them, reading that capacious definition literally would produce great uncertainty in the markets.

The CFTC itself thus correctly acknowledged from the start that it could not adopt the parenthetical as the definition of "spoofing," and that any workable definition must "more clearly distinguish the practice of spoofing from the submission, modification, and cancellation of orders that may occur in the normal course of business." 75 Fed. Reg. at 67,302. Yet neither Congress nor the Commission has supplied that due-process essential. Absolutely nothing in the statute explains when placing orders with the intent to cancel them is felony "spoofing" and when it is ordinary trading. And as for the CFTC, all it has provided are "four non-exclusive examples of possible

situations" that may (but may not) qualify as "spoofing," and the singularly unhelpful qualification that whether a trading technique is a federal felony depends on the "relevant facts and circumstances." 78 Fed. Reg. at 31,895-96.

In short, Congress has wholly failed in its responsibility to define the criminal conduct, and the CFTC has not even attempted "to provide the public and market participants with clear parameters distinguishing prohibited conduct from legitimate trading activity." CA7.Dkt.25-2 at 417. Instead, the Commission has just compounded the problem by seeking "to retain maximum flexibility for Commission staff to investigate and prosecute alleged wrongdoing." CA7.Dkt.25-2 at 416-17. Accordingly, neither the statute itself nor any rule purporting to interpret it defines "spoofing" "with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402-03.

3. Tellingly, the courts have fared no better when trying to explicate the statute's scope. The district court, for instance, rejected Coscia's vagueness challenge by positing that it is "clear" that what the statute prohibits is "intent to defraud by placing illusory offers." App.66. But it is not at all clear what the court meant by "illusory." If the Court meant that the orders were fictional or otherwise could not be filled, then the term does not describe Coscia's conduct. If the court meant that the orders were placed with an intent that they not be accepted, then that describes commonplace conduct no one thinks is or should be categorically felonious. By sentencing,

the court had shifted gears, this time maintaining that Coscia violated the statute because he "manipulated the market." N.D.Ill.Dkt.162 at 9. But the "anti-spoofing" provision does not state (and the jury was not instructed) that "spoofing" requires an effort to "manipulat[e] the market" (or, for that matter, an "intent to defraud"). To the contrary, the CEA's "disruptive" practices provisions, 7 U.S.C. §6c(a)(5), are distinct from its "manipulative" practices provisions, *id.* §9. And the "anti-spoofing" provision requires (and the jury was instructed) only that orders were placed with the intent to cancel them. Tr.1584-85. The district court's felt need to narrow the statute after the fact only underscores the statute's inherent vagueness.

The Seventh Circuit, for its part, declared that "[t]he statute 'standing alone' clearly proscribes the conduct" that it prohibits because "the term 'spoofing' is defined" by the parenthetical, and that the statute does not create any meaningful risk of arbitrary and discriminatory enforcement because "the government must prove knowledge and intent." App.19, 23. But that is no response when the problem is that even the Commission concedes that acting with the intent to engage in the conduct specified in the parenthetical is not sufficient to constitute "spoofing." The Seventh Circuit also tried to draw the distinction that "legal trades are cancelled only following a condition subsequent to placing the order, whereas orders placed in a spoofing scheme are never intended to be filled at all." App.24. But the very orders at issue here were bona fide orders that could be and were filled, and were programmed to cancel only upon the occurrence of certain conditions—one being a partial

fill. Thus, in practical application, the distinction drawn by the Seventh Circuit is no distinction at all.

In all events, the statute says nothing about whether the intent to cancel an order must be absolute or conditional; it instead broadly prohibits *any* "bidding or offering with the intent to cancel the bid or offer before execution." 7 U.S.C. §6c(a)(5)(C). So, much like the district court, the Seventh Circuit's post hoc felt need to cabin the statute's reach finds no support in its text.[3]

4. In the end, then, Coscia has been convicted of a felony based on proof of intentional conduct that is at best a necessary, but not sufficient, condition for "spoofing." And the regulated community is left guessing as to what is sufficient to cross the line. It cannot be that placing an order with intent to cancel will be deemed legitimate trading activity or a federal felony punishable by ten years in prison based on nothing more than the CFTC's (or a prosecutor's) post hoc "evaluati[on of] all of the facts and circumstances."

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[3] To the extent the theories posited by the district court or the Seventh Circuit might supply a limiting construction that could remedy the statute's vagueness problem, the jury was not instructed on those narrower theories. Accordingly, while Coscia certainly would prefer (and has consistently sought in the alternative) a decision embracing a narrowing construction to a decision upholding the statute in its current vague form—a result that the canon of constitutional avoidance and the rule of lenity would also support, *see, e.g.*, *Yates v. United States*, 135 S.Ct. 1074, 1088 (2015)—such a holding would, at a minimum, necessitate a new trial. And to the extent the statute is interpreted as proscribing orders placed with unconditional intent to cancel them, then the record of Coscia's conditional trading protocol would compel reversal.

