No. 21-852

In the Supreme Court of the United States

CHRISTOPHER D. LISCHEWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in a criminal antitrust case, application of the rule that certain categories of anticompetitive conduct are per se violations of the Sherman Act's prohibition on agreements in restraint of trade, 15 U.S.C. 1, is consistent with the constitutional requirement that the government prove every element of a crime beyond a reasonable doubt.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the Federal Reporter but is reprinted at 860 Fed. Appx. 512.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2021. The petition for a writ of certiorari was filed on December 6, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of conspiring to fix prices in the canned-tuna market, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 1. Petitioner was sentenced to 40 months of imprisonment, to be followed

by three years of supervised release. C.A. E.R. 105-106. The court of appeals affirmed. Pet. App. 1-8.

1. Section 1 of the Sherman Act prohibits "[e]very 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." 15 U.S.C. 1. Consistent with the background law against which it was enacted, Section 1 has long been construed by this Court "to outlaw only *unreasonable* restraints" of trade. *Ohio* v. *American Express Co.*, 138 S. Ct. 2274, 2283 (2018) (citation omitted); see, *e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60 (1911).

Restraints of trade "can be unreasonable in one of two ways." *American Express*, 138 S. Ct. at 2283. Some restraints are unreasonable per se under Section 1 based on their inherently anticompetitive "nature and character." *Standard Oil*, 221 U.S. at 64-65; see, *e.g.*, *NCAA* v. *Alston*, 141 S. Ct. 2141, 2156 (2021). Such per se unlawful restraints include "agreements among competitors to fix prices." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 886 (2007); see, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("[P]rice-fixing agreements are unlawful *per se* under the Sherman Act."). "Restraints that are not unreasonable *per se* are judged under the 'rule of reason,'" which "requires courts to conduct a fact-specific assessment" to determine the restraint's "'actual effect' on competition." *American Express*, 138 S. Ct. at 2284 (citations omitted).

2. Petitioner is the former chief executive of canned-tuna producer Bumble Bee Foods, LLC. See Gov't C.A. Br. 2. From 2010 to 2013, petitioner conspired to fix prices in the canned-tuna market with his competitors at StarKist and Chicken of the Sea. *Id.* at 5-10. The

conspiracy consisted of three forms of price-fixing, each of which was directed, overseen, and enforced by petitioner. See *id.* at 50-51, 58-59.

First, petitioner orchestrated a price-competition "truce" with StarKist. C.A. S.E.R. 531-540, 3518. Under that truce, petitioner agreed that Bumble Bee would not compete on price with StarKist's main product (chunk-light tuna), and StarKist agreed that it would not compete on price with Bumble Bee's main product (solid-white tuna). *Id.* at 1353-1361; C.A. E.R. 707 (discussing petitioner's "[p]eace proposal").

Second, petitioner fixed the pre-discount list prices that the three tuna producers would charge for various kinds of tuna products. Gov't C.A. Br. 6-8. On petitioner's orders, Bumble Bee coordinated the timing and amount of list-price increases with StarKist, Chicken of the Sea, or both at multiple points during the conspiracy, sometimes matching one another to the penny. *Ibid.*; see C.A. S.E.R. 3471.

Third, petitioner fixed the net prices (*i.e.*, prices including discounts) that the tuna producers would charge to retailers. Gov't C.A. Br. 8-10. Petitioner and StarKist agreed to end pricing to retailers that would permit $1-per-can promotions in favor of higher prices, such as $1.25-per-can. C.A. S.E.R. 609-612, 1620-1621, 2135-2138. Petitioner reached a similar agreement with Chicken of the Sea and its chief executive to abstain from "aggressive" promotion. *Id.* at 2208-2216, 2252-2260, 2275-2282; see *id.* at 2906-2907; C.A. E.R. 832-847.

