No. 17-1099

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government's brief in opposition fails to meet the basic challenge in a vagueness case: It cannot explain what is and is not "spoofing." That is because no one knows. Not the government, not the agency charged with enforcing the anti-spoofing provision, and certainly not "the trade" that Congress presumed to have a common notion of the prohibited activity. Instead, the government insists that this Court need not answer that question because whatever spoofing may be, petitioner's conduct surely qualifies. But that is no answer when, as here, the statute fails to meaningfully define the criminal prohibition at all.

Indeed, the statute all but facially admits that Congress was uncertain what it was prohibiting, employing the equivocal and triply incoherent formulation of barring 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) (emphasis added). Maybe it would satisfy due process to define a criminal prohibition by reference to what is "commonly known to the trade" if "the trade" actually had common knowledge of the prohibited practice. But when the regulated trade has no common view of what "spoofing" is, the statute operates as a cruel joke, and the due-process problem is undeniable. The government's defense of the statute's overbroad parenthetical only makes matters worse by suggesting that common trading practices are felonious if prosecutors deem them "artificial." The Due Process Clause cannot tolerate a situation where neither the government nor "the trade" can

meaningfully articulate the line between liberty and federal prison.

The government's defense on commodity fraud fares no better. Indeed, the government does not even make any serious effort to identify what about Coscia's genuine trading activity purportedly made it "fraudulent." Instead, the government shifts to a "market manipulation" theory, claiming that Coscia caused people to buy or sell at "worse" prices than they otherwise would have. But the government conveniently forgets that Coscia was not charged with the distinct offense of market manipulation; he was charged with fraud. That is no minor detail when the basic problem with the government's theory of fraud is that, as courts have recognized, bona fide trading activity like Coscia's does not involve any fraud.

The government's suggestion that this Court postpone its review until others are prosecuted under this vague statute has nothing to recommend it. Rather than wait years to determine that this statute is too "shapeless a provision to condemn someone to prison" for violating it, *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015), and then deal with thorny questions of retroactivity, *e.g.*, *Welch v. United States*, 136 S. Ct. 1257 (2016), the far better course is to stop these prosecutions in their tracks. Telling traders they can go to prison for engaging in a practice commonly known as "spoofing" when there is no commonly held understanding of the term is no joke. It is a deprivation of due process that merits this Court's review.

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

As this Court recently reaffirmed, "'[t]he prohibition of vagueness in criminal statutes' … is an 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law.'" *Sessions v. Dimaya*, No. 17-1099, slip op.4 (2018) (quoting *Johnson*, 135 S. Ct. at 2556-57). The "void-for-vagueness doctrine" not only "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes"; it also "guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Id.* at 4-5. In this sense, the doctrine serves as "a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Id.* at 5. The Dodd-Frank Act's anti-spoofing provision provides none of these protections and invites far "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Id.* at 11.

The vagueness of the anti-spoofing provision is evident on its face. The statute cannot proclaim what spoofing "is" (because no one knows) so also purports to prohibit conduct "of the character" of spoofing (which has the essence of what, no one can say) or is "commonly known to the trade as" spoofing (the trade has no idea). This triply incoherent approach would be almost comically imprecise if the consequences of violating the statute were not up to 10 years in federal prison.

The government insists that the statute's parenthetical saves the day, and "the statute's definition of 'spoofing' is clear: It prohibits 'bidding or offering with the intent to cancel the bid or offer before execution.'" Opp.14 (quoting 7 U.S.C. §6c(a)(5)(C)). But as both the industry regulators responsible for overseeing this activity—Commodity Futures Trading Commission ("CFTC") and Chicago Mercantile Exchange ("CME")—have acknowledged, to the extent the statute's parenthetical is meant to serve as a definition, that definition is unworkable because it is patently overbroad. *See, e.g.*, 75 Fed. Reg. 67,302 (Nov. 2, 2010) ("How should the Commission distinguish 'spoofing' … from legitimate trading activity where an individual enters an order larger than necessary with the intention to cancel part of the order …?"); CA7.Dkt.25-2 at 388 (warning that applying the parenthetical definition literally would risk criminalizing "the legitimate cancellation of other unfilled or partially filled orders").

The basic problem—a problem with which the government never comes to grips—is that traders routinely place orders with the intent to cancel them before execution in the commodity futures markets. As the CFTC itself implicitly acknowledged when it ultimately failed to promulgate any rule clearly articulating what is and is not spoofing, there is no principled distinction to draw between the many well-recognized trading strategies that everyone accepts as legitimate and "bidding or offering with the intent to cancel the bid or offer before execution." 7 U.S.C. §6c(a)(5)(C). Thus, if the statute really means what the government says, then it outlaws many order types that no one understands to be illegal.