76 Fed. Reg. at 14,947. And it certainly cannot be that once the prosecutor makes that post hoc judgment, the government need prove nothing more than the necessary, but not sufficient, conduct of placing of an order with intent to cancel. Under that regime, there is no way for "the ordinary citizen to conform his or her conduct to the law," *Morales*, 527 U.S. at 58, and nothing to prevent "arbitrary and discriminatory enforcement," *Skilling*, 561 U.S. at 402-03. By sanctioning that regime, the Seventh Circuit sanctioned not one, but two, due-process violations, as it not only excused the vagueness of the statute, but affirmed Coscia's conviction based solely on the necessary, but not sufficient, conduct of placing orders with the intent to cancel them.

Moreover, the reality that (just like the CFTC's roundtable) the Seventh Circuit, the district court, and the agency charged with enforcing the "anti-spoofing" statute apparently are not of one mind as to what it prohibits is itself a serious problem, as "the failure of 'persistent efforts … to establish a standard' can provide evidence of vagueness." *Johnson v. United States*, 135 S. Ct. 2551, 2558 (2015). The CFTC and market participants alike have spent the better part of a decade trying to identify an "ascertainable standard for inclusion and exclusion," *Goguen*, 415 U.S. at 578, all to no avail. That is bad enough before people start going to federal prison for conduct that no one can define. And that is the point that has now been reached, with Coscia in federal prison by virtue of a Seventh Circuit decision that sanctions convictions without meaningfully defining the felonious conduct.

That decision not only has grave consequences for traders who, like Coscia, have the misfortune of becoming the target of a zealous prosecutor's ire, but also creates massive uncertainty for *all* participants in the futures markets. Indeed, CFTC's own former director of enforcement lamented that the statute's "vagueness is going to chill legitimate trading." CA7.Dkt.25-2 at 266. CME echoed the same concern, cautioning that "failure to provide clarity with respect to the types of conduct and trading practices that constitute violations of the statute[s] will have a chilling effect on market participation." CA7.Dkt.25-2 at 382. That is precisely what will result if this vague statute is left standing—particularly given that most CME trading will be subject to prosecution in the Northern District of Illinois. Accordingly, absent this Court's intervention, market participants will be left subject not just to the whims of federal prosecutors, but subject to those of only *a single* prosecutor's office.

In short, the "anti-spoofing" provision lacks the "due process essentials," as it neither defines the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited," nor does so in a manner "that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 561 U.S. at 402-03. The statute's core term—"spoofing"—continues to have no accepted industry meaning and fails to adequately separate commonplace trading activity from criminal conduct. The Court should grant certiorari and hold the statute unconstitutionally vague.

II. The Court Should Grant Certiorari To Decide Whether Intent Alone Can Convert Bona Fide Trading Activity Into Fraud.

The decision below not only sanctions an inherently vague criminal prohibition, but also embraces a capacious conception of fraud that cannot be reconciled with decisions of other courts. The commodity fraud statute makes it a crime to "knowingly execute[], or attempt[] to execute, a scheme or artifice … to defraud any person in connection with any commodity for future delivery, … any option on a commodity for future delivery, or any security." 18 U.S.C. §1348. The irreducible minimum of a violation is some sort of "fraud"—*i.e.*, some false or deceptive conduct. *See, e.g.*, *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 660 (2d Cir. 2016) ("at its core, fraud requires proof of deception"). Here, the government could not make even that minimal showing, as there is no dispute that the orders Coscia placed were genuine orders that could be—and were in fact—executed. That should have been the end of the fraud inquiry. Indeed, courts have concluded in multiple contexts that genuine trading activity cannot amount to fraud—even if it was undertaken in hopes of moving the market.

For instance, in *United States v. Radley*, 659 F. Supp. 2d 803 (S.D. Tex. 2009), *aff'd on other grounds,* 632 F.3d 177 (5th Cir. 2011), the government indicted the defendants for commodity price manipulation on the theory that they "misled the market" in an effort to drive up the price of propane by placing multiple bids "creating the impression that multiple

counterparties wished to buy propane." 659 F. Supp. 2d at 807. The district court rejected that theory, concluding that "[w]hile these facts do successfully allege an increase in price, they fall short of alleging an **artificial** price because none of these bidding tactics is anything other than legitimate forces of supply and demand." *Id.* at 815. In the court's view, so long as "defendants were willing and able to follow through on all of the bids, they were not misleading" just because counterparties may have incorrectly "assumed that the[y] … came from multiple parties." *Id.*

Likewise, in *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189 (3d Cir. 2001), the plaintiff claimed that the defendant violated Rule 10b-5 by short selling stock to depress the price of certain securities. The Third Circuit rejected that argument, concluding that a trader does not "inject[] … inaccurate information into the market or creat[e] … a false impression of supply and demand for a stock" by engaging in "legitimate transactions with real buyers on the other side of the sale." *Id.* at 208, 214. And before this case, the Seventh Circuit itself had concluded that there is no "deception or manipulation" within the meaning of Rule 10b-5 when transactions are not "fictitious[]," but rather involve "real buyers" acting on real offers. *Sullivan & Long, Inc. v. Scattered Corp.*, 47 F.3d 857, 864-65 (7th Cir. 1995).

