No. 16-3017

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL COSCIA,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 14-cr-551
The Honorable Judge Harry D. Leinenweber

REPLY BRIEF OF DEFENDANT-APPELLANT MICHAEL COSCIA

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INTRODUCTION

In its opposition brief, the Government retreats from its position that Coscia's orders were "illusions" or "illusory" – a position that it had maintained through sentencing. *See, e.g.,* Dkt. 157; RSA 33. The Government acknowledges that all of Coscia's orders were in fact subject to execution. The Government now insists, however, that this Court must affirm the commodities fraud conviction and hold that these "fully executable" orders nevertheless produced "illusory supply and demand" and the "illusion of market movement." Brief of the United States ("Opp."), Docket Entry 29, at 43. This Court should decline this extraordinary invitation.

According to the Government, the fraudulent scheme consisted of Coscia using "his knowledge and expertise to estimate the optimum length of time to keep his orders active in the market, to catch the attention of other traders, but without risking order fulfillment." *Id.* Yet the trial record is undisputed that any order in an operating market, including an order that remains open long enough to "catch the attention of other traders" and "cause[] the market to move" is, by definition, subject to the risk of fulfillment. *Id.* Because Coscia's fraud conviction is predicated on the indefensible factual premise (unsupported by the trial record) that Coscia somehow -- "without risking order fulfillment" -- misled other human and computer traders about an amorphous

assumption concerning the likely duration of his orders, it must be reversed. *Id.*

In this regard, the Government's fraud theory fails because no reasonable trader could have expected that Coscia's orders would rest in the market for any period of time or under any particular circumstances. As explained in Coscia's opening brief, the rapid placement and cancellation of orders is commonplace in the markets in which he traded. In fact, 98% of all orders in some of the largest futures markets were cancelled before being executed, and 630 million orders were cancelled within a second on the markets in which Coscia traded during the relevant period. Opening Br. 6-9. Moreover, as the trial testimony confirms, the sophisticated high-frequency traders that were allegedly victimized by Coscia's trading activity well understood that the order books in these electronic markets do not reflect the actual supply and demand levels in the marketplace because, among other things, the exchanges permit "hidden quantity orders" that allow traders to obfuscate their true intentions. *Id.* at 6, 29-35. In any event, the trial record is devoid of any evidence of any commonly-held understanding as to the likely duration of orders or the actual supply and demand levels in the markets. Given these market realities, as a matter of law, no reasonable trader was entitled to rely on the on-going availability of executable orders or the accuracy of the supply and demand signals reflected in the order book.

The Government's spoofing theory fares no better. While the Government does not dispute that high rates of rapid placement and cancellation of orders are prevalent in the markets at issue, it nonetheless contends that Coscia's trading is distinguished from other commonly-utilized and lawful orders types, including "stop-loss" orders and "fill-or-kill" orders, because, "[i]n those strategies, the trader intends to fill the orders, under specific circumstances." Opp. 36. The Government's latest theory rests on an artificial distinction unsupported by the trial record or common sense. The undisputed trial evidence demonstrates that Coscia's orders (which were always exposed to being filled) were subject to cancellation only upon the occurrence of one of three conditions, all of which were commonly deployed by market participants, including the supposed "victims" of his crimes. And there is no logical distinction between placing an order with the intent to *fill* it, under specific circumstances (which the Government deems to be lawful) and placing an executable order with the intent to *cancel* it, under specific circumstances (which the Government apparently deems to be unlawful, at least with respect to Coscia).

For precisely this reason, the anti-spoofing provision is, in fact, unconstitutionally vague. Particularly since the CFTC had not issued binding guidance on the anti-spoofing provision and ultimately abandoned its rule-making efforts, no reasonable person would have assumed during the relevant period that Congress intended to draw

some distinction (as the Government does in this appeal) between orders placed with intent to *fill* under certain conditions and orders placed with intent to *cancel* under certain conditions. Yet the Government insists that message is made clear through the parenthetical language in the statute. This interpretation of the anti-spoofing provision would permit arbitrary enforcement and expose virtually every algorithmic trader to the whims of prosecutorial discretion, based on selective characterization of cancellation and fill metrics to label someone an "outlier," as the Government has done with Coscia. This Court should prevent that outcome.

Finally, even if Coscia's convictions are affirmed, this matter should be remanded for resentencing based on the District Court's erroneous application of a loss enhancement. While the Government asserts that the loss enhancement does not require a showing of reasonableness, this Court has vacated loss enhancements that bear no relation to economic reality, and the same result is warranted here.

