No. 17-1099

In the Supreme Court of the United States

MICHAEL COSCIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 7 U.S.C. 6c(a)(5)(C) is unconstitutionally vague as applied to petitioner's conduct.

2. Whether petitioner committed commodities fraud, in violation of 18 U.S.C. 1348.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 866 F.3d 782. The opinion and order of the district court denying petitioner's pretrial motion to dismiss the indictment (Pet. App. 45-59) is reported at 100 F. Supp. 3d 653. The opinion and order of the district court denying petitioner's motions for a new trial and for acquittal (Pet. App. 60-75) is reported at 177 F. Supp. 3d 1087.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2017. A petition for rehearing was denied on September 5, 2017 (Pet. App. 43-44). On November 14, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including January 3, 2018. On December 13, 2017, Justice Kagan further extended the time to and including February 2, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on six counts of commodities fraud, in violation of 18 U.S.C. 1348, and six counts of spoofing, in violation of 7 U.S.C. 6c(a)(5)(C), 13(a)(2). He was sentenced to 36 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-42.

1. High-frequency trading is the process of using computer software to execute, at very high speed, large volumes of securities or commodities trades. Pet. App. 3-4. Legitimate trading strategies can make this practice very profitable. *Id.* at 4. The simplest approaches take advantage of minor price discrepancies that emerge across national exchanges. *Ibid.* These price discrepancies allow traders to arbitrage between exchanges by buying low on one exchange and selling high on another. *Ibid.* Because such price discrepancies are often very small and disappear within fractions of a second, traders can make significant profit only by executing a high volume of transactions very quickly. *Ibid.*

High-frequency trading has opened the door to "spoofing," however, which Congress criminalized as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. Pet. App. 5. Specifically, Congress proscribed "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).

A knowing violation of the anti-spoofing provision is a felony. 7 U.S.C. 13(a)(2).

Although "spoofing, like legitimate high-frequency trading, utilizes extremely fast trading strategies," it "differs from legitimate trading, however, in that it can be employed to *artificially move* the market price of a stock or commodity up and down, instead of taking advantage of natural market events (as in the price arbitrage strategy discussed above)." Pet. App. 5. The simplest spoofing scheme is to place large and small orders on opposite sides of the market, with the intent to fill the small orders but to cancel the large ones. *Ibid.* When the trader wants to purchase a stock or commodity, he places a small order at a price below the current market price. *Ibid.* The trader then places large orders to sell starting at or around the higher market price, but with the price incrementally decreasing, thereby creating an artificial perception that the market is flooded with supply and that the market price is falling. *Id.* at 6. But the trader intends never to execute the large, market-shifting orders (because that would prevent him from profiting off the smaller purchase at a lower price), and instead cancels them within milliseconds of achieving the desired market shift and filling the small orders at the deflated price. *Ibid.*

"For example, consider an unscrupulous trader who wants to *buy* corn futures at $3.00 per bushel in a market where the current price is $3.05 per bushel." Pet. App. 6. "Under the basic laws of supply and demand, this trader can drive the price downward by placing *sell* orders for large numbers of corn futures on the market at incrementally decreasing prices (e.g., $3.04, then $3.03, etc.), until the market appears to be saturated with individuals wishing to sell, the price decreases, and, ultimately, the desired purchase price is reached." *Ibid.* The trader thus "spoofs" the market downward toward the price at which he actually wants to buy, by creating "the illusion of downward market movement resulting from a surplus of supply." *Ibid.* "Importantly, the large, market-shifting orders that he places to create this illusion are ones that he never intends to execute; if they were executed, our unscrupulous trader would risk extremely large amounts of money by selling at suboptimal prices." *Ibid.* "Instead, within milliseconds of achieving the desired downward market effect, he cancels the large orders." *Ibid.* Then, once the trader fills the small order and buys at the artificially deflated price, he can then sell at an artificially higher price by operating the same scheme in reverse. *Ibid.*

2. From August 2011 to October 2011, petitioner carried out the spoofing scheme described above tens of thousands of times. Pet. App. 7-9. During that period, petitioner placed over 450,000 large orders, and earned $1.4 million as a result of his market manipulations. *Id.* at 9-10.

