No. 19-288

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

REPLY BRIEF FOR PETITIONERS

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The Government does not contest the importance of the question presented—namely, whether operation of the *per se* rule in criminal antitrust cases contravenes the constitutional prohibition against conclusively presuming elements of crimes. Nor does the Government dispute that this case is an excellent vehicle for resolving this issue. Instead, the Government urges this Court to deny certiorari solely on the ground that the Ninth Circuit and other lower courts have correctly held that the *per se* rule does not run afoul of the Fifth and Sixth Amendments.

The Government's merits argument, however, never grapples with any of the reasoning in this Court's conclusive presumption cases. Indeed, the Government barely references those cases' holdings at all. In other words, confronted with a collision between two lines of case law, the Government simply ignores one of the lines of cases. This will not do. When *both* lines of case law are considered, it is apparent that the *per se* rule cannot be reconciled with this Court's modern criminal procedure jurisprudence. This Court should grant certiorari and reverse.

1. The Fifth and Sixth Amendments prohibit "conclusive presumption[s]" in criminal cases. *Francis v. Franklin*, 471 U.S. 307, 314 n.2 (1985). And in case after case, this Court has characterized the *per se* rule as a "*conclusive presumption* that the restraint [on trade that the Government challenges] is unreasonable." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 344 (1982) (emphasis added); *see also* Pet. 19 (citing several other cases). The district court here characterized the rule exactly this way too,

noting that bid rigging "is conclusively presumed to be unreasonable." Pet. App. 16. The court thus instructed the jury that if it found petitioners had an agreement to rig bids, it "need not be concerned with whether the agreement was reasonable or unreasonable." *Id.* 42. Instead, the district court instructed, bid rigging is "conclusively presumed to be illegal." *Id.*

The Government nevertheless protests—without providing any citations or explanation—that the rule that certain business arrangements are *per se* unreasonable is not a conclusive presumption "of the kind this Court has disapproved." BIO 12 n.2. The Government is wrong. As this Court has explained in its cases prohibiting conclusive presumptions, "[a] mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." *Francis*, 471 U.S. at 314. An example is the state law in *Carella v. California*, 491 U.S. 263 (1989) (per curiam), which required juries to be instructed that "intent to commit theft by fraud is presumed from failure to return rented property within 20 days of demand." *Id.* at 265 (internal quotation marks omitted). Such a "conclusive presumption" violates the Fifth and Sixth Amendments, the Court reasoned, because it "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; *see also Carella*, 491 U.S. at 266.

This description of an impermissible "conclusive presumption" describes the *per se* rule perfectly. The Sherman Act prohibits "only *unreasonable* restraints" on trade. *State Oil Co. v. Kahn*, 522 U.S. 3, 10 (1997)

(emphasis added); *see also* Pet. 10. The Government, therefore, does not deny that unreasonableness is an offense element in any Sherman Act prosecution. Yet the *per se* rule removes the element of unreasonableness from the case once the prosecution proves certain predicate facts (here, bid rigging). The *per se* rule thus does in criminal antitrust cases exactly what this Court's criminal procedure jurisprudence forbids.

2. The Government next contends this Court has held that price-fixing agreements are "categorically," or "necessarily," unreasonable under the Sherman Act. BIO 7, 9. This contention, however, misreads this Court's case law. The Court has admitted that "the match between the presumed and the actual" in the context of the *per se* rule "is imperfect." *Maricopa Cty.*, 457 U.S. at 344. That is, the *per se* rule requires "the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Id.* So the most one can say is that agreements falling under the *per se* rule will "almost always" be unreasonable. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018) (quotation marks omitted). "Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977).

Even if every agreement falling under the *per se* rule were, in fact, unreasonable, it still would not matter. In a criminal case, the application of law to the facts must always be "assign[ed] solely to the jury." *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); *see*

also Carella, 491 U.S. at 265. In *Carella*, therefore, the Court did not pause to consider whether individuals who keep a rented item for more than 20 days always do, in fact, intend to steal it. *See* 491 U.S. at 265-66. The mere withdrawal of the intent issue from the jury itself violated the Constitution. Nor, in a wire fraud case, could a court take the element of materiality away from the jury where the defendant obtained more than $1 million—on the theory that $1 million is always a material amount of money. *See United States v. Gaudin*, 515 U.S. 506, 514 (1995).

So too here. The Sherman Act requires a showing of unreasonableness, and it does not further delineate what kinds of agreements are unreasonable. In the criminal context, the Constitution thus requires juries to apply the Act's legal standard to the facts—and, in order to convict, to find in any given case that the charged agreement is unreasonable. *See* Pet. 18-20; Due Process Inst. *Amicus* Br. 8-9.

3. The Government objects that applying the prohibition against conclusive presumptions to the *per se* rule would "conflict[] with this Court's decisions" in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). BIO 11. This objection is also misguided. Both of those cases long predate this Court's recognition (beginning in 1970) of the constitutional requirement that juries find every element of a crime beyond a reasonable doubt, as well as the attendant prohibition in criminal cases against conclusive presumptions. *See* Pet. 12 (discussing this case law). And when older cases come into conflict with the Court's modern understanding of due process

and the right to jury trial, it is the older cases that must give way—not vice versa. *See, e.g.*, *Hurst v. Florida*, 136 S. Ct. 616, 623-24 (2016); *Ring v. Arizona*, 536 U.S. 584, 608-09 (2002). This is especially so where no constitutional claim was even advanced in the older cases, so no *stare decisis* question is in play.

Such is the situation here. In *Trenton Potteries* and *Socony-Vacuum*, the Court upheld jury instructions in *per se* cases that "withdrew from the jur[ies] the consideration of the reasonableness" of alleged price-fixing agreements. *Trenton Potteries*, 273 U.S. at 396; *see also id.* at 407. "Whether the prices actually agreed upon were reasonable or unreasonable was immaterial." *Id.* at 401; *see also Socony-Vacuum*, 310 U.S. at 210 (irrelevant whether agreement was "reasonable or unreasonable"). The juries needed only to find that the allegedly illegal agreements "existed." *Socony-Vacuum*, 310 U.S. at 210; *see also id.* at 216. These non-constitutional decisions cannot be reconciled with the Court's subsequent recognition that the Fifth and Sixth Amendments prohibit jury instructions in criminal cases that "remove[] the presumed element from the case once the [prosecution] has proved the predicate facts giving rise to the presumption." *Francis*, 471 U.S. at 314 n.2.

In short, old opinions judicially crafting the *per se* rule have run into current constitutional reality. Whatever may have been permissible in criminal antitrust cases before recognition of the constitutional rule against conclusive presumptions—and whatever may still be permissible today in civil cases—this Court should make clear that such presumptions may no longer be used in criminal prosecutions.

4. The Government finally asserts that there is no need for this Court to "broadly reexamine its criminal antitrust jurisprudence." BIO 14. Petitioners, however, are asking for no such thing. They merely ask for juries to find all of the elements of criminal antitrust violations, including unreasonableness. This would not require any retooling of *substantive* antitrust law. It would simply require honoring one of the Constitution's most elementary *procedural* protections. That is not too much to ask when personal liberty is at stake.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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