ARGUMENT

I. The Commodities Fraud Convictions Must Be Reversed

As explained in Coscisa's opening brief, the trial record is undisputed that (i) every one of his orders was intended to be – and was in fact – subject to execution risk; and (ii) no reasonable traders in the electronic futures markets could have expected his orders to rest in the market for any particular amount of time or under any particular

conditions. These conclusions are supported by extensive citations to the trial record, including testimony of the Government's own witnesses, regarding the order activity at issue and the nature of futures markets. Brief of Defendant-Appellant Michael Coscia ("Opening Br."), Docket Entry 18, at 6-9, 27-35. And they foreclose any rational finding that Coscia's trading was deceptive.

Because the Government is incapable of refuting these showings, it attempts to sidestep them by (i) arguing that Coscia's "fully executable" orders created only the "illusion" of supply and demand; (ii) urging a materiality standard that would be meaningless in the context of the commodity futures markets; and (iii) confusingly citing evidence of traders' dissatisfaction with algorithm performance as evidence that traders could have been *deceived* by Coscia's order activity. For the reasons set forth below, this Court should reject these efforts and reverse the commodities fraud convictions.

a. The Government Points To No Evidence That Coscia's Order Activity Was Deceptive

Ultimately, the Government's commodities fraud theory boils down to its characterization of Coscia's large order activity as creating the "illusion" of market movement that drove unwitting traders into his small orders. Opp. 43. According to the Government, Coscia "used his knowledge and expertise to estimate the optimum length of time to keep his orders active in the market, to catch the attention of other traders,

without risking order fulfillment." *Id.* at 43 (emphasis added). This theory is inherently implausible and contradicted by the trial evidence.

The trial record shows that Coscia's large orders were at risk of being filled: they were filled approximately 8,000 times (Tr. 417), and Coscia honored every one of those transactions.[1] Confronted with these undisputed facts, the Government acknowledges that Coscia's large orders were "fully executable" (Opp. 43), but argues that these genuine orders created only the "*illusion* of market movement." *Id.* (emphasis in original). Under this latest theory by the Government, the large orders themselves are no longer "illusory" as it had previously insisted (*see, e.g.* Dkt. 157; RSA 33); now they are "real." Opp. 43. The Government now theorizes (without any factual support) that the deception arises from the fact that these "orders typically were on the market just long enough to trigger a market reaction," but not long enough to risk "order fulfillment." *Id.* Further, the Government maintains that Coscia "selected price levels that were high or low enough not to risk fulfilment but close enough to the best bid or offer that the market noticed the change in supply and

[1] Moreover, the Government's assertion that Coscia tried to cancel these large orders *before* they were executed did not withstand scrutiny at trial: the Government's expert conceded on cross-examination that the cancellation orders he described in his direct testimony likely did *not* reflect attempts to cancel large orders before they could be filled. Tr. 238, 1392-94. Rather, these cancellation orders merely reflected attempts to cancel the balance of large orders after they had already been partially filled—and partial fill orders are undisputedly commonplace and legitimate. *Id.* (Of course, whether or not Coscia tried to cancel particular orders before execution does not change the fact that they were fully exposed to execution.)

demand." *Id.* According to the Goverment, "[a]ll of these things prove that, although the orders were real, defendant used them as part of a scheme to defraud[.]" *Id.*

Apparently lost on the Government is the fact that any order that is open long enough to provoke a market reaction is, by definition, subject to the risk of fulfillment. Likewise, if an order is visible and sufficient to alter the market's perception of supply and demand at particular price levels, it is also available to be bought (or sold) at the price level at which it rests. Tr. 234. And, of course, prices change in the marketplace because buyers and sellers quote prices that are different from the prevailing bids or offers. Tr. 1361. The Government's fraud theory openly disregards these fundamental market realities.[2]

Moreover, undisputed trial testimony from the Government's own witnesses establishes that traders (human and computer) in the electronic futures markets, including Coscia's supposed victims, are capable of reacting to market developments and changing positions in

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[2] Even as the Government concedes that Coscia's large orders were "fully executable," it confusingly suggests that the trial evidence shows that Coscia himself described the large orders as "decoys." Opp. 10, 27, 38, 42. This is disingenuous. As a threshold matter, Coscia himself never used the term "decoy," and the witness at issue was not referring to Coscia's large orders (that the Government contends were deceptive), but rather to commonly-utilized "ping" orders used by Coscia to ascertain market conditions. Tr. 498, 527-28, 919. And the witness made clear that his use of the term "decoy" did not have any deceptive connotations whatsoever. Tr. 528. In any event, even if Coscia subjectively believed his orders were decoys that would not be filled, it does not change the fact that, in an open market, they could be.