For example, during one round of spoofing copper futures, petitioner placed a small order to sell five futures contracts "at a price of 32755, which was, at that time, higher than the current market price." Pet. App. 8 (footnote omitted). He then placed large orders "on the opposite side of the market (the buy side) at steadily growing prices, which started at 32740, then increased to 32745, and increased again to 32750." *Ibid.* "These buy orders created the illusion of market movement, swelling the perceived value of any given futures contract (by fostering the illusion of demand) and allowing [petitioner] to sell his current contracts at the desired price of 32755—a price equilibrium that he created." *Id.* at 8-9.

"Having *sold* the five contracts for 32755, [petitioner] now needed to *buy* the contracts at a lower price in order to make a profit." Pet. App. 9. So he placed an order to buy five contracts at 32750, "which was below the price that he had just created," and then placed large-volume orders on the opposite side of the market to sell at higher but decreasing prices (first 32770, and then 32765). *Ibid.* Those large orders "created downward momentum on the price of copper futures by fostering the appearance of abundant supply at incrementally decreasing prices." *Ibid.* "The desired devaluation of the contracts was almost immediately achieved, allowing [petitioner] to buy his small orders at the artificially deflated price of 32750." *Ibid.* "The large orders were then immediately cancelled." *Ibid.*

Petitioner commissioned and used two computer programs to facilitate his scheme. Pet. App. 9-10. Petitioner asked the designer to make the "programs act '[l]ike a decoy,' which would be '[u]sed to pump [the] market.'" *Id.* at 10 (citation omitted; brackets in original). Specifically, one of the programs was "designed to pump or deflate the market through the use of large orders that were *specifically designed* to be cancelled if they ever risked actually being filled." *Id.* at 22; see also *id.* at 26. The program would cancel the large orders (1) after the passage of time (usually a matter of milliseconds); (2) if the small orders were filled; or (3) if a single large order was filled even in part. *Id.* at 10, 22. The parameters of the program and petitioner's actual trading activities thus "clearly indicate[d]" that petitioner placed large orders with "an intent to cancel" them before execution. *Id.* at 22; see *id.* at 23-24. Furthermore, petitioner "did not place orders with the intent to cancel *under certain circumstances*—he placed orders with the present intent to *always cancel* the large orders." *Id.* at 24 n.45. "His purpose was not to trade on those orders, but rather to use them to shift the market up or down." *Ibid.*

During his period of spoofing, petitioner "cancelled the vast majority of his large orders," whereas he filled a far larger proportion of his small orders. Pet. App. 25; see *id.* at 26. On the Chicago Mercantile Exchange, 0.08% of petitioner's large orders were filled, compared to 35.61% of his small orders. *Id.* at 26. Furthermore, only 0.57% of petitioner's large orders were on the market for more than one second, whereas 65% of large orders by other high-frequency traders were open for more than a second. *Ibid.* In addition, petitioner's order-to-trade ratio was 1592%, which means that his average order was "much larger than his average trade." *Ibid.* In contrast, the order-to-trade ratio for other market participants ranged from 91% to 264%. *Ibid.* And petitioner's "cancellations represented 96% of all Brent futures cancellations on the Intercontinental Exchange during the two-month period in which he employed his software." *Id.* at 25-26.

3. In 2014, a federal grand jury indicted petitioner on six counts of commodities fraud, in violation of 18 U.S.C. 1348, and six counts of spoofing, in violation of 7 U.S.C. 6c(a)(5)(C), 13(a)(2). Pet. App. 7, 61. Petitioner moved to dismiss the indictment, arguing in part that Section 6c(a)(5)(C) is void for vagueness because, he contended, it fails to offer an ascertainable standard to separate spoofing from legitimate trade practices. *Id.* at 48. Petitioner further argued that his alleged

trading activity did not constitute a scheme to defraud for purposes of 18 U.S.C. 1348. Pet. App. 55-56. The district court denied the motion to dismiss, finding that Section 6c(a)(5)(C) was not impermissibly vague as applied to petitioner and that the indictment sufficiently alleged a scheme to defraud. *Id.* at 55, 57-58.