3. A grand jury indicted petitioner for violating Section 1 of the Sherman Act by conspiring to fix prices in the canned-tuna market. C.A. E.R. 698-706. Before trial, petitioner moved for his case to be decided under the rule of reason, rather than the rule that price-fixing

agreements are per se unlawful. *Id.* at 98-99. The court denied petitioner's motion because the indictment charged a "price-fixing conspiracy," which "is subject to the per se rule." *Id.* at 102-103 (citing *Socony-Vacuum*, *supra*). The court also found that petitioner had "waived" the argument—"belatedly raised" for the first time in his reply brief—that "the per se rule is unconstitutional," which the court of appeals had in any event previously rejected. *Id.* at 102 n.2 (citing *United States* v. *Manufacturers' Ass'n of Relocatable Bldg. Indus.*, 462 F.2d 49, 50 (9th Cir. 1972)).

Like his pretrial motion, petitioner's proposed jury instructions incorporated the rule of reason, rather than the per se rule. See C.A. E.R. 666-682. Petitioner asked the district court to instruct the jury that the government must "prove that the price-fixing agreement is unreasonable," and that price-fixing "is illegal under Section 1 of the Sherman Act only if you find that the competitive harm substantially outweighed the competitive benefit." *Id.* at 671-672. Petitioner also asked the court to instruct the jury that the government must prove that petitioner "joined the conspiracy with the intent to unreasonably restrain competition." *Id.* at 671. The district court declined to adopt those instructions. See Pet. App. 2.

The government moved pretrial to exclude, as irrelevant under the per se rule, evidence of purported "justifications or excuses for [petitioner's] collusive conduct, as well as any evidence that the price-fixing conspiracy had no actual effect on prices." C.A. E.R. 689. In response, petitioner represented that he had "no intention of introducing so-called 'justification and effects' evidence at trial." C.A. S.E.R. 3396. Petitioner's counsel stated that he was "not going to say that [peti-

tioner] entered into a price-fixing agreement but that agreement was reasonable." *Id.* at 3429. The district court denied the government's motion in part and granted petitioner's request to "introduce evidence providing alternative explanations to show that similar prices or movement in prices were not the result of a price fixing agreement." C.A. E.R. 88.

Consistent with his pretrial representations, petitioner offered no evidence at trial that the charged price-fixing conspiracy was reasonable, justified, or otherwise procompetitive. See Gov't C.A. Br. 40-45. On the day of opening statements, petitioner submitted a five-page "rule of reason" proffer of "the evidence which he would have presented as part of his defense in a rule-of-reason case." C.A. E.R. 566; see *id.* at 565-570. That document did not address the charged conspiracy to fix prices for canned-tuna nationwide, but instead asserted that fixing canned-tuna prices would have "no actual impact" if the "relevant market" were defined as "geographically limited" submarkets for "ready-to-eat proteins." *Id.* at 566-570. The district court did not address the proffer, and petitioner did not raise the issue of the proffer thereafter.

During closing arguments, the government explained to the jury that "price fixing is a felony crime" because it "disrupts our economy" and "prevents markets from operating the way that they're supposed to," such that "the economy and consumers across the country * * * all suffer." C.A. E.R. 130-131. The government added that, even if the charged "scheme only stole a few cents at a time, the massive scale of the canned tuna industry meant that those numbers added up." *Id.* at 132; see *id.* at 135 (arguing that price-fixing schemes all "have the same effect: Cheating consumers of the

benefits of free competition"). At the close of trial, the district court instructed the jury that "[c]onspiracies to fix prices" are unlawful "without consideration of the precise harm they have caused or any business justification for their use." *Id.* at 18. The court also instructed the jury that "the government must prove beyond a reasonable doubt * * * that the defendant knowingly joined the conspiracy charged in the indictment," "with the intent to advance the objective of the conspiracy —here, price fixing." *Id.* at 29.

The jury found petitioner guilty of the price-fixing conspiracy. C.A. E.R. 112-113. The court sentenced petitioner to 40 months of imprisonment, to be followed by three years of supervised release. *Id.* at 105-106.

