No. 19-____

IN THE
Supreme Court of the United States

JAVIER SANCHEZ, GREGORY CASORSO,
and MICHAEL MARR,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sherman Act, 15 U.S.C. § 1, creates civil and criminal liability for certain anticompetitive conduct. Specifically, it prohibits any contract or combination "in restraint of trade or commerce." Consistent with the common law, this Court has long interpreted this language to require proof of an "unreasonable" anticompetitive effect. Most antitrust cases are therefore governed by the "rule of reason" and require an explicit finding of unreasonableness. At the same time, this Court has held that certain business arrangements are unlawful *per se*. In those cases, proof of one of those specified arrangements operates as a conclusive, or irrebuttable, presumption that the arrangement is unreasonable.

The question presented is whether the operation of the *per se* rule in criminal antitrust cases violates the constitutional prohibition—grounded in the Fifth and Sixth Amendments—against instructing juries that certain facts presumptively establish an element of a crime.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

United States v. Javier Sanchez, No. 4:14-cr-00580-PJH-2 (judgment Dec. 7, 2017).

United States v. Gregory Casorso, No. 4:14-cr-00580-PJH-3 (judgment Dec. 7, 2017; amended judgment Feb. 23, 2018).

United States v. Michael Marr, No. 4:14-cr-00580-PJH-1 (judgment Mar. 23, 2018).

United States v. Victor Marr, No. 4:14-cr-00580-PJH-1 (judgment of acquittal Aug. 22, 2017).

United States Court of Appeals (9th Cir.):

United States v. Javier Sanchez, No. 17-10519 (judgment Jan. 25, 2019).

United States v. Gregory Casorso, No. 17-10528 (judgment Jan. 25, 2019).

United States v. Michael Marr, No. 18-10113 (judgment Jan. 25, 2019).

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PETITION FOR WRIT OF CERTIORARI

Petitioners Javier Sanchez, Gregory Casorso, and Michael Marr respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit's opinion is reproduced at Pet. App. 1-5.

JURISDICTION

The Ninth Circuit issued its opinion on January 25, 2019 and denied petitioners' timely request for rehearing en banc on April 3, 2019. Pet. App. 1-5, 47-56. On June 19, 2019, Justice Kagan extended the time for filing this petition to and including August 1, 2019. *See* No. 18A1342. On July 17, 2019, Justice Kagan further extended the time for filing this petition to August 30, 2019. *See id.* This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 15, Section 1 of the United States Code states, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on

> conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

INTRODUCTION

The Fifth and Sixth Amendments give a criminal defendant the constitutional right to have a jury decide whether the prosecution has proven every element of a charged offense beyond a reasonable doubt. Furthermore, this Court has repeatedly held that any jury instruction that takes an element away from jurors by directing them to rely on an "irrebuttable or conclusive presumption" is unconstitutional. *Francis v. Franklin*, 471 U.S. 307, 317 (1985); *see also, e.g.*, *Carella v. California*, 491 U.S. 263, 265-66 (1989) (per curiam); *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979); *Morissette v. United States*, 342 U.S. 246, 274-75 (1952).

In this case, the Government charged petitioners with committing Sherman Act antitrust violations. Those charges, the Government recognized, required it to prove that petitioners engaged in an "unreasonable" restraint of trade and commerce. Indictment, N.D. Cal. ECF No. 1, at 14-16, 19-21. Yet at petitioners' trial, the district court instructed the jury that the key element of the offense the petitioners allegedly committed—engaging in "unreasonable" conduct—had been established by a conclusive presumption that "bid rigging" is automatically unlawful. Such instructions are uniformly given in "*per se*" criminal antitrust prosecutions, and several courts of appeals have upheld their use.

The question presented is whether giving a "*per se*" instruction in criminal cases transgresses the constitutional prohibition against conclusive presumptions. In the decades since it established the rule against conclusive presumptions, this Court has not directly addressed, much less resolved, the constitutional conflict posed by reliance on an irrebuttable presumption of unreasonableness in a *per se* antitrust prosecution. In fact, it last applied the *per se* rule in a criminal case in 1945, before the emergence of its "conclusive presumptions" jurisprudence and when criminal violations of the Sherman Act were misdemeanors.

