No. 24-124

# In the Supreme Court of the United States

**BRENT BREWBAKER,**
*Cross-Petitioner,*

**v.**

**UNITED STATES,**
*Cross-Respondent.*

---

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

---

## REPLY TO CROSS-RESPONDENT'S BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

---


**Elliot S. Abrams**
*Counsel of Record*
CHESHIRE PARKER SCHNEIDER, PLLC
133 Fayetteville Street
Suite 400
Raleigh, NC 27601
(919) 833-3114
elliot.abrams@cheshirepark.com

*Counsel for Cross-Petitioner*

**Ripley Rand**
**Samuel Hartzell**
WOMBLE BOND DICKINSON (US) LLP
555 Fayetteville Street
Suite 1100
Raleigh, NC 27601
ripley.rand@wbd-us.com
sam.hartzell@wbd-us.com

*Counsel for Cross-Petitioner*



*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

## TABLE OF CONTENTS

**Page(s)**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Other Authorities**

## REPLY BRIEF FOR PETITIONERS

### I. The Court Should Review the Constitutionality of the Sherman Act Crime.

1. This conditional cross-petition first raises the question whether the Constitution allows a federal crime to be defined by courts using the common-law approach of case-by-case adjudication. "To ask the question is nearly to answer it," *Rodriguez v. Fed. Deposit Ins. Corp.*, 589 U.S. 132, 133 (2020), because "the notion of a common-law crime is utterly anathema today," *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari) (cleaned up). "Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States v. Davis*, 588 U.S. 445, 451 (2019); *see also, e.g.*, *United States v. Reese*, 92 U.S. 214, 216 (1875); *Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature.").

Because the Sherman Act literally criminalizes all business contracts, determining which contracts are criminal requires a "common-law approach." *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 901 (2007). But this approach violates the Court's repeated holding that the legislature cannot set a net large enough to capture all possible offenders and leave it to police and courts to decide what conduct to prosecute and convict. *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983) (quoting *Reese*, 92 U.S. at 216); *Percoco v. United States*, 598 U.S. 319, 337–38 (2023) (Gorsuch, J., concurring) (Congress "must do more than invoke an aspirational phrase and leave

it to prosecutors and judges to make things up as they go along."). Indeed, "the *more important* aspect of vagueness doctrine is not actual notice, but . . . the requirement that a legislature establish minimal guidelines to govern law enforcement and keep the separate branches within their proper spheres." *Sessions v. Dimaya*, 584 U.S. 148, 181 (2018) (Gorsuch, J., concurring in part) (ellipsis in original) (quoting *Kolender*, 461 U.S. at 358); *id*. at 182.

2. The Government does not argue that defining crimes through the common-law process is permissible. It instead argues (at 6) that "courts exercise judicial rather than legislative power" when deciding what acts constitute an antitrust crime, and it suggests (at 7–9) that the Sherman Act provides the requisite guidelines necessary to maintain separation of powers. Both premises are wrong.

As the then-Division Chief for the Antitrust Section of the Department of Justice correctly explained, "By adopting a common-law approach, Congress in effect delegated much of its lawmaking power to the judicial branch." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 663 (1982). "From the beginning the Court has treated the Sherman Act as a common-law statute"; it "adapts to modern understanding and greater experience," such that "the Sherman Act's prohibition on 'restraint[s] of trade' evolves to meet the dynamics of present economic conditions." *Leegin*, 551 U.S. at 899; *United States v. Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943) (L. Hand, J.), (The Sherman Act gave courts "a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common

law, and by so doing has delegated to the courts the duty of fixing the standard for each case."). Indeed, this Court has recognized that courts often make "legislative changes" with respect to the Sherman Act. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (emphasis added). Therefore, the Government is incorrect that courts "exercise of judicial rather than legislative power" when deciding what conduct violates the Sherman Act. Gov. Br. 6.

The Government also suggests (at 7–9) that the Sherman Act's text and the common law provide enough guidance to avoid separation of powers and related vagueness problems. But, as former Antitrust Division Chief Baxter recognized, the Sherman Act gives "only the most general statutory directions." Baxter, 60 Tex. L. Rev. at 663. "Taken on their face, the antitrust provisions could have reached almost all business decisions." *Id.* at 664 (cleaned up). And the context for those textual provisions is little help:

> Congress provided little if any extrastatutory guidance to direct interpretation of the basic antitrust provisions. The legislative histories of the antitrust statutes provide only the most basic description of the goals Congress sought to promote—competition and free enterprise—and little indication of how these goals can best be fostered by the judiciary.