Petitioner proceeded to trial, where a jury found him guilty on all counts. Pet. App. 2. Petitioner moved for a judgment of acquittal on the Section 1348 counts, arguing that the government had failed to prove that he committed fraud, and he renewed his vagueness challenge to Section 6c(a)(5)(C). *Id.* at 65. The district court denied petitioner's motion. *Id.* at 75. The court found that the government had presented "substantial evidence" that petitioner placed orders he never intended to fill and "thus sought to manipulate the market for his own financial gain." *Id.* at 63. The court also rejected petitioner's vagueness claim, again concluding that Section 6c(a)(5)(C) gave petitioner fair notice that his conduct was unlawful. *Id.* at 65-67.

4. The court of appeals affirmed. Pet. App. 1-42.

a. The court of appeals rejected petitioner's contention that Section 6c(a)(5) is unconstitutionally vague as applied to him. Pet. App. 15-20.

As an initial matter, the court of appeals rejected petitioner's argument that Section 6c(a)(5) fails to define "spoofing" and instead refers to an industry definition that has not been established. Pet. App. 15-16. The court determined that Section 6c(a)(5) expressly defines spoofing in the statutory parenthetical to mean "*bidding or offering with the intent to cancel the bid or offer before execution*." *Id.* at 16 & n.37 (quoting 7 U.S.C. 6c(a)(5)(C)). Because "Congress provided the necessary definition" in the statute, the court explained, Congress "put the trading community on notice" that conduct like petitioner's was unlawful. *Id.* at 19. And because "the term 'spoofing' is clearly defined in the statute," the court found that even if "no legislative history, no recognized industry definition, no Commodity Futures Trading Commission rule" defined spoofing, the "statute 'standing alone' clearly proscribes the conduct." *Id.* at 18-19.

The court of appeals additionally determined that petitioner's charged conduct "clearly falls within the ambit of the statute" even if the parenthetical were illustrative, rather than definitional. Pet. App. 18. Specifically, "the statute put [petitioner] on notice that, when he submitted offers with the purpose of cancelling them, his actions constituted spoofing." *Id.* at 20 n.40.

The court of appeals also rejected petitioner's contention that, even if the statute gives adequate notice, the statutory definition encourages arbitrary enforcement. Pet. App. 21-24. The court explained that petitioner's constitutional claim requires proof that "*his* prosecution arose from arbitrary enforcement." *Id.* at 21. The court determined, however, that "the conduct at issue falls so squarely in the core of what is prohibited by the law that there is no substantial concern about arbitrary enforcement because no reasonable enforcing officer could doubt the law's application in the circumstances." *Id.* at 21-22 (quoting *Farrell* v. *Burke*, 449 F.3d 470, 494 (2d Cir. 2006)). The court observed that petitioner "commissioned a program designed to pump or deflate the market through the use of large orders that were *specifically designed* to be cancelled if they ever risked actually being filled," and his "trading record" further reinforced his intent to cancel. *Id.* at 22. The court further found that his behavior "clearly falls within the confines of the conduct prohibited by the statute," and it explained that petitioner could not challenge "any allegedly arbitrary enforcement that could hypothetically be suffered by a theoretical legitimate trader." *Ibid.*

The court of appeals further determined that, even if petitioner could raise such a challenge, Section 6c(a)(5)(C) does not permit arbitrary enforcement because it "requires that an individual place orders with 'the intent to cancel the bid or offer before execution.'" Pet. App. 23 (quoting 7 U.S.C. 6c(a)(5)(C)); see *id.* at 22-23. The court explained that the intent requirement "imposes clear restrictions on whom a prosecutor can charge with spoofing" and therefore limits criminal prosecutions under the statute "to the pool of traders who exhibit the requisite criminal intent." *Id.* at 23. The court added that the intent requirement "renders spoofing meaningfully different from legal trades," like "'stop-loss orders'" ("'an order to sell a security once it reaches a certain price'") or "'fill-or-kill orders'" ("'an order that must be executed in full immediately, or the entire order is cancelled.'"). *Id.* at 23-24 (citations omitted). The court observed that those trading strategies involve orders that "are designed to be executed upon the arrival of *certain subsequent events*." *Id.* at 24. In contrast, the court explained, spoofing requires "an intent to cancel the order *at the time it was placed*." *Ibid.* "The fundamental difference," the court continued, "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." *Ibid.*