It is past time to confront this problem, and this is the ideal case in which to do it. Criminal violations of the Sherman Act are now punishable by ten years' imprisonment, and the Government sought substantial sentences here. Petitioners responded by proffering credible evidence that the bid rigging in

which they engaged was actually pro-competitive (and therefore reasonable). But they were prevented from presenting that contention to the jury. As a result, they were convicted and sent to prison, without the jury ever deciding whether their conduct was unreasonable.

STATEMENT OF THE CASE

1. Petitioners Sanchez, Marr, and Casorso were engaged in real estate business. They primarily owned, operated, and brokered rental properties in Alameda and Contra Costa counties in California. From 2008 to 2011, in the wake of the financial crisis, they purchased bank-owned properties at foreclosure auctions.

In 2014, the Government indicted petitioners, alleging various counts of "bid rigging" as an unreasonable restraint of trade, in violation of the Sherman Act. In particular, the Government alleged that, although petitioners were nominally competitors, they and other coconspirators worked together to rig bids at the auctions. According to the Government, the conspirators would agree in advance not to bid against each other on certain properties at the auctions. They would agree not to bid above a certain price, or they would appoint one person to bid. Then, if they obtained a property, they would subsequently conduct private resale auctions among themselves to determine who would ultimately own the property.

2. Petitioners did not deny that they had coordinated bidding. Instead, they sought to argue that their conduct was necessary—and, indeed, pro-competitive—under the extraordinary circumstances

that prevailed at the time. Accordingly, petitioners moved in the district court to argue to the jury that their conduct was permissible under the rule of reason.

In support of that motion, petitioners proffered various evidence, including declarations from two experts. *See generally* Andrien Decl., N.D. Cal. ECF No. 66-1; O'Toole Decl., N.D. Cal. ECF No. 66-2. The fundamental market truth revealed by the experts was that the banks had near total control of the auction markets. The banks owned the properties, and were thus sellers—but they also acted as buyers. Indeed, the banks purchased approximately 85% of the auctioned properties. Andrien Decl. ¶¶ 21, 27. The banks were able to control all information about the properties, and were thus able to purchase foreclosed properties at below-market prices, realizing substantial profits. *See, e.g.*, O'Toole Decl. ¶¶ 8, 11.

The banks exploited their dominant position in the market. The banks listed hundreds of properties for auction per day, but bidders were not notified of the listed properties *until the day of the auction*. *See, e.g.*, O'Toole Decl. ¶¶ 5, 7, 10, 11. Prior to the day of the auction, therefore, no bidders other than the banks had any relevant information about the properties. Among other things, outside bidders were not told: whether the property was occupied, whether the property had any existing leases, whether the property had any tax liens (which the buyer would have to pay after purchase), whether the property had a remaining mortgage, whether the property was in marketable condition or had defects and damage, whether the party had marketable title, and so on.

What is more, of the hundreds of listed auction properties, only a small percentage would actually be sold at the auction. Outside bidders would not know until the time of the auction itself which properties would come up. Therefore, even on the day of the auction, after receiving the list of possible properties, outside bidders could not effectively conduct due diligence because they could only guess which properties to research.

The properties were sold "as is," with no disclosures of defects and no customary warranties. Indeed, the banks would not even warrant that the address of the properties was correct. *See* O'Toole Decl. ¶ 8. The banks set the opening bid—which, of course, was not disclosed until the time of the auction. Making matters worse, state law held that all bids at foreclosure auctions were irrevocable offers to purchase and could not be rescinded. *See id.* ¶ 9. All sales were final, and were payable in cash immediately after the auction.

In short, petitioners sought to show at trial that, given the extraordinary barriers outsiders confronted in California's foreclosure auction system, they had to coordinate bids in order to participate at all. They sought to show that their coordination efforts, while ostensibly anti-competitive, were actually pro-competitive. Petitioners' defense, moreover, was not based on mere supposition. Their expert witnesses offered empirical analyses showing that, after the government raided petitioners' businesses and ended the supposed conspiracy, auction prices actually went *down*. *See, e.g.*, Andrien Decl. ¶¶ 23, 26, 29, 32.

3. Prior to trial, the district court denied petitioners' motion to have the case analyzed under the rule of reason; it ruled that because petitioners were charged with bid rigging, a *per se* antitrust violation, they were not allowed to present their actual reasonableness defense. Pet. App. 7-12. The court further held that, because the case was charged as "a per se case, no argument as to reasonableness or lack of economic harm [would] be permitted in closing." *Id.* 40.