To avoid this result, the government embraces the Seventh Circuit's effort to distinguish an order "'designed to be executed upon the arrival of *certain subsequent events*,'" and an order placed with "'an intent to cancel the order *at the time it was placed*.'" Opp.12 (quoting Pet.App.23-24). "'The fundamental difference,'" the government claims, "'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.'" Opp.12-13 (quoting Pet.App.24). That purported distinction cannot withstand scrutiny. Traders place partial-fill, good-til-date, stop-loss, and ping orders with the intent that most (if not all) of the orders will be cancelled, Pet.8, meaning they are "never intended to be filled at all." Opp.13. A trader who simultaneously places several ping orders, for example, plainly intends that the vast majority will be "canceled without consummating any transaction." Opp.12 n.1. And stop-loss orders are programmed to execute only under certain unfavorable conditions, so "the goal" is very much "that the order always be cancelled without consummating any transaction," and "the metric of success" is whether that goal is achieved. Opp.12 n.1.

Moreover, the fact that these and other common orders are "'cancelled only following a condition subsequent to placing the order,'" Opp.12-13 (quoting Pet.App.24), does not distinguish them from Coscia's orders in the slightest. His orders likewise were programmed to cancel only upon the occurrence of certain conditions, and they were *executed* if someone filled them before one of those conditions came to pass. The distinction the government seeks to draw thus is

not a distinction at all, let alone a "fundamental" distinction that guards against the "unpredictability and arbitrariness" that the statute's vague text invites. *Dimaya*, slip op.11.

Unable to provide a coherent explanation of what is and is not spoofing, the government insists that it is immaterial because whatever spoofing may be, Coscia's trading qualifies. Perhaps that argument would get the government somewhere if the definition of spoofing were truly only "unclear at the margins." Opp.11; *but cf. Johnson*, 135 S. Ct. at 2561 (noting that a vague statute is void in all its applications). But the problem with the anti-spoofing statute is that it is not even clear what constitutes its *core*, let alone its outer contours. The government cannot cure that problem by arbitrarily declaring Coscia's conduct in its heartland, as one cannot be in the center of an undefined space. "The truth is, no one knows" how "to locate the ordinary case." *Dimaya*, slip op.1 (Gorsuch, J., concurring).[1]

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[1] At any rate, the government's portrayal of Coscia's conduct is largely untethered from the facts. The government declares that Coscia's "'cancellations represented 96% of all Brent futures cancellations on the Intercontinental Exchange during the two-month period in which he employed his software.'" Opp.6 (quoting Pet.App.25-26). In reality, Coscia represented only *0.0664%* of cancellations (*i.e.*, 47,649 out of 71,785,276) on the Brent contract during that time. N.D.Ill.Dkt.175-59. And the government's so-called "order-to-trade ratio," Opp.6, is an arbitrary metric that reflects only irrelevant details of how market participants *responded to* Coscia's trading activity. For example, if a trader placed a 10-lot order that was filled by 10 trades of 1 contract each, his order-to-trade ratio would be 1000%. If the *same trader's* 10-lot order was instead filled by 2 trades of 5 contracts each, his order-to-trade ratio would be only 200%.

Nor can the government differentiate between spoofing and the legitimate placing of trades that will not be fulfilled by emphasizing (literally) that the former "*artificially move* the market price of a stock or commodity." Opp.3. How one determines whether trading activity is *artificial* in an anonymous market where no one really wants to end up executing most of their trades, and where exchanges affirmatively permit traders to disguise their true intentions, is the whole problem. If Congress had drawn a clear line between the artificial and the real, then traders could conform their conduct. But making something a felony and hoping "the trade" will know it when they see it, *cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), just will not do. The government's felt need to highlight the word "artificial" only highlights the vagueness problem. The anti-spoofing provision is precisely the type of "[v]ague law" that "invite[s] arbitrary power … by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up." *Dimaya*, slip op.1 (Gorsuch, J., concurring).

II. The Court Should Grant Certiorari To Decide Whether Bona Fide Trading Activity Can Constitute Fraud.

The government begins defending the commodity fraud conviction by insisting that there was sufficient evidence that Coscia used his trading strategy "to manipulate the market for his own financial gain." Opp.17. That is a curious defense, as there is a statute

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This ratio thus says little, if anything, about Coscia's trading, and certainly does not "mean[] that his average order was 'much larger than his average trade,'" Opp.6 (quoting Pet.App.26).

that deals with "market manipulation"—7 U.S.C. §9—and Coscia was not charged with violating it, a fact that the government and the courts below conveniently ignore. *See, e.g.*, N.D.Ill.Dkt.162 at 9-12; Pet.25-26. The government cannot save its *fraud* conviction by insisting that it had sufficient evidence to convict Coscia of something else entirely, as "no person shall be made to suffer the onus of a criminal conviction except upon ... evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). The government's shifting of its legal theory only underscores how lacking in legal grounding its fraud theory truly is.[2]

To prove *fraud*, the government must identify some sort of *deception*. *See, e.g.*, *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016) ("'fraud' connotes deception or trickery"); *United States ex rel. O'Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 660 (2d Cir. 2016) (same); Restatement (Second) of Torts §525 (1977). And that is precisely what is lacking here. Coscia's trading orders were bona fide orders, and, as courts have recognized, bona fide orders cannot "artificially" move the market or otherwise create an "illusion of supply and demand," Opp.17.