under 5 milliseconds. Tr. 668-70, 743-44; *see also* Dkt. 156-1 ¶ 28 & Table 6 (showing that over 1,900 different *manual* traders filled Coscia's large orders). By contrast, according to the Government, Coscia's algorithm was programmed to cancel his large orders only after one of three conditions was satisfied, and even then not until 250 – 400 milliseconds elapsed. Opp. 9-10, 18. This is a significant length of time in these electronic markets, and based on the trial testimony, no rational juror could conclude that orders left open for this length of time created only "illusionary" supply or demand or otherwise deceived the market.

Once the Government's counterfactual characterizations of Coscia's large orders are stripped away, and the orders are recognized for what they indisputably were – namely, real orders that were subject to genuine market risk and fully capable of execution by counterparties – the Government's presentation of Coscia's trading activity as a deceptive scheme descends into incoherence. For example, the Government contends that the fraud is also evident from the fact that Coscia "flipped to the opposite side of the market and reversed course" after cancelling his large orders. Yet this trading technique has been recognized as commonplace and legitimate. *See Stone Fort Holdings, LLC, v. Doe(s)*, 2016 WL 5934096, No. 16 C 4991, *5 (RWG) (N.D. Ill. Oct. 11, 2016). (holding that "there is nothing improper or illegitimate about placing passive orders in the order book and then reversing position"). And while the Government makes much of the high rate of fills for Coscia's smaller

orders compared to his larger orders, no inference of fraud can arise from the fact that counterparties chose to fill those orders at prices that they deemed acceptable. Indeed, the fact that nearly all of the counterparties to Coscia's small orders also filled his large orders demonstrates that Coscia's small order counterparties were not deceived; rather, these very traders were the same persons filling the large orders. *See* Dkt. 156-1 ¶ 29 (finding that "[o]ver 2,200 traders accounting for over 95% of all contracts traded by Mr. Coscia traded with both his small and large orders").

On this point, the Government goes to great lengths to try to distinguish this case from the *Radley* case, in which the District Court held that any misperceptions about the defendants' bids were not perpetuated or caused by defendants and, "[s]ince defendants were willing and able to follow through on all of the bids, they were not misleading." Opening Br. 27-29 (citing and quoting *United States v. Radley,* 659 F. Supp. 2d 803, 815 (S.D. Tex. 2009), *aff'd on other grounds*, 623 F.3d 177 (5th Cir. 2011). But the distinctions the Government attempts to draw between this case and *Radley* are unavailing.

In particular, the Government contends that Coscia did not "follow through" on all of his bids and he "caused misconceptions about his orders, namely, that he intended to trade them." Opp. 46-47 (internal quotation marks and citation omitted). Yet the Government proffered no

evidence at trial that Coscia did not honor any of his orders for as long as they were open; in fact, the evidence showed that he did. *See, e.g.,* Tr. 772. And there was no evidence whatsoever that Coscia caused any "misconceptions" about his orders. Rather, the Government's witnesses conceded that Coscia's orders did not contain any representations as to how long they would rest on the market or under what conditions they would be cancelled. Tr. 676, 720, 768-69. Thus, as in *Radley*, the orders at issue here were not fraudulent as a matter of law. *Radley,* 659 F. Supp. 2d at 815; *see also Stone Fort Holdings,* 2016 WL 5934096 at *6 (rejecting plaintiff's theory that defendants' orders could have plausibly "creat[ed] the false appearance of a change in the supply or demand for the securities[,]" given that "all of the offers or bids were legitimate and could have been matched by a willing participant placing an aggressive order").[3]

b. The Government Did Not Prove Materiality

The Government agrees that materiality is a required element of commodities fraud but asserts that Coscia waived his objections to the District Court's materiality definition during the jury instruction

[3] What the Government is apparently referring to in accusing Coscia of a failure to "follow through" in his bids is that he did not keep them open until they were filled, regardless of changing circumstances, such as time elapsed or other market conditions. But during the relevant period there was no law, regulation, or exchange rule that imposes a minimum resting time requirement in the rapidly evolving commodity futures markets, in which orders are canceled 98% of the time, often in milliseconds. Nor is there any evidence that traders in these markets expect orders to remain open for a minimum amount of time. *See infra* at 12.