The district court also rejected several jury instructions proposed by the defense. Instead, it adopted those proposed by the Government. The district court thus instructed the jury as follows:

> The Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are *conclusively presumed* to be illegal, without inquiry about the precise harm they have caused or the business excuse for their use. Included in this category of unlawful agreements are agreements to rig bids.
>
> Therefore, if you find that the government has met its burden with respect to each of the elements of the charged offense, you need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any, done by it.

Pet. App. 42-43 (emphasis added).

Given the district court's rulings and jury instructions, the jury verdict of guilt was essentially a foregone conclusion. The jury, indeed, returned guilty verdicts on all counts. The district court sentenced petitioners to terms of imprisonment ranging from eighteen to thirty months and imposed substantial fines.

4. Relying on *United States v. Manufacturers' Association of Relocatable Building Industry*, 462 F.2d 49 (9th Cir. 1972), the Ninth Circuit affirmed petitioners' convictions.

The defendant in *Manufacturers'* was charged with a criminal antitrust offense, and—like petitioners here—it sought to present a defense based on reasonableness. But the *Manufacturers'* jury was instructed that because the defendant was charged with a *per se* offense, it could not consider reasonableness. On appeal, the defendant argued that the jury instructions impermissibly removed an element of the offense from the jury's consideration, in violation of the Due Process Clause.

The Ninth Circuit rejected that argument. It reasoned that the Sherman Act actually forbids two distinct substantive offenses: (1) *per se* crimes, and (2) rule-of-reason crimes. *Mfrs.'*, 462 F.2d at 52. It then asserted that those crimes have different elements—the latter has an element of unreasonableness, but the former does not. *Id.* Therefore, since *per se* offenses have no element of unreasonableness, the jury instructions did not preclude the jury from considering any element of the offense. *Id.*

In this case, petitioners argued that *Manufacturers'* was no longer good law (if it ever was). Specifically, petitioners maintained that the foundations of *Manufacturers'* have been severely eroded by intervening decisions of this Court—both in antitrust law and also in constitutional criminal procedure. But the Ninth Circuit disagreed. The panel held that *Manufacturers'* was still good law, and thus that it was "bound" by that earlier decision. Pet. App. 2.

REASONS FOR GRANTING CERTIORARI

This Court has never determined whether the *per se* rule in antitrust cases can be squared in criminal prosecutions under the Sherman Act with the constitutional prohibition against conclusive presumptions. It should do so now and hold that it cannot.

A. The *Per Se* Rule In Antitrust Law Is Incompatible With The Constitutional Prohibition Against Conclusive Presumptions.

The question presented in this case arises at the juncture of two separate threads of this Court's case law. First, in antitrust law, this Court has created the *per se* rule, which holds that in certain types of antitrust cases, unreasonableness is conclusively presumed, and therefore need not be proven. But second, in a series of constitutional criminal procedure cases, this Court has held that conclusive presumptions are never allowed.

1. a. The text of the Sherman Act, 15 U.S.C. § 1, prohibits any contract or combination "in restraint of

trade or commerce." These statutory terms "took their origin in the common law." *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911); *see also* VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1501 (3d ed. 2010). And under the common law, a "restraint of trade" was "synonymous with" an "*undue* restraint of the course of trade." *Standard Oil*, 221 U.S. at 61 (emphasis added); *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (common law did not reach acts that were "reasonably necessary" to the legitimate operation of business), *aff'd*, 175 U.S. 211 (1899). Consequently, in its seminal *Standard Oil* decision, the Court held that the Act requires challenged business activities to be judged according to "*the standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute." 221 U.S. at 60 (emphasis added); *see also Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

In short, "this Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Or, as Justice Brandeis wrote a century ago, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

b. In practice, the inquiry into reasonableness can be "complex" and "entails significant costs." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982).

It requires, among other things, "expert understanding of industrial market structures." *Id.* It can even require "incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been reasonable." *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Therefore, as a matter of convenience and "litigation efficiency," this Court has created a series of "*per se* rules," covering certain types of business practices. *Maricopa Cty.*, 457 U.S. at 343-44; VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1511b (3d ed. 2010) ("The value of the per se rule lies in the reduction of the private and institutional costs of litigation, which can be considerable."). In such cases, it is "irrelevant" whether the defendant's business practice was, in fact, reasonable. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 (1972). Instead, once the plaintiff proves that the defendant engaged in a specified business practice, there is "a *conclusive presumption* that the restraint is unreasonable." *Maricopa Cty.*, 457 U.S. at 344 (emphasis added).