4. The court of appeals affirmed in an unpublished memorandum opinion. Pet. App. 1-8. The court observed that, as petitioner had acknowledged, it was "bound by precedent upholding" the "constitutionality of the 'per se' rule," and that "the government need not show 'an intent to produce anti-competitive effects.'" *Id.* at 2 (quoting *United States* v. *Brown*, 936 F.2d 1042, 1045-1046 (9th Cir. 1991)). The court also found that the "district court did not abuse its discretion in instructing the jury on the per se rule" or in excluding "supposed reasonableness" evidence, and that the government's closing argument "correctly reflected the substantive law." *Id.* at 5. The court added that, even if petitioner's claims of instructional error "had merit," any error was harmless "'beyond a reasonable doubt'" because the evidence of petitioner's guilt under Section 1 "was overwhelming." *Ibid.* (citation omitted); see *id.* at 7 (noting "the overwhelming evidence that [petitioner] participated in a price-fixing conspiracy").

ARGUMENT

Petitioner principally contends (Pet. 14-23) that—and the question presented (Pet. i) is limited to whether—applying the per se rule in criminal antitrust cases violates the constitutional requirement to prove every element of an offense beyond a reasonable doubt. He also argues (Pet. 30-32) that the intent standard for rule-of-reason cases established in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), should be extended to per se cases. And he asserts (Pet. 32-38) for the first time that the per se rule violates nondelegation, separation-of-powers, and fair-warning principles. The court of appeals correctly rejected the first two theories, Pet. App. 2-3, and had no opportunity to address the others, which petitioner did not raise below. No further review is warranted. Petitioner does not identify any conflict in the lower courts on any of the issues he raises, but instead asks (Pet. 3-4, 37-38) this Court to reconsider the "status quo" of criminal antitrust principles. This Court recently declined to do so in a criminal antitrust case presenting many of the same arguments, see *Sanchez* v. *United States*, 140 S. Ct. 909 (2020) (No. 19-288), and the same disposition is appropriate in this case.

1. In keeping with decades of this Court's jurisprudence, the court of appeals correctly recognized that application of the per se rule in a criminal antitrust prosecution does not deprive the defendant of any constitutional protections and that intent to join a per se unlawful conspiracy is sufficient to convict under Section 1 of the Sherman Act. Pet. App. 2.

a. Section 1 of the Sherman Act, which may be enforced both criminally and civilly, proscribes "[e]very 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." 15 U.S.C. 1; see 15 U.S.C. 4, 15a. As this Court recently reiterated, the "'statutory policy'" embodied in the Sherman Act "is one of competition," and Congress's adoption of that policy "'precludes inquiry into the question whether competition is good or bad.'" *NCAA* v. *Alston*, 141 S. Ct. 2141, 2159 (2021) (citation omitted). In one of its first Sherman Act cases, this Court read Section 1 to prohibit *any* agreement that restrained trade. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897). The Court soon clarified that, in light of its common-law origins, Section 1 was properly understood to cover only *unreasonable* restraints of trade. *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60 (1911).

At the same time, the Court reiterated its earlier holding that price-fixing agreements by their "nature and character" categorically fall "within the purview of" Section 1 because they necessarily "operate[] to produce the injuries which the statute forbade." *Standard Oil*, 221 U.S. at 64-65 (citing *Trans-Missouri Freight*, *supra*). That interpretation reflected the common-law principle that certain kinds of anticompetitive restraints, including price-fixing, were categorically unlawful, with no "question of reasonableness [left] open to the courts." *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 238 (1899) (quoting *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898) (Taft, J.), aff'd 175 U.S. 211 (1899)). As a result, the "inquiry * * * end[s] once a price-fixing agreement [i]s proved." *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982).

The Court applied that settled interpretation of Section 1 to a criminal prosecution in *United States* v.

Trenton Potteries Co., 273 U.S. 392 (1927). There, the government prosecuted multiple individuals and corporations for forming "a combination to fix and maintain uniform prices for the sale of sanitary pottery." *Id.* at 394. The district court instructed "the jury[] that if it found the agreements or combination complained of, it might return a verdict of guilty without regard to the reasonableness of the prices fixed." *Id.* at 395. In issuing that charge, the court rejected the defendants' request for an instruction that the jury could convict only if it found "an undue and unreasonable restraint of trade." *Ibid.* This Court subsequently held that the district court "correctly withdrew from the jury the consideration of the reasonableness of the" charged price-fixing conspiracy. *Id.* at 396; see *id.* at 407.