The court below tried to distinguish these cases on the theory that they did not involve "artificial market movement." App.30 n.64. But the whole point of these cases is that market movement *is not artificial* in any relevant sense if it is the product of bona fide trading

activity in which the terms of an order are precisely what the trader who places them represents. As the former chief executive officer of CME aptly explained, "bids and offers on the electronic platform do not create an appearance of 'false market depth' as all bids and offers represent true and actionable market depth and liquidity until such time that they are withdrawn." CA7.Dkt.25-3 at 597. Accordingly, so long as orders are true and actionable—as Coscia's indisputably were—they are, by definition, not false, deceptive, or otherwise fraudulent.

In concluding otherwise, the Seventh Circuit embraced the same troubling reasoning that the D.C. and Second Circuits have embraced—namely, that "the actor's purpose" alone may convert otherwise lawful trading activity into a crime. *Markowski v. SEC*, 274 F.3d 525, 528 (D.C. Cir. 2001); *see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir 2007) ("in some cases scienter is the only factor that distinguishes legitimate trading from improper manipulation"). That simply is not consistent with market realities, as a genuine bid or offer on which the trader is "willing and able to follow through," *Radley*, 659 F. Supp. 2d at 815, is likewise a genuine reflection of market liquidity, regardless of whether the party placing the order hopes it will or will not be filled, and regardless of what the counterparty accepting the order may believe it says about the state of the market.

Moreover, just as with its amorphous conception of "spoofing," the government's amorphous conception of "fraud" would sweep in concededly legitimate trading activity. For example, "iceberg" or "hidden

quantity" orders are plainly designed to mislead the market about the true extent of supply or demand, yet CME expressly permits them, and both the CFTC and the Department of Justice have agreed that they are permissible. Indeed, the Seventh Circuit did not conclude otherwise; it just tried to distinguish them on the ground that "they are designed to be executed under certain conditions." App.37. That is certainly true, and may well explain why they do not constitute "spoofing." But it does nothing to explain why Coscia's trading was "deceptive" while placing a series of small orders to mislead the market about the size of the trader's intended trading is not. The decision below thus injects into the commodity fraud statute the same vagueness problems as the "anti-spoofing" provision.

In short, just as "spoofing" demands something more than the concededly sometimes-permissible intent to place orders with the intent to cancel them, commodity fraud demands something more than the placing of genuine, executable orders. By failing to identify with specificity what that something is, the decision below leaves the commodity futures markets utterly unclear as to what trading activity is permissible, and what trading activity is a federal felony punishable by imprisonment.

III. The Questions Presented Are Exceptionally Important, And This Is An Ideal Vehicle To Consider Them.

The questions presented are important and will have wide-reaching impact. While this may have been the first spoofing prosecution, it certainly will not be the last. Indeed, just this week, the government announced eight more "spoofing" and commodity

fraud enforcement actions—six, notably, in the Northern District of Illinois. *See* Press Release, CFTC (Jan. 29, 2018), http://bit.ly/2GtlOi9.

As CME itself reiterated to the CFTC during its later-abandoned rulemaking effort, while there is undoubtedly "a shared interest among market participants, exchanges, and regulators in having market and regulatory infrastructures that promote fair, transparent and efficient markets," there is an equally shared interest in ensuring that market participants have the clarity they "deserve … with respect to their obligations under the rules and fairness and consistency with regard to their enforcement." CA7.Dkt.25-2 at 592. Indeed, "failure to provide clarity with respect to the types of conduct and trading practices that constitute violations of the statute[s] will have a chilling effect on market participation because of exposure to uncertain regulatory risks and the possibility that legitimate trading practices will be arbitrarily construed, post-hoc, to be unlawful." CA7.Dkt.25-2 at 592.

These chilling effects stand to impact not just the futures markets, but also the ability of this Court to correct the Seventh Circuit's error if it denies review here. As explained, because CME operates all of the nation's leading futures exchanges, the threat of criminal prosecution in the Seventh Circuit will always exist, whether under the "anti-spoofing" statute or under the commodity fraud statute. And the penalties are sufficiently severe—imprisonment, fines, and suspension (or even total bar) from the futures markets—that few, if any, traders threatened with prosecution will be willing to take the risk that

they will prevail at trial under the exceedingly government-friendly standards that the Seventh Circuit has embraced. The decision below thus not only stands to chill legitimate trading activity, but also stands to pressure those unfortunate enough to find themselves the target of a criminal prosecution or civil enforcement action into pleading or settling rather than trying their luck with a court that has already given its imprimatur to boundless theories of both statutes.

Given that dynamic, if the decision below is left standing, another case in which the issues have been pressed, passed upon, and fully developed through a trial record may not materialize any time soon. And in the meantime, the futures markets will continue to suffer from the crippling uncertainty and inevitable prospect of "arbitrary and discriminatory enforcement" that results when Congress fails to define a criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and … in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 561 U.S. at 402-03.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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