conference. This assertion is incorrect and, in any event, misses the point. As Coscia demonstrated in his opening brief, the District Court applied an inapposite materiality standard in determining whether, as a matter of law, there was sufficient evidence from which a reasonable jury could find the materiality element satisfied. Opening Br. 29-30. And the question of what is the appropriate materiality standard to apply, which Coscia raised in the proceedings below, is subject to this Court's *de novo* review. *United States v. Thornton*, 539 F.3d 741, 745 (7th Cir. 2008).[4]

Ultimately, the Government and Coscia agree that the materiality inquiry should be focused on the perception of Coscia's orders among other sophisticated futures traders. *See* Opening Br. 29-35; Opp. 47-51. But the Government fails to answer, and therefore apparently concedes, Coscia's point that the District Court's "capable of influencing" standard is meaningless in the context of the futures markets, and that a different standard—such as the standard applied in securities cases—must apply. *See* Opening Br. 29-31.

For the materiality inquiry to be meaningful in this context, it must contain an element of reasonableness in connection with whether other traders could have been deceived by Coscia's purportedly fraudulent

[4] Coscia preserved his challenge to the adequacy of the District Court's materiality instruction during the proceedings below when he contended that, without additional elements, the instruction that "[a] fact or matter is material if it is capable of influencing the decision of the person[s] who learn[s] of it" was insufficient to hold the Government to its burden to prove materiality. Dkt. 74.

conduct. Opening Br. 26-27 (citing this Court's holdings that there is no scheme to defraud unless the scheme is "reasonably calculated to deceive persons of ordinary prudence" and collecting decisions from other Circuits showing that an alleged deception is only material if "there is a substantial likelihood that a reasonable investor would consider [the deceptive conduct] important in making a decision"). Here, there is no evidence in the record showing that traders harbored an expectation regarding the amount of time Coscia's orders would rest in the market in making their trading decisions. In fact, the Government's own witnesses confirmed the opposite. Tr. 676 ("When you see an order in the market, you don't know how long it's going to be resting in the market before it's withdrawn."); *see* Opening Br. 19-20. And these sophisticated traders also understood that, due to "Hidden Quantity" orders (aptly referred to as "iceberg orders" in the marketplace), "displayed liquidity" does not represent "true liquidity." *See* Opening Br. 8-9, 33-34 (citing Tr. 1155-56; *see also* Tr. 231-32, 350; Def. Ex. 207).

With no means to refute these critical facts, the Government instead attempts to confuse the issue by citing testimony from its trader witnesses about how their algorithms reacted to Coscia's fully executable orders in sub-optimal ways and had to be modified accordingly. Opp. 49-50. This testimony falls far short of establishing that any futures trader had a reasonable basis to assume that Coscia's large orders would remain open under any particular conditions or for any particular

amount of time, as would be necessary to demonstrate materiality under the appropriate standard.

For the same reason, the Government's efforts to distinguish the *Finnerty* and *Sullivan & Long, Inc.* holdings are unpersuasive. *United States v. Finnerty*, 474 F. Supp. 2d 530 (S.D.N.Y. 2007), *aff'd*, 533 F.3d 143 (2d Cir. 2008); *Sullivan & Long, Inc. v. Scattered Corp.*, 47 F.3d 857 (7th Cir. 1995). Indeed, the Government does not even attempt to grapple with the core principle arising from these decisions – namely, that there can be no fraud where the underlying conduct is not contrary to reasonable expectations. *See* Opening Br. 29-35. In interpreting the commodities fraud statute *de novo*, the Court should apply the same principle here and reverse the commodities fraud convictions.

II. The Spoofing Convictions Must Be Reversed

The anti-spoofing provision as applied to Coscia is unconstitutionally vague for two reasons. First, Coscia lacked fair notice that his at-issue trading was prohibited because, without any legislative history, recognized industry definition, or a CFTC rule to provide guidance, a person of ordinary intelligence could only speculate as to what Congress intended to proscribe when it placed "spoofing" in quotation marks without any citation to what was being quoted.[5]

[5] Coscia also established that, based on the placement of spoofing in the disruptive practices section of the Commodity Exchange Act and circumstances leading up to the Dodd-Frank Act, a plausible construction of the anti-spoofing provision would be one that limits its

Second, using the parenthetical phrase "bidding or offering with the intent to cancel the bid or offer before execution" as the literal definition of spoofing would enable arbitrary enforcement because the law provides no parameters to meaningfully distinguish Coscia's conduct from other orders cancelled before execution (at a 98% clip) in the world's largest futures markets. The Government's opposition, for the reasons set forth below, fails to contravene these arguments, and the spoofing conviction must be reversed accordingly.