In explaining its holding, the Court emphasized that the "aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *Trenton Potteries*, 273 U.S. at 397. Accordingly, price-fixing "[a]greements * * * may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable." *Ibid.* The Court emphasized that it has "always [been] assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman [Act], despite the reasonableness of the particular prices agreed upon." *Id.* at 398. And the Court accordingly concluded that the district court's instruction was correct, and the defendants' proposed charge "rightly refused," because "[w]hether the prices actually agreed upon were reasonable or unreasonable was immaterial." *Id.* at 401.

The Court applied the same approach to the criminal prosecution for a price-fixing conspiracy in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). As in *Trenton Potteries*, the district court in *Socony-Vacuum* instructed the jury that it could find guilt "if [the alleged] illegal combination existed," regardless of "how reasonable or unreasonable" it might be. *Id.* at 210. This Court upheld the instruction on the ground that "it would *per se* constitute" such an unlawful "restraint if price-fixing were involved," and no reasonableness instruction was therefore required. *Id.* at 216. The Court explained that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act." *Id.* at 218; see *id.* at 212 (citing *Trans-Missouri Freight*, *supra*). "Whatever economic justification particular price-fixing agreements may be thought to have," the Court added, "the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 226 n.59; see *id.* at 221 (explaining that having "reasonableness" as "an issue in every price-fixing case" would be anathema to the Sherman Act).

As those decisions illustrate, instructing a jury that it may find a defendant guilty of violating Section 1 based on a finding that he entered into a price-fixing agreement—without a separate inquiry into whether the agreement was reasonable—does not "deny a jury decision as to an element of the crime." *United States* v. *Manufacturers' Ass'n of the Relocatable Bldg. Indus.*, 462 F.2d 49, 52 (9th Cir. 1972). It instead reflects the basic principle that juries resolve only questions of fact, and "any agreement for price-fixing, if found, [is]

illegal as a matter of law." *Trenton Potteries*, 273 U.S. at 400; see, *e.g.*, *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 461 (1927) (explaining that, at common law, the "reasonableness" of price-fixing agreements was not "left to the * * * jury"); *Addyston Pipe*, 175 U.S. at 238 (similar).

b. For similar reasons, to the extent that it might be considered part of the question presented, the per se rule means that if a defendant is found to have knowingly entered into a price-fixing agreement, no need exists to separately prove that he intended to harm competition. While "intent is an element of a criminal antitrust offense," *Gypsum*, 438 U.S. at 435, the requisite intent "where the defendant is charged with a per se violation," such as conspiring to fix prices, is "intent to conspire to commit the offense"—not a more generalized intent to restrain trade unreasonably, *United States* v. *Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991) (quoting *United States* v. *Koppers Co.*, 652 F.2d 290, 296 n.6 (2d Cir.), cert. denied, 454 U.S. 1083 (1981)).

The Court's decision in *Gypsum* does not suggest otherwise. The premise of the per se rule is that some forms of conduct, such as price fixing, are "unquestionably anticompetitive" as a matter of law. *Gypsum*, 438 U.S. at 440; see *Trenton Potteries*, 273 U.S. at 397 ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition."). *Gypsum* itself involved conduct that was not per se unlawful—namely, "exchanges of competitive information"—as to which the Court required proof of "knowledge" that anticompetitive "effects would most likely follow" or the "purpose of producing" such effects. 438 U.S. at 427-429, 440, 441 n.16, 444 & n.21. But the Court expressly distinguished such rule-of-reason offenses, which are "not invariably * * * anticompetitive," from

"unquestionably anticompetitive" per se violations of Section 1, like price fixing. *Id.* at 440-441 & n.16, 444 & n.21.