b. The court of appeals also rejected petitioner's separate contention that his conduct was, as a matter of law, not fraudulent. Pet. App. 28-32. The court found that the evidence supported the determination that petitioner "designed a scheme to pump and deflate the market through the placement of large orders." *Id.* at 29. Petitioner's scheme was "deceitful," the court reasoned, because he sought to manipulate the market by placing large orders that he intended to cancel, in order to create an artificial illusion of inflated supply or demand. *Ibid.* And the government had presented "substantial" evidence of petitioner's fraudulent intent. *Ibid.*; see *id.* at 29-32 (describing evidence).

ARGUMENT

Petitioner contends (Pet. 21-33) that 7 U.S.C. 6c(a)(5)(C) should be set aside as void for vagueness and that his conduct was, as a matter of law, not fraudulent. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or any other circuit. Indeed, the questions presented are novel and could arise in other circuits. Further review is not warranted.

1. The court of appeals correctly rejected petitioner's contention (Pet. 21-29) that Section 6c(a)(5)(C) is void for vagueness as applied to petitioner.

a. The Due Process Clause bars enforcement of a criminal statute on vagueness grounds only if the statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see *Johnson* v. *United States*, 135 S. Ct. 2551, 2556-2557 (2015). Courts apply a "strong presumpti[on]" that acts of Congress are not unconstitutionally vague. *Skilling* v. *United States*, 561 U.S. 358, 403 (2010) (citation omitted).

A statute is not void for vagueness because its applicability is unclear at the margins, *Williams*, 553 U.S. at 306, or if a reasonable jurist might disagree on where to draw the line between lawful and unlawful conduct in particular circumstances, *Skilling*, 561 U.S. at 403. Rather, a statute is void for vagueness only if it requires proof of an "incriminating fact" that is so indeterminate as to invite arbitrary and "wholly subjective" application. *Williams*, 553 U.S. at 306; see *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974) (vague statute lacks "any ascertainable standard for inclusion and exclusion" of conduct within its scope).

For example, the Court has "struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent.'" *Williams*, 553 U.S. at 306; see *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 870-871 (1997); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). The Court has struck down a statute that forbade loitering "with no apparent purpose." *City of Chicago* v. *Morales*, 527 U.S. 41, 61 (1999). And the Court has struck down a statute that required courts to determine whether the "idealized ordinary case" of a crime posed a "serious potential risk of physical injury to another" that is comparable to a "confusing list of examples" that were themselves "'far from clear in respect to the degree of risk each pose[d].'" *Johnson*, 135 S. Ct. at 2557-2558, 2561 (quoting *Begay* v. *United States*, 553 U.S. 137, 143 (2008)).

Section 6c(a)(5)(C) contains no such indeterminacy. The statute prohibits "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). As the court of appeals correctly recognized, the statute's parenthetical phrase expressly defines the term "spoofing." That definition provides fair notice that the statute prohibits "bidding or offering with the intent to cancel the bid or offer before execution." *Ibid.*; see Pet. App. 16-17. Thus, contrary to petitioner's contention (Pet. 23), the statute does not prohibit undefined conduct or leave traders "guess[ing] what Congress had in mind."

b. Petitioner acknowledges (Pet. 24) the statute's parenthetical definition, but contends that "spoofing" cannot mean what the statute says because, he asserts, "no one wants to categorically prohibit" the "common practice" of bidding or offering with the intent to cancel the bid or offer before execution. But as the court of appeals explained, see Pet. App. 24, the common practices petitioner to which refers are fundamentally different from spoofing and do not fall within the ambit of the statute's prohibition.