a. The Anti-Spoofing Statute Is Inherently Vague

In his opening brief, Coscia demonstrated that (1) the futures industry proclaimed that the term "spoofing" was not commonly understood and the anti-spoofing provision did not provide adequate guidance as to what conduct it prohibited; (2) after the Dodd-Frank Act's enactment, the CFTC neither adopted the parenthetical clause as the definition of "spoofing" (as the Government urges this Court to do in this appeal) nor provided any other definition or binding guidance to the marketplace; and (3) a CFTC Commissioner warned that, without binding rules, the anti-spoofing provision was vague and it would leave the Government with unfettered discretion as to how to enforce the provision. Opening Br. 9-15, 42-44. This regulatory history

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application to non *bona fide* orders that are entered and cancelled in the pre-open of a market, and therefore without being subject to market risk. *See* Opening Br. 48-51; *infra* at 22-23.

demonstrates the lack of fair notice provided to Coscia. Opp. 32. The Government does not (and cannot) contest any of it.[6]

The inherent vagueness of the anti-spoofing provision is illustrated by the shifting interpretations ascribed to it by the District Court in the proceedings down below. Opening Br. 36-39. In its opposition, the Government dismisses the significance of the District Court's confusion, noting that the District Court's discussion of the statute does not bear on whether Coscia had fair notice years before. Opp. 33. But this misses the point: If an experienced federal judge cannot decipher the statute in a consistent way years after the CFTC published its binding guidance, this is a powerful indication that a person of ordinary intelligence would not have known what the statute prohibited before binding guidance was available. *Cf. Stoller v. CFTC*, 834 F.2d 262, 267 (2d Cir. 1987) ("The fact that the [Government] abruptly changed its own interpretation in the middle of the proceedings in our judgment further demonstrates the need

[6] The Government fails in its half-hearted attempt to brush away the extensive evidence that the industry did not have fair notice of the meaning of "spoofing." It asserts, without any support whatsoever, that "much of the cited industry debate has centered on what it means to be 'of the character of' or 'commonly known in the trade as' spoofing." Opp. 33. But the CFTC itself acknowledged in 2011 that the industry had requested that it define "spoofing" itself – not merely what would be "of the character of spoofing" or "commonly known in the trade as spoofing" — and that it "describe, with specificity, what trade practices constitute spoofing." Opening Br. 12-14. Despite the manifest confusion in the industry, the CFTC did not respond with adequate guidance by the time of Coscia's at-issue trading. *Id.*

both for a clearer and more explicit interpretation and for appropriate notice thereof to the public as to what conduct is permissible.”).

The Government’s revisionist portrayal of the District Court’s various interpretations of the statute does not change this conclusion. For example, the Government seeks to excuse the District Court’s erroneous statement that “intent to defraud” is an element of spoofing (Opening Br. 23) on the grounds that the District Court was merely using a “short-hand phrase” to distinguish Coscia’s trading from good faith trading. Opp. 33-34. In the same decision, however, the District Court identified “intent to defraud” as a specific element of the Government’s commodities fraud charges. Dkt. 124 at 9. Thus, under the Government’s reading, the District Court assigned different meanings to the same phrase within the same decision. This is implausible.

Moreover, the Government offers no explanation for why the District Court would incorrectly characterize spoofing as a subspecies of market manipulation in its order denying Coscia’s Post-Trial Motions, let alone an explanation for why the District Court’s jury instruction diverged from the reasoning expressed across multiple post-trial orders. Opening Br. 36-38.[7] As such, the confusion exhibited by the District

[7] While the Government defends the District Court’s characterization of spoofing as a form of market manipulation as “factually accurate” (Opp. 33-34), its belief that Coscia’s trading activity created an artificial price (the *sine qua non* of market manipulation) is unsupported by any trial evidence.