2. The courts below correctly applied those settled precedents to this case. Petitioner does not dispute that a charge of "conspiring to fix prices in the canned tuna market," Pet. App. 1, is a charge of a per se violation of Section 1 under this Court's precedents. The district court thus correctly instructed the jury that "[i]f there was, in fact, a conspiracy to fix the prices for canned tuna as alleged, it was illegal." *Id.* at 9. The court also correctly instructed the jury that the government must prove "the defendant knowingly joined the conspiracy charged in the indictment." C.A. E.R. 29. And the court of appeals correctly upheld petitioner's conviction based on those instructions. Pet. App. 1-5. Petitioner accordingly does not meaningfully dispute the lower courts' application of this Court's settled antitrust principles to his case; instead, he challenges (Pet. 14-37) those principles. His challenge lacks merit.

a. Petitioner first contends (Pet. 14-23) that application of the per se rule in criminal antitrust prosecutions is incompatible with the principle articulated in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and related decisions that a jury must find every element of a criminal offense beyond a reasonable doubt. Specifically, petitioner contends (Pet. 14-20) that his conviction is constitutionally invalid because the jury was not instructed that it had to find beyond a reasonable doubt that his price-fixing conspiracy was unreasonable.

Petitioner's contention cannot be squared with *Trenton Potteries* and *Socony-Vacuum*. As explained above, the Court in those cases expressly recognized that the jury did not need to find that a price-fixing conspiracy

is unreasonable. See pp. 8-10, *supra*. This Court has never suggested that those decisions are infirm in any way, let alone that they have been overruled. To the contrary, the Court reiterated the per se rule in *Gypsum*, 438 U.S. at 440, and lower courts have uniformly applied it without requiring juries to decide the reasonableness of per se unreasonable conduct, see *United States* v. *Giordano*, 261 F.3d 1134, 1142-1144 (11th Cir. 2001) (collecting cases). And notwithstanding that petitioner's argument "in effect asks [the Court] to overrule" long-settled precedent, *id.* at 1143, he does not even attempt to overcome the *stare decisis* considerations in favor of maintaining precedent, see, *e.g.*, *Gamble* v. *United States*, 139 S. Ct. 1960, 1969-1980 (2019).

Nothing in the *Apprendi* line of cases suggests a retreat from *Trenton Potteries* and *Socony-Vacuum*. As petitioner notes (Pet. 15-16), *Apprendi* "re-stated" principles that "were long established by the Constitution and this Court's prior case law." See, *e.g.*, *In re Winship*, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation."). This Court accordingly recognized well before *Trenton Potteries* and *Socony-Vacuum* that the requirement to prove guilt beyond a reasonable doubt "applies to every element necessary to constitute the crime." *Davis* v. *United States*, 160 U.S. 469, 487 (1895); see, *e.g.*, *Wilson* v. *United States*, 232 U.S. 563, 570 (1914). *Trenton Potteries* and *Socony-Vacuum* then made clear that factual unreasonableness is not an element of a criminal violation of the Sherman Act based on a violation of the per se rule.

Petitioner's description (Pet. 20-23) of the per se rule as an "evidentiary presumption[]" is unsound. While

this Court's civil antitrust cases sometimes describe the per se rule as a "conclusive presumption that [a] restraint is unreasonable," *Maricopa County*, 457 U.S. at 344, none indicates that the per se rule creates an *evidentiary* presumption of the kind this Court has disapproved in criminal cases, see *Francis* v. *Franklin*, 471 U.S. 307, 313 (1985). As petitioner himself noted below, "[t]he *per se* rule is not a rule of evidence at all. Instead, it merely establishes that price fixing, *if proved*, is unreasonable." C.A. S.E.R. 3436. The per se rule, in other words, does not change what is required to prove a crime; it is instead an "interpretation[] of the Sherman Act" to categorically prohibit a certain type of conduct. *FTC* v. *Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 432-433 (1990).