*Id.* As a result, the Sherman Act "forced" courts to "measure" business practices against courts' own "conception of the public interest" to determine what practices to outlaw. *Id.* In other words, as Robert Bork explained,

> Lacking any real guidance from either the language of the statute or its legislative

> history, . . . the courts were forced themselves to legislate in a broad manner and to discuss what consistent and useful policy might be.

Robert H. Bork, *The Rule of Reason and the* Per Se *Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 782 (1965); *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) ("In consequence of the vagueness of its language . . . , the courts have been left to give content to [§ 1].").

The Government responds (at 6) that courts are merely interpreting the statutory phrase "restraint of trade," 15 U.S.C. § 1, just as they interpret the text of any other law—that is, by gleaning its original, recognized meaning. But, as Judge Bork noted,

> One frequently hears talk of the original meaning of the Sherman Act or of the intent of Congress in enacting that law, but it can hardly be stressed too much that, with respect to the Sherman Act . . . such talk of legislative intent is more than usually foolish. Congress simply had no discoverable intention that would help a court decide a case one way or the other.

Bork, 74 Yale L.J. at 783. Thus, courts have

> effectively writ[ten] this [criminal] law bit by bit in decisions spanning decades with the help of prosecutors . . . who present [courts] with one option after another. But that is not a path the Constitution tolerates. Under our system of separated powers, the Legislative Branch must do the hard work of writing federal criminal laws. Congress cannot give the Judiciary uncut marble with instructions to chip away all that does not resemble David.

*Percoco*, 598 U.S. at 337–38 (Gorsuch, J., concurring) (citing *Reese*, 92 U.S. 214).

3. The Sherman Act's unconstitutional delegation of crime-making authority is important enough for this Court to consider.[1] The common-law approach of making law through case-by-case adjudication relies on parties—primarily the Government—to prosecute novel theories that test whether certain conduct is legal. Indeed, as former Antitrust Division Chief Baxter explained, under this common-law approach, "[e]very new case is an experiment." Baxter, 60 Tex. L. Rev. at 665 (quotation marks omitted). It may be appropriate to "experiment" in civil cases, but not when the defendant's liberty is at stake.

The danger to the public arising from this experimentation is not speculative; the Antitrust Section has claimed that "the executive branch is within its discretion to prosecute [a] case" "even when precedent suggests a *contrary* result." *Id.* at 687 (emphasis added). That was the case here. The Government alleged a *per se* Sherman Act crime based on conduct that nine circuits had deemed to be governed by the rule of reason: forming a price agreement within a dual-distribution arrangement. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420–21 & n.8 (5th Cir. 2010). Still the Government "experimented" to see if its theory would be accepted "even [though] precedent suggested" it would not be. Baxter, 60 Tex. L. Rev. at 665, 687. As

[1] The Government's argument that Mr. Brewbaker did not raise his separation of powers challenge until his Fourth Circuit reply brief is wrong. Mr. Brewbaker moved in the district court to dismiss the indictment for unconstitutional vagueness, C.A. J.A. 1070, and he again raised that challenge in his opening brief, Pet. C.A. Br. 54.

a result, Mr. Brewbaker was wrongly convicted and served eighteen months in prison (away from his wife who was and is suffering from brain cancer) only to have the Fourth Circuit correctly hold (after Mr. Brewbaker had served his entire sentence) that the alleged conduct did not constitute the charged *per se* antitrust offense.

The Government even goes as far as to claim (at 14–15) that the Constitution would permit criminal prosecutions of rule-of-reason violations. Under that position, every business transaction is subject to criminal charge, leaving citizens to engage in commerce at the risk of incarceration based on the discretion of unelected prosecutors and judges. And, of course, the Court "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

That assumption would be particularly unjustified here, where the Government has sued many of the world's most recognizable companies for alleged anticompetitive conduct—conduct that it now says could be charged criminally. For example, the Antitrust Section's website lists alphabetically—by name of the first-listed defendant—each case it has brought. There are thousands of companies listed in total. Focusing only on the 228 cases within the "A" section of the list, there are more than 500 companies sued by the Government for anticompetitive conduct, including the following nationally recognizable companies:

1. ABC (American Broadcasting Companies)
2. Activision Blizzard
3. Adobe
4. Aetna
5. AIG
6. Alaska Air
7. Alliant Techsystems
8. ALLTEL
9. AMC Entertainment Holdings
10. Amcor
11. American Airlines
12. American Bar Association
13. American Express
14. Anheuser-Busch InBev
15. Apple
16. AT&T
17. BP
18. Cargill
19. Carmike Cinemas
20. CBS
21. Cigna
22. Continental Airlines
23. Cox Cable Communications
24. Delta Air Lines
25. DirectTV
26. Doubleday & Company, Inc
27. Google
28. Grupo Modelo
29. HarperCollins Publishers
30. Honeywell
31. Humana
32. Intel
33. Intuit
34. JetBlue
35. Mack Trucks
36. Mastercard
37. Oxford University Press
38. Penguin Books
39. Pixar
40. Random House
41. Rio Tinto
42. Simon & Schuster

43. T-Mobile
44. Time Warner
45. United Airlines
46. Union Carbide
47. Virgin America
48. Visa
49. Volvo

U.S. Department of Justice, Antitrust Division, *Antitrust Case Filings*, https://www.justice.gov/atr/antitrust-case-filings-alpha (last visited Sept. 13, 2024) [https://perma.cc/83UH-S35X].

The Antitrust Section now claims (at 14–15) that it had discretion to charge each of these companies—and each of the thousands more it has sued—with a felony offense carrying up to a $100 million fine. Conferring such discretion on federal prosecutors and agents to charge and arrest virtually every economic actor in the country violates the "more important" protection of the vagueness doctrine: the separation of powers. *Kolender*, 461 U.S. at 358.

Indeed, a hallmark of totalitarianism is using vague laws that subject virtually every citizen to arrest and punishment at the whim of the police and courts. Yet the Sherman Act does just that. It can be read to "reach[] almost all business decisions," and, according to former Antitrust Division Chief Baxter, even precedent limiting the reach of the Sherman Act is no bar to the Government's discretion to charge conduct as criminal under the Sherman Act's common-law approach. 60 Tex. L. Rev. at 664, 687. Thus, every citizen engaged in business dealings is subject to being charged and arrested based on the discretion of the executive branch—and convicted based on the policy determinations of the judicial branch.

There is thus a "pressing need for this Court to answer the question raised here," which has increased recently with the expanding volume and novelty of antitrust prosecutions. Br. of *Amici Curiae* Due Process Inst. & the Cato Inst. in Supp. of Pet'r at 18, *Lischewski v. United States*, 142 S. Ct. 2676 (2022) (No. 21-852), 2022 WL 296301, at *18.

4. Finally, the Government argues (at 14) that this Court should reject the instant challenges based on *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), and *Nash v. United States*, 229 U.S. 373 (1913). But "*stare decisis* has never been treated as 'an inexorable command,'" *Ramos v. Louisiana*, 590 U.S. 83, 105 (2020) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)), especially when, as here, the disputed precedent has been undermined by later developments and created significant negative real-world consequences. *See also Leegin*, 551 U.S. at 899 ("*[s]tare decisis* is not as significant" with respect to the Sherman Act because the meaning of the act "evolves" over time").

Both *Standard Oil* and *Nash* relied on the assumption that Congress' intended meaning would be ascertainable and would, therefore, not require courts to legislate.[2] Yet it is now recognized that

---

[2] *Compare Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 51 (1911) (The statutory terms "took their origin in the common law, and were also familiar in the law of this country prior to and at the time of the adoption of the [Sherman Act]."), *and Nash v. United States*, 229 U.S. 373, 377 (1913) (relying, in part, on "the common law as to the restraint of trade thus taken up by the statute"), *with Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) ("[T]he term 'restraint of trade' . . . invokes the common law itself, and not merely the static content that the

"with respect to the Sherman Act . . . Congress simply had no discoverable intention." Bork, 74 Yale L.J. at 78; *cf. Johnson*, 576 U.S. 591, 598 (2015) ("[T]he failure of 'persistent efforts . . . to establish a standard' can provide evidence of vagueness." (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921))).