Court in interpreting the anti-spoofing provision remains a potent illustration of the anti-spoofing statute's inherent vagueness.

b. Coscia Lacked Fair Notice of The Government's Definition of Spoofing

The Government does not refute Coscia's argument that Congress, by placing the term "spoofing" in quotation marks, apparently intended to reference a term of art that Congress (incorrectly) believed was established in the industry, as it had done with the analogous "wash sales" provision. Opening Br. 40-42. The Government merely points to three decisions in which courts considered parenthetical clauses in defining a statutory term, and then asserts that the parenthetical clause must also define "spoofing" here. Opp. 31-32. None of these decisions, however, hold that a parenthetical clause defines a term that Congress also set off in quotation marks, as it did with "spoofing." *See Lopez v. Gonzales,* 549 U.S. 47 (2006) (construing the term aggravated felony in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(B)); *Desai v. Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008) (discussing construction of the term controlled substance in the Controlled Substances Act, 8 U.S.C. § 1182(a)(2)(A)); *Nutrilab, Inc. v. Schweiker*, 713 F.2d 335 (7th Cir. 1983) (construing the term articles in the Food, Drug and Cosmetic Act, 21 U.S.C. §321(f)). Because these decisions show that Congress did not place other statutory terms in quotation marks when defining them through parenthetical clauses, they actually *corroborate* Coscia's

contention that, by virtue of placing "spoofing" in quotation marks, Congress intended for the parenthetical clause *not* to define the term.

Moreover, even as the Government insists that the parenthetical clause supplies the definition of spoofing, and "[t]here hardly could be a clearer example of fair notice," it goes on to offer a construction of the parenthetical clause that does not correspond with the language in the parenthetical and otherwise defies logic. Opp. 30-37. Specifically, in attempting to explain why commonly-utilized and lawful orders types, such as "stop-loss" orders and "fill-or-kill" orders, supposedly fall outside the provision's intent requirement and do not implicate concerns of arbitrary enforcement, the Government states that, "[i]n those strategies, the trader intends to *fill* the orders, under certain circumstances." Opp. 36 (emphasis added).

There is no legitimate distinction between an order placed with the "intent to *fill* under certain circumstances" (apparently deemed lawful by the Government) and an order (which is subject to fulfillment at any time) placed with intent to *cancel* under certain circumstances (apparently deemed unlawful, at least with respect to Coscia). They are two ways of saying the same thing. And there is certainly nothing in the statute itself that would have placed a person of ordinary intelligence on notice to this artificial distinction during the relevant period. For this reason, too, Coscia lacked fair notice. *See Liparota v. United States*, 471

U.S. 419, 427 (1985) (holding that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity").[8]

c. The Anti-Spoofing Provision Encourages Arbitrary Enforcement

As shown above, embedded within the parenthetical language of the anti-spoofing provision, the Government perceives a distinction between orders placed with intent to *fill* under certain circumstances and those placed with intent to *cancel* under certain circumstances – which are two ways of saying the same thing. To be sure, this construction finds no mooring in the statutory language or the realities of the marketplace, but the mere fact that the Government felt compelled to offer it underscores the inherent vagueness of the statute. It also lays bare the risk of arbitrary enforcement that arises when a statute lacks meaningful parameters for law enforcement.

Because the Government cannot identify any such meaningful parameters within the statute, it argues that Coscia lacks standing to challenge whether commonly-utilized order types would be subject to a risk of arbitrary enforcement. Opp. 35. This argument runs contrary to

[8] To the extent that the Government's interpretation of the anti-spoofing provision as *permitting* orders to be placed with intent to fill (or cancel) under certain circumstances is correct, then the spoofing conviction must be reversed in light of the Government's repeated acknowledgments that Coscia's trading algorithm was programmed to cancel orders (which, as described above, were subject to execution) *only* upon the satisfaction of one of three conditions. *See, e.g.,* Opp. 18 (describing the three conditions that served as prerequisites to cancellations under Coscia's trading logic).

this Court's precedents. For example, in *Record Head Corp. v. Sachen*, the plaintiff sought injunctive and declaratory relief on the grounds that a criminal drug paraphernalia ordinance was unconstitutionally vague. 682 F.2d 672 (7th Cir. 1982). The Court struck down the ordinance on the grounds that that it enabled arbitrary enforcement. *Id.* at 679.[9] Its holding made clear that the harm wrought by a statute that enables arbitrary enforcement offends the Constitution regardless of whether the appellant shows that he is a victim of an arbitrary prosecution himself:

> By arbitrary enforcement, we do not mean isolated cases of possibly unjust enforcement, because the Court has indicated that challenges to the statute as applied are ordinarily an adequate protection. We mean rather enforcement that leaves to the arresting or prosecuting authorities the job of determining, essentially without legislative guidance, what the prohibited offense is. The vice of such enforcement is two-fold. First, it undermines the sense a citizen body must have, if it is to respect a system of law, that the law is the same for any offender. Second, it encourages legislators to evade difficult decisions that would otherwise subject them to political pressures and accountability.