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[2] The government likewise cannot bootstrap Coscia's spoofing conviction into a fraud conviction. Irrespective of its many flaws, the anti-spoofing provision resides neither in the CEA's "manipulative" practices provisions, *see, e.g.*, 7 U.S.C. §9, nor in provisions criminalizing securities and commodities fraud, *see, e.g.*, 18 U.S.C. §1348. It resides in the CEA's separate "disruptive" practices provisions, 7 U.S.C. §6c(a)(5), which does not require proof of fraud.

See, e.g., *United States v. Radley*, 659 F. Supp. 2d 803, 815 (S.D. Tex. 2009), *aff'd on other grounds*, 632 F.3d 177 (5th Cir. 2011); *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 208, 214 (3d Cir. 2001).

The government has little to say about these cases, dismissing one as a district court case and then making the unremarkable point that they arose in different factual contexts. But the government does not even try to distinguish their *legal* holdings that, irrespective of a trader's subjective intent, genuine trading activity cannot be characterized as fraud just because it impacted the market to the trader's benefit. As CME's former chief executive officer has explained, genuine orders "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." Pet.32 (citing CA7.Dkt.25-3 at 597). Thus, even accepting the premise that Coscia's orders "moved the markets," that does not convert those genuine and executable orders into fraud.

Once again, the government does not and cannot explain what differentiates Coscia's trading from trading that no one considers fraudulent. For example, it cannot explain how "iceberg" or "hidden quantity" orders, which are plainly designed to purposefully mislead the market about a trader's true intentions, Pet.8, 32-33, can be perfectly permissible while Coscia's trading somehow constitutes fraud. Moreover, to the extent the government tries to identify any "deception," its theory is nonsensical. While the government claims that those who traded on Coscia's small orders were "defrauded" because

"[t]hey bought or sold at worse prices," Opp.18, it conveniently neglects to note that all eighteen of the purported "victims" identified in the indictment, along with more than 2,200 others, traded on Coscia's *large* orders too. N.D.Ill.Dkt.156-1 at 9. Permitting commodity fraud to attach to legitimate trading behavior based solely on one side's alleged intent allows counterparties to have their cake and eat it too; they can benefit from filling "artificially" *de*flated orders, and then turn around and complain when they trade on "artificially" *in*flated orders based on the same purportedly "illusory" market imbalances.

As all of that underscores, trading is a complex activity that, as each trial witness acknowledged, depends on much more than the state of the "order book"—*i.e.*, the electronic list of buy and sell orders for a specific commodity—at any given moment (or millisecond) in time. As courts thus have correctly recognized in decisions that the government cannot distinguish, any conception of fraud that seeks to capture bona fide trading activity just because it may have "moved the market" is wholly unworkable. This Court should grant certiorari and reject the amorphous conception of commodity fraud that the decision below embraced.

III. This Case Is An Ideal Vehicle To Address These Important And Timely Issues.

This case presents an excellent vehicle for the Court to resolve the questions presented. The issues were pressed, passed upon, and fully developed through a trial record—something that is unlikely to occur again any time soon now that the Seventh Circuit's decision is the law of the land. The

government attempts to diminish the need for review by noting that spoofing prosecutions have arisen outside of the Seventh Circuit. But the government does not deny that it will be able to bring most cases in the Seventh Circuit. Indeed, the very press release that it invokes to support its wait-and-see approach refers to eight new prosecutions, *six* of which were brought in the Northern District of Illinois. And in the only case that was brought elsewhere and has proceeded past indictment, the government ended up asking the district court to dismiss the charges and allow it re-indict in the Northern District of Illinois. *United States v. Flotron*, No. 3:17-cr-220, 2018 WL 940554 (D. Conn. Feb. 19, 2018).

The government ignores the chilling effect that the vague anti-spoofing prohibition has on legitimate activity. As CME reiterated to the CFTC during its later-abandoned rulemaking effort, "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.25-3 at 592.

But there is a deeper flaw in the government's wait-and-see approach: The statute is hopelessly vague and chills market activity *now*. This Court could wait for subsequent traders to be deprived of their liberty in subsequent prosecutions and eventually decide that it is plainly unconstitutional to define a criminal offense principally based on a presumed common knowledge in "the trade" that

simply does not exist. The Court could then deal with the inevitable retroactivity questions that arise when it belatedly recognizes that a criminal statute is void-for-vagueness. *See*, *e.g.*, *Welch*, 136 S. Ct. 1257. Or the Court could intervene now before another person spends another day in federal prison based on a criminal statute that is plainly too "shapeless a provision to condemn someone to prison." *Johnson*, 135 S. Ct. at 2560. The choice is clear. This Court should grant review now to protect liberty and provide much needed clarity.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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