For example, a "stop-loss order" is "an order to sell a security once it reaches a certain price," and a "fill-or-kill order" is "an order that must be executed in full immediately, or the entire order is cancelled." Pet. App. 23-24 (citations omitted). In those situations, the order is "designed to be executed upon the arrival of *certain subsequent events*." *Id.* at 24.[1] In contrast, spoofing requires "an intent to cancel the order *at the time it was placed*." *Ibid.* "The fundamental difference is that legal

[1] The additional types of orders described by petitioner (Pet. 8) have the same feature. All contemplate that a transaction of some nature will occur after the order is placed, if certain conditions are met. In none of the examples is the goal that the order always be canceled without consummating any transaction at all, which was the metric of success for the large orders petitioner placed here.

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." *Ibid.*

Petitioner's entire plan here, for example, was to cancel his large spoofing orders before they were filled—but after they had the effect of artificially moving the market price upwards or downwards by creating an illusion of excess supply or demand, thereby allowing petitioner to buy or sell at prices he manufactured. See Pet. App. 24 n.45 (petitioner "did not place orders with the intent to cancel *under certain circumstances*—he placed orders with the present intent to *always cancel* the large orders"). Spoofing orders like petitioner's fall thus within Section 6c(a)(5)(C)'s prohibition, while the legitimate orders he describes do not.

Petitioner emphasizes (Pet. 4) that "in some instances" his large orders were filled. But petitioner succeeded in cancelling the overwhelming majority of his large orders, including 99.92% of those orders on the Chicago Mercantile Exchange. See Pet. App. 26. And the fact that a tiny fraction were ultimately filled does not show that he intended them to be filled at the time he placed them. It instead shows that his plan always to cancel those orders was occasionally unsuccessful.

Petitioner is also wrong to suggest (Pet. 10-11) that the Commodity Futures Trading Commission (CFTC) has taken the view "that the statute's parenthetical cannot be read as a literal definition of 'spoofing.'" To the contrary, the CFTC issued interpretive guidance affirming that Section 6c(a)(5)(C) "requires that a person intend to cancel a bid or offer before execution," 78 Fed. Reg. 31,890, 31,896 (May 28, 2013), an explanation that mirrors Section 6c(a)(5)(C)'s statutory definition. Far from "resist[ing] the conclusion that placing orders with the intent to cancel them is *always* unlawful," Pet. 14, the CFTC's guidance recognizes that "a single instance of trading activity can violate [Section 6c(a)(5)(C)], provided that the activity is conducted with the prohibited intent," 78 Fed. Reg. at 31,896. Nor has the CFTC "acknowledged * * * problems" with the statute by initiating a proposed rulemaking. Pet. 10. Rather, the CFTC simply requested comment on issues relating to all three subsections of Section 6c(a)(5) because Congress granted the CFTC the authority to "make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to prohibit the trading practices described in [Section 6c(a)(5)] and any other trading practice that is disruptive of fair and equitable trading." 7 U.S.C. 6c(a)(6); see 75 Fed. Reg. 67,301, 67,301-67,302 (Nov. 2, 2010).

c. Petitioner contends (Pet. 27-29) that Section 6c(a)(5)(C) may encompass cases where it could be difficult to determine whether a trader placed an order "with the intent to cancel the bid or offer before execution." 7 U.S.C. 6c(a)(5)(C). But "the mere fact that close cases can be envisioned" does not render a statute vague. *Williams*, 553 U.S. at 305. And as explained, the statute's definition of "spoofing" is clear: It prohibits "bidding or offering with the intent to cancel the bid or offer before execution." 7 U.S.C. 6c(a)(5)(C).