Id. at 678. Here, the Government's interpretation of the anti-spoofing provision, if not limited by this Court, would provide the Government with unfettered discretion to accuse nearly any trader in the futures markets of spoofing. Yet this Court's precedents establish its authority to prevent "the vice of such enforcement" — and, in doing so, to prevent the chilling effect on legitimate futures trading that would follow. *Id.*

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[9] The Court did so while noting that the ordinance did *not* interfere with freedom of speech and therefore plaintiff could not mount a facial challenge on that basis. *Id.* at 675.

Moreover, contrasting Coscia's order activity with other commonly-utilized and conditional order types is a necessary prerequisite to determining whether his prosecution resulted from arbitrary enforcement. And, as shown above, the Government's only analysis of these alternative order types confirms that it is, in fact, drawing irrational and arbitrary distinctions as it relates to Coscia's order activity.

Without any other means to persuade this Court that Coscia's prosecution did not result from arbitrary enforcement, the Government points to various (benign) aspects of his trading and highly-selective (and in certain cases, inaccurate) statistics to assure this Court that Coscia was an "outlier" and appropriately targeted for punishment. These efforts are unavailing. For example:

- The Government emphasizes that Coscia cancelled 98.21% of his large orders. Opp. 15. This statistical measure aligns almost perfectly with the market-wide cancellation rate of 98% for the largest futures markets and, therefore, supports a finding of arbitrary enforcement here. In any event, even if Coscia's cancellation rate were 99.9%, there is no basis to conclude that persons who engage in otherwise lawful activity (cancellations) at a higher rate than others are committing a crime.

- The Government contends in its opposition that Coscia entered more large orders than all other market participants (*see* Opp. 4, 21, 39), an allegation that was controverted by data obtained post-trial (and whose legal significance is difficult to understand in any event). Dkt. 156-1 ¶ 17-20 & Table 4.[10]

[10] Based on data obtained post-trial, Coscia showed that over 50% of the orders placed by other market participants are open for less than one second, and that his cancellation rate on orders open for less than one second is similar to the cancellation rate for similar orders placed by all other market participants. Dkt. 156-1 ¶ 5.

- The Government contends that Coscia's expert witness Matthew Evans "acknowledged, on cross-examination . . . that other high-frequency traders rarely cancel large orders." Opp. 21. In fact, the exhibit being discussed by Evans showed that nine other high-frequency traders cancelled *more* large orders than Coscia. Tr. 1281-1283, Def. Ex. 523.

- The Government implies that Coscia behaved suspiciously by placing his small orders at prices that were away from the best bid or offer in the market, suggesting these prices "did not exist in the market." Opp. 3. But, as a matter of common sense, prices in the market change because buyers and sellers are willing to quote prices that are *different* from those currently prevailing in that market. By the Government's standard, every trader that places an order that is different from prevailing market prices is acting illegally (and hence prices should never change at all).

- The Government argues that Coscia's trading was unusual because he entered orders on opposite sides of the market, even though, as a District Court in this Circuit recently held, "there is nothing improper or illegitimate about placing passive orders in the order book and then reversing position." *Stone Fort Holdings,* 2016 WL 5934096 at *5.

Ultimately, the relevant inquiry is not whether Coscia's trading patterns were different from those of the other futures traders who cancelled 630 million orders within a second during the relevant period. Opening Br. 8. The relevant inquiry is whether the anti-spoofing provision provides any meaningful parameters for law enforcement to distinguish between proscribed and permitted conduct. *See Ashton v. Kentucky*, 384 U.S. 195, 199 (1966); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). For the reasons set forth above, it does not.

d. The Anti-Spoofing Provision Could Be Construed To Prohibit The Disruptive Practice Of Entering and Cancelling Orders Without Subjecting Them To Market Risk

The Government contends that Congress could not have intended the anti-spoofing provision to prohibit only those orders that are cancelled before being subject to market risk because "a trader cannot enter an order that is anything but real and tradable." Opp. 36-37 (internal quotation marks and citation omitted). This argument ignores that, prior to the enactment of the Dodd-Frank Act, both the CFTC and the CME pursued actions against traders for entering and cancelling orders within the pre-opening period—orders that were therefore *not* exposed to market risk (e.g., not executable). Opening Br. 48-51. Orders that are not subject to market risk are also inherently "disruptive" because they burden the exchange without increasing the liquidity or trading opportunities on the exchange.[11] Accordingly, this interpretation—unlike the District Court's interpretation of the anti-spoofing provision that conflates the offense with fraud and manipulation—would be consistent with Congress' placement of the anti-spoofing provision within the "Disruptive Practices" provision of the

[11] The Government contends Coscia's orders were "disruptive" because they "induced other traders to trade with him at prices that were not maximally efficient." Opp. 16. This assertion is unsubstantiated: the Government did not prove that Coscia created artificial prices, nor that the prices at which Coscia traded his small orders were not "maximally efficient," a term the Government does not even define. In fact, the Government's expert witness conceded that he could not conclude that Coscia "moved the market." Tr. 1386-87.