Petitioner is accordingly mistaken in dismissing (Pet. 22-23) the per se rule as a mere device of "convenience" and "efficiency." See *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 894-895 (2007) (rejecting the premise that per se rules are justified solely by "convenience"). Instead, the per se rule is "a statutory command" of Section 1 that is "analogous to per se restrictions upon, for example, stunt flying in congested areas." *Superior Ct. Trial Lawyers*, 493 U.S. at 432-433 (citation and internal quotation marks omitted). Even if some "violations of such rules actually cause no harm," the rules are warranted nevertheless because "every stunt pilot poses some threat to the community." *Id.* at 433-434. "So it is with * * * price fixing" and other per se unlawful conduct, all of which threatens "the central nervous system of the economy." *Id.* at 434-435 (citation omitted).

Petitioner ultimately challenges (Pet. 29-30) the per se rule itself, suggesting that "modern antitrust doctrine"

has abandoned a clear "division between per se and rule-of-reason cases." Petitioner is mistaken. While rule of reason analysis may range from "abbreviated" to "plenary," *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 769, 779 (1999), this Court has always treated certain restraints as "unreasonable" per se without "further examination," *NCAA* v. *Board of Regents*, 468 U.S. 85, 100,104 (1984); see *Ohio* v. *American Express Co.*, 138 S. Ct. 2274, 2283-2284 (2018). Chief among them is "horizontal price-fixing," which "has been consistently analyzed as a *per se* violation for many decades." *Superior Ct. Trial Lawyers*, 493 U.S. at 436 n.19; see *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006) ("Price-fixing agreements * * * are *per se* unlawful."). And contrary to petitioner's assertions, price-fixing cartels are not "analyzed for reasonableness" under this Court's "recent cases" based on a possibility of "consumer benefits" or the "special characteristics of a particular industry." Pet. 29 & n.4 (citation omitted); see *Alston*, 141 S. Ct. at 2156 (reiterating that "some agreements among competitors so obviously threaten" competition as to be "unlawful *per se*"); *id.* at 2160 (directing arguments about "the special characteristics of [a] particular industry * * * to Congress") (citation omitted).

b. Petitioner's contention (Pet. 30-32) that a conviction for a per se antitrust violation requires proof of intent to harm competition is outside the question presented (Pet. i) and meritless in any event. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (explaining that the Court ordinarily does not decide "issues outside the questions presented by the petition for certiorari").

Petitioner relies (Pet. 30-32) almost entirely on this Court's discussion of criminal intent in *Gypsum*. But, as explained above, *Gypsum* was a rule-of-reason case,

and it did not prescribe a standard of intent for per se cases, where the conduct is "unquestionably anticompetitive" as a matter of law. 438 U.S. at 440. Petitioner thus errs in contending that lower courts in per se cases are misapplying *Gypsum*, and he offers no sound basis for extending a knowledge-of-unreasonableness rule to a context—prosecutions under the per se rule—that the Court itself distinguished and to which it does not logically apply. Instead, his arguments effectively rest, at bottom, on his insupportable contention that price-fixing is not per se unlawful under the Sherman Act.

To the extent that petitioner suggests that no intent instruction at all was given in his case, the record does not support that fact-bound assertion. The district court instructed the jury that the government must prove beyond a reasonable doubt that petitioner "knowingly joined the conspiracy," "with the intent to advance the objective of the conspiracy—here, price fixing." C.A. E.R. 29. The instructions further required proof that petitioner "knowingly—that is, voluntarily and intentionally—became a member of the conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it." *Id.* at 16. And the court emphasized that petitioner must have "knowingly participate[d] in effecting the illegal conspiracy," "for the purpose of furthering the conspiracy to fix prices." *Id.* at 30. Contrary to petitioner's suggestion (Pet. 13), those instructions did not remove "intent from the jury's consideration."

c. Petitioner also errs in contending (Pet. 32-38) that application of the per se rule in criminal antitrust cases violates nondelegation, separation-of-powers, and fair-warning principles. As a threshold matter, those contentions are likewise outside the question presented,

which concerns only "the constitutional principle that every element of an offense must be submitted to a jury and proven beyond a reasonable doubt," Pet. i, and none of them was raised below, see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (observing that this is "a court of review, not of first view").