Because the *per se* rules rely on "broad generalizations about the social utility of particular commercial practices," *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977), the Court has long acknowledged that they are "imperfect," *Maricopa Cty.*, 457 U.S. at 344. That is, the *per se* rules invalidate some combinations "that a fullblown inquiry might have proved to be reasonable." *Id.* But they are nonetheless justified in civil antitrust cases because they save time and money. Furthermore, conclusive presumptions in civil cases comport with due process so long

as they "bear a sufficiently close nexus with [the] underlying policy objectives." *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975).

2. In criminal cases, however, conclusive presumptions are impermissible. The Fifth and Sixth Amendments require that a jury find each element of the offense beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 (1970). Conclusive presumptions violate those constitutional requirements.

Under the Fifth Amendment's Due Process Clause, a defendant must be presumed innocent until he is proven guilty beyond a reasonable doubt. A conclusive presumption violates this guarantee. "A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption." *Francis*, 471 U.S. at 314 n.2; *accord Sandstrom*, 442 U.S. at 517. Such a presumption thus "foreclose[s] independent jury consideration of whether the facts proved established certain elements of the offenses." *Carella*, 491 U.S. at 266. This is incompatible "'with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.'" *Sandstrom*, 442 U.S. at 523 (quoting *Morissette*, 342 U.S. at 275).

Conclusive presumptions also violate the Sixth Amendment right to a jury trial. Even when elements involve the determination of "legal questions," those elements must be found by a jury. In *United States v. Gaudin*, 515 U.S. 506 (1995), therefore, this Court invalidated a longstanding practice allowing judges rather than juries to determine the element of materi-

ality in criminal fraud cases. "[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id*. at 514.

This process of requiring juries to find all ultimate facts may sometimes be less efficient than imposing mandatory presumptions. But the Sixth Amendment's jury trial right "cannot turn on whether or to what degree trial by jury impairs the efficiency" of litigation. *Blakely v. Washington*, 542 U.S. 296, 313 (2004). The right to jury trial "isn't designed to promote efficiency but to protect liberty." *United States v. Haymond*, 139 S. Ct. 2369, 2384 (2019). The right, therefore, "has never been efficient; but it has always been free." *Ring v. Arizona*, 536 U.S. 584, 607 (2002) (quotation marks omitted).

B. The Constitutional Prohibition Against Conclusive Presumptions Must Prevail Over The Judicially Created *Per Se* Rule.

This Court has not applied a *per se* rule in a criminal case since its decision in *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945). But the Government continues to prosecute individuals and companies for *per se* violations of the Sherman Act. And lower courts continue to allow juries to be instructed in such cases, as here, that certain types of business practices are "conclusively presumed to be illegal." Pet. App. 42.

The interaction between this Court's antitrust jurisprudence and its modern criminal procedure jurisprudence creates a conundrum. The conclusive presumption established in the Court's *per se* rules is a

longstanding principle of antitrust law. But when antitrust violations are prosecuted criminally, that principle clashes with a bedrock constitutional right—the right to have every element be found by a jury, such that conclusive presumptions are unconstitutional.

In this situation, the judicially created *per se* rules must give way. To state the obvious, constitutional rules must prevail over statutory rules—and, even more so, over judicial glosses created to administer statutory rules. The Constitution reigns supreme.

In fact, this Court has already confirmed as much in another antitrust case raising a similar issue. In *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), this Court explained that, given the common-law tradition of requiring *mens rea* for criminal offenses, "a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence." *Id.* at 435; *see also id.* at 436-43. In addition, the Court held that this element "cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices." *Id.* at 435.

In so holding, the Court acknowledged that the Sherman Act "has not been interpreted as if it were primarily a criminal statute." *Gypsum*, 438 U.S. at 439. And "a civil violation" of the Sherman Act "can be established by proof of either an unlawful purpose *or* an anticompetitive effect." *Id.* at 436 n.13 (emphasis added). But that is of no moment in criminal cases. The fact finding regarding every element of a criminal offense "must be left to the trier of fact alone." *Id.* at 446. That being so, instructions telling the jury that "the requisite intent followed, *as a matter of law*, from

a finding that the [defendant's conduct] had an impact on prices" could not be given in a criminal antitrust case. *Id.* Citing *Morissette*, the Court explained that "the jury must remain free to consider additional evidence before accepting or rejecting [any] inference" regarding intent. *Id.*

The same basic reasoning applies here. In a civil case involving the *per se* rule, a jury may be instructed to presume that a certain type of business, such as the bid rigging at issue here, satisfies the element of unreasonableness. But, in a criminal case, such a conclusive presumption violates due process and the right to jury trial. It impermissibly removes the element of unreasonableness from the case "once the [prosecution] has proved the predicate facts giving rise to the presumption." *Francis*, 471 U.S. at 314 n.2.