Commodity Exchange Act. 7 U.S.C. § 6c.[12] When construed in this manner, the anti-spoofing provision would reach conduct that clearly concerned regulators before the enactment of the Dodd-Frank Act—without enabling arbitrary enforcement. Opening Br. 48-51.

III. Coscia's Sentence Is Tainted By An Erroneous Guidelines Calculation

The application of Coscia's 14-point loss enhancement cannot stand unless the Government proved by a preponderance of the evidence that Coscia caused losses to victims, that those losses could not reasonably be calculated, and thus substituting gain for loss would be reasonable. The Government has failed to satisfy any of these requirements.

The Government contends that it would have been too difficult for it to calculate the actual losses. Opp. 52-57. Yet it had every opportunity to prove losses by analyzing the trading records available from CME. It just chose not to do so. And its failure to undertake any effort to prove losses here stands in contrast to the approach taken by the Government in other trading cases. *See, e.g., United States v. Walsh*, 723 F.3d 802, 806-09 (7th Cir. 2013) (upholding the Government's loss calculation that was "derived from an analysis of the Metatrader trading platform records"); *United States v. Moses,* 219 F. App'x 847, 850-51 (11th Cir. 2007) (upholding the Government's loss calculation based on

[12] Indeed, the CFTC acknowledged during its aborted rule-making process that some market participants understood the anti-spoofing provision to proscribe only these non-executable orders. Opening Br. 49.

expert examination of voluminous stock trading data). Further, the Government's emphasis on the large volume of trading data in this case is unpersuasive: the Sentencing Guidelines provide alternative methods to reasonably estimating losses, which the Government also chose not to undertake. U.S.S.G. §2B1.1 cmt. 3(C)(iv) (permitting the Government, when reasonable, to calculate loss based on the "approximate number of victims multiplied by the average loss to each victim").

The Government's lack of proof that Coscia caused any losses at all likewise renders erroneous the loss enhancement applied at sentencing. To meet its burden to show by a preponderance of the evidence that Coscia proximately caused losses, the Government relies on a single "loss" testified to by one trading firm (Citadel) that—as clearly shown in Coscia's opening brief—was disproven by data produced during the sentencing proceedings. *Compare* Opening Br. 54-55 *with* Opp. 54. The only other witnesses (two) that the Government contends incurred losses caused by Coscia provided threadbare, generalized testimony uncorroborated by proof of even a single, specific transaction. Opening Br. 55-56. The Government's reliance on this shallow support for a 14-point loss enhancement is unreasonable in light of its concession that any of Coscia's thousands of counterparties might just as likely have made, rather than lost, money. Opening Br. 24. The District Court's guidelines calculation cannot be sustained under these circumstances.

Moreover, Coscia established that the District Court's core assumption in holding that gain would be a reasonable proxy for loss—that Coscia's trading profits arose in a "zero-sum" environment in which his gains must have equaled other traders' collective losses—was a flawed construct borne out of the District Court's personal theories, ungrounded in any actual evidence regarding the nature of the commodity futures markets. Opening Br. 52-54. In response, the Government merely posits that a loss enhancement may be derived from gain regardless of whether gain is a reasonable estimate of loss. Opp. 55. Yet teasonableness lies at the heart of the Sentencing Guidelines. *See, e.g.,* U.S.S.G. §2B1.1 cmt. 3(A) (providing that "'actual loss' means the *reasonably* foreseeable pecuniary harm that resulted from the offense") (emphasis added); U.S.S.G. §2B1.1 cmt. 3(C) (requiring the court "make a *reasonable* estimate of the loss") (emphasis added). Accordingly, this Court should not uphold the application of a loss enhancement unsupported by any showing of reasonableness. *See United States v. Schneider*, 930 F.2d 555, 559 (7th Cir. 1991).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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Dated: October 20, 2016
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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2016, service of the foregoing document was made to all counsel of record via ECF.

Upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause fifteen copies of the brief to be transmitted to the Court within 7 days of that notice date.

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CERTIFICATE OF COMPLIANCE WITH FED. R. App. P. 32(A)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Bookman Old Style, Font Size 12.

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