In any event, the contentions lack merit. Petitioner identifies no decision of this Court invalidating a federal statute under the nondelegation doctrine based on a judicial interpretation of a statute, and this Court has previously rejected the argument that Section 1 "cannot be carried out without a judicial exertion of legislative power" as "clearly unsound." *Standard Oil*, 221 U.S. at 69. Contrary to petitioner's contention (Pet. 34-35), giving meaning to a federal criminal provision does "not 'create a common law crime.'" *United States* v. *Lanier*, 520 U.S. 259, 267 n.6 (1997) (citation omitted). This Court's cases construing Section 1's per se rule apply "the law as it was made" by Congress, *Trenton Potteries*, 273 U.S. at 400 (citation omitted), much as the Court routinely does in interpreting the scope of other federal criminal laws, see, *e.g.*, *Lanier*, 520 U.S. at 266 n.6.

Nor does the per se rule render the Sherman Act unconstitutionally vague. More than a century ago, this Court held in a case involving the rule of reason that the Sherman Act was not "so vague as to be inoperative," even though the standard for conviction involved "an element of degree." *Nash* v. *United States*, 229 U.S. 373, 376-378 (1913). That logic applies *a fortiori* to per se offenses, as to which "the *per se* rule can give clear guidance," *Leegin*, 551 U.S. at 886, obviating any need to assess reasonableness. Petitioner thus "could not have had any reasonable doubt that his [price-fixing] conduct violated section one," which forecloses his vagueness

claim "under contemporary due process standards." *United States* v. *Miller*, 771 F.2d 1219, 1225 (9th Cir. 1985); see *Salman* v. *United States*, 137 S. Ct. 420, 428-429 (2016) (rejecting similar claims where defendant's insider trading was "in the heartland of" criminal securities laws).

3. This Court has recently denied review of a petition raising similar claims, see p. 7, *supra*, and petitioner identifies no basis for doing otherwise here.

In particular, petitioner does not contend that the court of appeals' decision conflicts with any other court of appeals' precedent; instead, all six circuits to address the jury-right issue have upheld the constitutionality of the per se rule's application in criminal cases. See *Giordano*, 261 F.3d at 1143-1144; *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195-1196 (3d Cir. 1984), cert. denied, 470 U.S. 1029, and 470 U.S. 1085 (1985); *United States* v. *Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683-684 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *Koppers*, 652 F.2d at 293-294; *United States* v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1104-1106 (7th Cir.), cert. denied, 444 U.S. 840 (1979); *Manufacturers*, 462 F.2d at 52. Likewise, all nine circuits to expressly address the requisite mens rea in a criminal case involving per se unlawful behavior have declined to require a separate showing of intent to harm competition. See *Giordano*, 261 F.3d at 1143; *United States* v. *Nippon Paper Indus. Co.*, 109 F.3d 1, 7 (1st Cir. 1997), cert. denied, 522 U.S. 1044 (1998); *United States* v. *Misle Bus & Equip. Co.*, 967 F.2d 1227, 1233-1236 (8th Cir. 1992); *Brown*, 936 F.2d at 1046; *United States* v. *Suntar Roofing, Inc.*, 897 F.2d 469, 479-480 (10th Cir. 1990); *United States* v. *Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988) (per

curiam); *Koppers*, 652 F.2d at 296 n.6; *United States* v. *Society of Indep. Gasoline Marketers*, 624 F.2d 461, 464-465 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Gillen*, 599 F.2d 541, 543-546 (3d Cir.), cert. denied, 444 U.S. 866 (1979).

The petition for a writ of certiorari thus boils down to a request that this Court broadly reexamine its criminal antitrust jurisprudence based on petitioner's assertion (Pet. 37) that "criminal antitrust doctrine is held together by inertia rather than logic." No need exists for the Court to do so. The Court's law in this area is well-settled, as evidenced by the uniformity in the lower courts, and fundamentally sound as a matter of constitutional law, statutory interpretation, and antitrust policy. Petitioner's conviction for participating in a multi-year price-fixing cartel—based on "overwhelming" evidence of conduct that has been per se unlawful under Section 1 for more than a century, Pet. App. 5—accordingly does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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