C. The Lower Courts' Efforts To Justify Using The *Per Se* Rule In Criminal Cases Conflict With The Plain Text Of The Sherman Act And This Court's Case Law.

The lower courts and commentators have struggled to resolve the tension between antitrust law's *per se* rules and this Court's criminal procedure cases. At oral argument in this case, for example, one of the Ninth Circuit judges recognized that there is a "tension that lies between the application of a *per se* rule and the Supreme Court's holding, in admittedly a very different context, that in criminal cases, you

don't have mandatory presumptions."[1] Commentators—including a former lawyer in the Government's antitrust division—have gone even further, suggesting that the *per se* rule simply cannot be squared with the prohibition in criminal cases against conclusive presumptions. *See* Robert Connolly, *How Per Se Rule Will Die In Criminal Antitrust Cases*, Law 360 (Mar. 20, 2019); James J. Brosnahan & William J. Dowling III, *The Constitutionality of the Per Se Rule in Criminal Antitrust Prosecutions*, 16 Santa Clara L. Rev. 55, 56 (1975).

There is, of course, a relatively simple solution at hand: holding that the time-saving device of *per se* treatment applies in civil cases but not in criminal cases. After all, the Court adopted the equivalent resolution in *Gypsum*.

But courts of appeals that have addressed the issue have resisted that simple solution. Instead, they have engaged in legal and semantic gymnastics, none of which withstands scrutiny.

1. The Ninth Circuit has attempted to justify the *per se* rule's application in criminal cases by holding that the Sherman Act creates two distinct offenses. According to the Ninth Circuit, this Court "has enunciated two distinct rules of substantive law: (1) certain classes of conduct, such as price-fixing, are, without more, prohibited by the Act; (2) restraints upon trade or commerce which do not fit into any of these classes are prohibited only when unreasonable."

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[1] 9th Cir. Oral Arg. Video 18:08-22 (Jan. 16, 2019), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014940.

United States v. Mfrs.' Ass'n of Relocatable Bldg. Indus., 462 F.2d 49, 52 (9th Cir. 1972). Because the first category of offense has no element of unreasonableness, the Ninth Circuit's reasoning goes, there is no constitutional transgression: "The *per se* rule does not operate to deny a jury decision as to an element of the crime charged, since 'unreasonableness' is an element of the crime only when no *per se* violation has occurred." *Id.*

This "two offenses" theory has no support in the Sherman Act's statutory text. By its plain terms, the Act defines a single offense, not two. And this Court has made clear that, absent clear textual indication to the contrary, courts should assume that one piece of text in a criminal statute defines a single offense. *McNally v. United States*, 483 U.S. 350, 358-59 (1987).

The "two offenses" theory also conflicts with this Court's antitrust jurisprudence. "'[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.'" *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779-80 (1999) (brackets in original) (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984)). In other words, while different types of business practices may trigger different modes of judicial scrutiny (at least in civil cases), the "categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear." *Id.* at 779. In the end, there is only a single prohibition against unreasonable "restraint of trade." 15 U.S.C. § 1.

2. Faced with the reality that the Sherman Act establishes only a single crime, the Ninth Circuit in *Manufacturers'* made one other attempt to reconcile the *per se* rule with the constitutional bar against conclusive presumptions. The Ninth Circuit claimed that "[t]he *per se* rule does not establish a presumption" at all. *Mfrs.'*, 462 F.2d at 52. Instead, "[w]hen the Court describes conduct as *per se* unreasonable, [it does] no more than circumscribe the definition of 'reasonableness.'" *Id.*

The Seventh Circuit, faced with the same constitutional argument that petitioners raise here, has similarly reasoned that the *per se* rule is a substantive rule of law rather than an evidentiary presumption. "It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.'" *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979) (quotation marks omitted).