Unlike statutes prohibiting conduct that is "annoying," *Coates*, 402 U.S. at 615, or undertaken with "no apparent purpose," *Morales*, 527 U.S. at 60-62, Section 6c(a)(5)(C) contains no element that is inherently indeterminate. The requirement of "bidding or offering" is concrete and clear. 7 U.S.C. 6c(a)(5)(C). The statute further requires that the bid or offer be made "with the intent to cancel the bid or offer before execution." *Ibid.* That requires the trader to have the requisite intent to cancel at the time the bid or order is placed, not to develop that intent at some later time. Pet. App. 24. And whether a trader placed that bid or offer with the requisite intent to cancel is a "clear question[] of fact" that must be "addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Williams*, 553 U.S. at 306. In some cases, "it may be difficult" to make this "true-or-false determination." *Ibid.* "But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *Ibid.* (quoting *American Commc'ns Ass'n* v. *Douds*, 339 U.S. 382, 411 (1950)).

In any event, the "touchstone" of vagueness analysis "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 the court of appeals recognized (Pet. App. 21), petitioner therefore can prevail only by showing that the statute failed to provide clear warning that it proscribed *his* conduct, not some other hypothetical conduct. See *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.") (quoting *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). Here, the trial evidence showed that petitioner placed the large orders "not with the intent to actually consummate the transaction," Pet.

App. 26, but instead to cancel them before they were filled yet after they enabled him to buy (or sell) a smaller order on the opposite side of the market at an artificially deflated (or inflated) price. Petitioner had no reason to believe that those large orders would fall outside the scope of Section 6c(a)(5)(C). Accordingly, even if he could show that Section 6c(a)(5)(C) proscribes some legitimate trading activities without fair warning, those hypothetical applications of the statute would not make the statute vague as applied to petitioner.

d. Petitioner does not claim that a circuit conflict exists over whether or under what circumstances the anti-spoofing statute is unconstitutionally vague. To the contrary, he asserts (Pet. 16) that his indictment "marked the first-ever criminal prosecution" under Section 6c(a)(5)(C), and does not dispute that this issue is novel. The decision below appears to be the first court of appeals case that even mentions Section 6c(a)(5)(C). That dearth of case law presumably explains why petitioner, in arguing that courts have struggled to explain the statute's scope, cites only statements by the lower courts in this very case. See Pet. 25-26.[2]

Contrary to petitioner's suggestions (see Pet. 34), there is no sound basis for concluding that this issue will arise only within the Seventh Circuit. The United States has already announced spoofing prosecutions it is pursuing in other circuits. See Office of Pub. Affairs, Dep't of Justice, *Eight Individuals Charged With Deceptive Trading Practices Executed on U.S. Commodities Markets* (Jan. 29, 2018) (announcing several spoofing prosecutions, including one in the Southern District of

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[2] The court of appeals rejected petitioner's criticisms of the district court's statements regarding Section 6c(a)(5)(C). See Pet. App. 19 n.40.

Texas); see also, *e.g.*, *In re HSBC Sec. (USA) Inc.*, CFTC No. 18-08, 2018 WL 684635 (Jan. 29, 2018) (conduct and exchange in New York). Moreover, significant exchanges are located outside the Seventh Circuit, such as the Intercontinental Exchange, which "is an electronic commodity exchange based in Atlanta, Georgia." *In re Amaranth Natural Gas Commodities Litig.*, 730 F.3d 170, 175 (2d Cir. 2013); see Pet. App. 10-11 & n.18 (discussing evidence of petitioner's spoofing on that exchange). Review by this Court accordingly is unwarranted and at a minimum would be premature.

2. The second question presented likewise does not warrant this Court's review.

a. As both courts below correctly concluded, sufficient evidence supported the jury's determination that petitioner committed commodities fraud, in violation of 18 U.S.C. 1348. The evidence showed that petitioner "designed a scheme to pump and deflate the market through the placement of large orders" that he intended to cancel, and which he used "to manipulate the market for his own financial gain" by creating an illusion of supply or demand so that he could transact small orders at an artificially inflated or deflated price. Pet. App. 29.