*Standard Oil* and *Nash* were also decided before the Court rejected the notion that "federal courts have the power [to exercise] independent judgment on matters of general law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quotation marks omitted). Thus, when *Standard Oil* and *Nash* were decided, the Court had yet to firmly establish the prohibition on a statute giving courts the power to "develop a common-law crime," *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). Now, of course, the Court has made plain that a criminal statute is unconstitutionally vague if determining its meaning "requires not interpretation but invention," and that such statutes delegate power to the court that is "clearly beyond judicial power," *Skilling v. United States*, 561 U.S. 358, 422 (2010) (Scalia, J., concurring). *See, e.g., Davis*, 588 U.S. at 451.

Additionally, in *Nash*, the Court decided the case by rejecting a proposition of law that the Court has since repeatedly endorsed—that is, that "[t]he criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable." *Nash*, 229 U.S. at 377 (quoting *Tozer v. United States*, 52 F. 917, 919 (C.C.E.D. Mo. 1892)); *see also, e.g.*, *L. Cohen*

---

common law had assigned to the term in 1890."), *and Leegin*, 551 U.S. 888–89 (same).

*Grocery Co.*, 255 U.S. at 89; *Johnson*, 576 U.S. at 598; *Smith v. Goguen*, 415 U.S. 566, 572–82 (1974).

This Court's vagueness doctrine has also developed significantly since 1913 when *Nash* was decided. The Court has since recognized the increased importance of avoiding laws that delegate to prosecutors, courts, and juries the responsibility to determine what the criminal law is, *see, e.g.*, *Kolender*, 461 U.S. at 358; and the Court has noted that a law need not be unconstitutionally vague in all applications to violate due process, *Johnson*, 576 U.S. at 602.

Thus, "the logic of the Court's analyses [in *Standard Oil* and *Nash*] has been undercut" over the last century. Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 Fla. St. U. L. Rev. 709, 711 (2018). And legal developments in antitrust and vagueness law show that *Standard Oil* and *Nash* are wrong "as a matter of law" when considering "the quality of the precedent[s'] reasoning, consistency and coherence with other decisions, changed law, [and] changed facts." *Ramos*, 590 U.S. at 122 (Kavanaugh, J., concurring in part). Those precedents are also having negative "real-world effects on the citizenry," *id.*, as exemplified by Mr. Brewbaker's wrongful conviction and imprisonment.

* * *

Because of the Government's increasing volume and novelty of antitrust prosecutions and the clear unconstitutionality of the common-law crime-making process at issue, the Court should accept this conditional cross-petition and declare the Sherman Act crime unconstitutional.

## II. The Court Should Review the Fourth Circuit's Legal Error in Its Harmless Error Analysis.

1. The Government argues (at 17) that the Fourth Circuit did not find a constitutional violation. But a valid indictment is a constitutional requirement. *E.g.*, *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007); *United States v. Cruikshank*, 92 U.S. 542, 557 (1875). So the Fourth Circuit found a constitutional error when it held the indictment failed to state an offense.

2. Having found a constitutional error, the Fourth Circuit had to reverse all counts unless the Government demonstrated the error to have been harmless beyond a reasonable doubt as to one or more counts. But the Government did not provide a record-based harmlessness argument. Instead, it asked the Fourth Circuit to rely on a presumption that the jurors considered each count separately. Gov. C.A. Br. 67. And the court erroneously did so.

3. Thus, the petition presents an important legal issue: Can a court of appeals rely on a presumption of correctness to find a constitutional error harmless beyond a reasonable doubt?

4. Because the harmless error test is a frequently invoked appellate doctrine, and because the Fourth Circuit's legal analysis creates a dangerous precedent that would insulate most multi-count convictions from meaningful review based on a presumption of correctness, the Court should grant certiorari to consider this issue.

## CONCLUSION

The Court should grant this conditional cross-petition.

/s/ Elliot S. Abrams
Elliot S. Abrams
*Counsel of Record*
CHESHIRE PARKER SCHNEIDER, PLLC
133 Fayetteville Street, Suite 400
Raleigh, NC 27601
(919) 833-3114
elliot.abrams@cheshirepark.com

Ripley Rand
Samuel Hartzell
WOMBLE BOND DICKINSON (US) LLP
555 Fayetteville Street, Suite 1100
Raleigh, NC 27601
ripley.rand@wbd-us.com
sam.hartzell@wbd-us.com

*Counsel for Cross-Petitioner*