This is a fascinating quotation. The problem, of course, is that the Sherman Act does *not* read "An agreement among competitors to rig bids is illegal." Ordinarily courts cannot resolve problems of statutory interpretation by positing "as if" solutions. Rather, this Court's "job" is to "apply faithfully the law Congress has written," not to "rewrite" its text. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). All the more so in criminal cases. Federal crimes are "solely creatures of statute," *Liparota v. United States*, 471 U.S. 419, 424 (1985), and "the notion of a common-law crime is utterly anathema," *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting). "Only the people's elected representatives in Congress have the power to write new federal

criminal laws." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019).

What is more, the Ninth and Seventh Circuit's reasoning flies in the teeth of this Court's precedent. Recall that in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the Court explained that the *per se* rule is "a conclusive *presumption* that the restraint is unreasonable." *Id.* at 344 (emphasis added). The Court has used the same phrase since *Standard Oil Co. v. United States*, 221 U.S. 1 (1911): "conclusive *presumption*." *Id.* at 65 (emphasis added); *see also, e.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (stating that price-fixing is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it] ha[s] caused or the business excuse for [its] use"); *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 100 ("In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.").

The Court has also made clear that the presumption is an evidentiary shorthand, not a substantive construction of the Sherman Act. As the Court has explained, claims of enhanced competition in *per se* cases are "unlikely to prove significant in any particular case." *Maricopa Cty.*, 457 U.S. at 351; *see also N. Pac. Ry.*, 356 U.S. at 5 (reasonableness inquiries in *per se* cases are "so often wholly fruitless when undertaken"). "For the sake of business certainty and litigation efficiency," therefore, the Court "tolerate[s] the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Maricopa Cty.*, 457 U.S. at 344. This is a rule of expediency, not

substance. After all, the Act prohibits only "unreasonable" business practices, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); this Court lacks the power to hold it substantively dictates otherwise.

3. Other circuits have, in effect, taken the opposite tack from the Ninth Circuit. Instead of reasoning that the *per se* rules are simply definitions of "unreasonableness," the Second Circuit maintains that "the Sherman Act does not make 'unreasonableness' part of the offense." *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981). Reasoning that "there [is] no need for the government to prove that the [defendant's conduct was] unreasonable," that court finds no problem cutting the jury out in *per se* cases of the "judicially-created" finding in that respect. *Id.* at 294-95. The Third and Eleventh Circuits have adopted this same logic. *See United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195-96 (3d Cir. 1985); *United States v. Giordano*, 261 F.3d 1134, 1144 (11th Cir. 2001).

This reasoning fares no better than the Ninth or Seventh Circuit's justifications for allowing the *per se* rule's conclusive presumption to operate in criminal cases. "[T]his Court has long recognized that Congress intended to outlaw only *unreasonable* restraints." *Khan*, 522 U.S. at 10 (emphasis added). As we have explained, that is what the common law required, and the Court has construed the Sherman Act's text to incorporate that element. *See supra* at 9-10. Lower courts cannot simply pronounce that the element of unreasonableness does not exist.

* * *

Frankly speaking, not only is the Sherman Act "unlike most traditional criminal statutes," *United*

States v. U.S. Gypsum Co., 438 U.S. 422, 438 (1978), but antitrust law has been inattentive to the special problems that arise in criminal proceedings. Nearly all of this Court's antitrust cases—and all of its recent cases—have been civil cases. Multi-volume antitrust treatises barely mention criminal practice. Most attorneys specializing in antitrust law spend their entire careers practicing solely in the civil arena.

But the Sherman Act is a criminal statute as well as a civil statute, and federal prosecutors can use it to deprive citizens of their liberty. As some American politicians and citizens call for more aggressive antitrust enforcement, it is reasonable to expect even more criminal antitrust actions. The implications of criminal antitrust law merit greater attention. In particular, this Court should clarify how antitrust law interacts with the constitutional rights guaranteed to criminal defendants. While antitrust jurisprudence is in some ways exceptional, the Bill of Rights contains no antitrust exemption.

In this case, petitioners were prosecuted for a violation of the Sherman Act, and they sought to defend themselves by showing that their conduct was actually pro-competitive and therefore beyond the reach of the Act. Petitioners had a credible defense in this respect, backed by experts prepared to testify that their conduct was reasonable. But because of the *per se* rule, they were prevented from presenting that argument to the jury. As a result, they were convicted, and sentenced to terms in federal prison. This case presents an ideal vehicle to consider whether that mode of procedure, and the operation of the *per se* rule, is constitutionally valid when individual liberty is on the line.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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