The government presented substantial evidence of petitioner's fraudulent intent. Pet. App. 29. Among other things, he commissioned computer programs precisely in order "'to pump [the] market' and act '[l]ike a decoy.'" *Ibid.* (citation omitted; brackets in original). Specifically, he "*designed* a system that used large orders to inflate or deflate prices, *while also structuring that system to avoid the filling of large orders*" and instead to consummate the small orders he placed on the opposite side of the market. *Ibid.* Those programs were "intended to create the *illusion* of market movement." *Ibid.* Petitioner's "highly unusual" trading patterns also "clearly indicated a desire to use the large orders as a means of shifting the market equilibrium toward his desired price," at which point he would fill the opposite small order, "while avoiding the actual completion of th[e] large transactions." *Id.* at 31-32.

Petitioner contends (Pet. 30) that his conduct was not fraudulent because the large orders "were genuine orders that could be—and were in fact—executed." The court of appeals correctly rejected that claim, as it confuses "*illusory* orders with an *illusion* of market movement." Pet. App. 29. What made petitioner's scheme deceptive was that, at the time he placed the large orders, he intended to cancel them before they were filled but after they had created an illusion of excess demand or supply and thereby enabled him to buy or sell small orders on the opposite side of the market at artificially deflated or inflated prices. See *ibid.*

Petitioner's assertions of his scheme's legitimacy further err in looking only at one half of the picture (the large orders he placed but never intended to fill), when he obtained the profits of his fraudulent scheme from the small orders he placed on the opposite side of the market. Under any common understanding of the word, the counterparties to petitioner's small orders were defrauded: They bought or sold at worse prices because petitioner had succeeded in using the large to-be-cancelled orders as a tool of deception to manipulate the market price in his favor. And as noted above, see p. 13, *supra*, the fact that a tiny fraction of petitioner's large orders were filled before he could cancel them does not establish that his scheme was not fraudulent. Rather, it shows that his fraudulent scheme was sometimes not entirely successful.

b. The court of appeals' sufficiency-of-the-evidence ruling is highly fact-specific and does not conflict with any decision of any other circuit court.

Petitioner cites (Pet. 30) *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). But a district court decision cannot give rise to a conflict warranting this Court's review. See Sup. Ct. R. 10. In any event, as the court of appeals explained below, *Radley* is inapposite because it did not involve "the development of a specific program to create the illusion of artificial market movement that included the use of large orders to inflate the price while also taking steps to avoid transactions in the large orders." Pet. App. 30 n.64; see *ibid.* (noting that the court in *Radley* "specifically noted that the alleged facts fell 'short of alleging an artificial price'") (quoting *Radley*, 659 F. Supp. 2d at 815).

Petitioner also cites (Pet. 31) *GFL Advantage Fund, Ltd.* v. *Colkitt*, 272 F.3d 189 (3d Cir. 2001), cert. denied, 536 U.S. 923 (2002), which held that the lawful short sales of stock at issue in that case did not constitute "market manipulation in violation of Section 10(b) and Rule 10b-5," *id.* at 203; see 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5. But *Colkitt* is inapposite because it did not involve evidence that the defendant engaged in short selling as "part of a scheme to manipulate stock prices" or "in conjunction with some other deceptive practice that either injected inaccurate information into the market or otherwise artificially affected the price of the stock." 272 F.3d at 207. As the Third Circuit recognized, lawful short sales "do not distort markets or create a false impression of supply and demand because they are legitimate transactions with real buyers on the other side of the sale who are betting that the stock's price will rise." *Id.* at 214.[3] In contrast, petitioner used large orders that he intended always to cancel as a tool to manipulate market prices in a desired direction (by creating an illusion of excess supply or demand), so that he could earn windfall profits off small orders that he placed on the opposite site of the market. The jury properly determined that petitioner's scheme was a form of fraud, and nothing in *Colkitt* is to the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Indeed, the Seventh Circuit itself treated legitimate short sales differently from the conduct at issue here. See *Sullivan & Long, Inc.* v. *Scattered Corp.*, 47 F.3d 857, cert. denied, 516 U.S. 818 (1995). And even if petitioner were correct that the two scenarios must be treated identically, any intra-circuit tension between *Sullivan & Long* and the decision below would best be resolved in the first instance by the Seventh Circuit itself. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).