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

BRIEF FOR *AMICUS CURIAE* DUE PROCESS INSTITUTE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Due Process Institute is a bipartisan, non-profit, public-interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Due Process Institute has already participated as an *amicus curiae* before this Court in cases presenting important criminal justice issues, such as *Timbs v. Indiana*, 139 S. Ct. 682 (2019), and *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019). In addition, the Due Process Institute has participated as an *amicus curiae* in several cases bearing on Fifth and Sixth Amendment issues similar to those presented here, such as *United States v. Haymond*, 139 S. Ct. 2369 (2019), and *Asaro v. United States*, No. 19-107 (petition for *certiorari* pending). As in *Haymond* and *Asaro*, the Due Process Institute has a strong interest in this case; the "*per se*" rule, as applied to criminal antitrust defendants, poses a grave threat to the fundamental principles guaranteed by the Fifth and Sixth Amendments. Accordingly, the Due Process Institute files this brief in support of the petition for certiorari.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *amicus curiae* certifies that counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due and have consented to this filing.

SUMMARY OF THE ARGUMENT

Together, the Fifth and Sixth Amendments guarantee that a criminal defendant will not be deprived of his liberty unless a jury finds each element of a crime beyond a reasonable doubt. This fundamental promise is at the heart of our Constitution's protections against arbitrary government action. Consistent with this bedrock principle, this Court has long held that conclusive presumptions that remove an element of a crime from the jury's consideration are unconstitutional.

The *per se* rule of antitrust law operates as just such a conclusive presumption with regard to an element of criminal prosecutions under Section 1 of the Sherman Act. Section 1 prohibits only those agreements that unreasonably restrain trade. "Unreasonableness" is typically proven through an elaborate economic investigation into the particular conduct at issue and the nature and history of the industry involved. However, this Court has held that a small number of restraints may be presumed to be unreasonable, without more, even if they are not always in fact unreasonable. As the Court has repeatedly acknowledged, this *per se* rule operates as a *conclusive* presumption as to "unreasonableness."

Whatever the merits of this approach in the civil context, when applied in criminal antitrust proceedings, this conclusive presumption cannot be squared with the protections guaranteed by the Fifth and Sixth Amendments. In such circumstances, defendants like petitioners are prohibited from introducing evidence that the challenged conduct is in fact reasonable or otherwise defensible. The

government is relieved of its burden of proof on the issue of unreasonableness. And juries are instructed that because certain agreements are "conclusively presumed" to be illegal, they "need not be concerned" with whether the challenged conduct was reasonable, or if any harm was actually caused. Indeed, that is exactly what happened in this case.

The *per se* rule has no place in criminal law. The rule is not a congressional command; it is a judicial gloss on a notoriously vague statute that does not itself draw any bright line dividing "reasonable" from "unreasonable" conduct. And it is a judicial gloss that this Court has candidly admitted is prophylactic, and is designed largely to serve "litigation efficiency." While a conscious tradeoff of invalidation of some lawful conduct in favor of litigation efficiency may be something that the Court is willing to tolerate in the civil arena, it cannot stand as applied to criminal defendants. In our criminal justice system, it is a basic tenet that it is worse to convict an innocent person than to let a guilty one go free. The *per se* rule tips the scale in precisely the opposite direction.

The *per se* rule is all the more pernicious given the context in which it operates. The Sherman Act itself provides no guidance as to which restraints of trade are and are not unlawful, so that task has been left largely to the courts. And in recent years, this Court has limited and overturned many of its decisions involving the *per se* rule. As those cases underscore, the *per se* rule is often on shaky and ever-shifting grounds even in the civil context, making it all the more problematic in the criminal context. If the touchstone of legality in this context is to be

"reasonableness," then at the very least, that is a question that should be left to the jury in a criminal case.

Instead, the *per se* rule operates to empower the government to obtain convictions for a crime punishable by ten years in prison even when, as here, the conduct in question may in fact have been reasonable. That approach simply cannot be squared with the Constitution. Yet the conclusive presumption that the *per se* rule creates not only was applied to violate petitioners' due process rights here, but stands as a grave threat to all criminal antitrust defendants, and undoubtedly has encouraged other defendants to agree to plea deals, rather than proceed to a trial in which the most critical question in the case must be conclusively presumed in the government's favor.

In short, the *per se* rule threatens core principles of fairness in the criminal justice system, for it deprives criminal defendants of core constitutional protections and the presumption of innocence. This Court should grant certiorari and conclude that such judicially crafted shortcuts are no more permissible in antitrust law than anywhere else.

ARGUMENT

I. The *Per Se* Rule Operates To Relieve The Government Of Its Obligation To Prove An Essential Element Of An Antitrust Offense.

The Fifth Amendment guarantees that no one may be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V. The Sixth Amendment provides all criminal defendants the right to a speedy and public trial by an impartial jury. U.S.

Const. amend. VI. Together, these "pillars of the Bill of Rights" ensure that the government must prove, and a jury must find, "every fact which the law makes essential to [a] punishment" beyond a reasonable doubt. *United States v. Haymond*, 139 S.Ct. 2369, 2376 (2019) (internal quotation omitted). Indeed, as this Court reiterated just this past Term, the guarantee that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty … stands as one of the Constitution's most vital protections." *Id*. at 2373.

Pursuant to these bedrock constitutional principles, instructions that direct the jury to presume an element of a crime have long been held impermissible. For decades, the Court has repeatedly struck down such conclusive presumptions as violative of the Constitution. *See, e.g.*, *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Carella v. California*, 491 U.S. 263 (1989). Yet despite this clear line of precedent, when it comes to the Sherman Act, this bedrock constitutional principle is honored only in the breach.

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." 15 U.S.C. §1. Section 1 is (and always has been) interpreted as outlawing only *unreasonable* restraints of trade. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018). Thus, notwithstanding the Ninth Circuit's unsupported conclusion to the contrary, *see United*

States v. Mfrs. Ass'n of Relocatable Bldg. Indus., 462 F.2d 49 (9th Cir. 1972), unreasonableness is a necessary element for all Section 1 claims.

Yet even though unreasonableness is an element of a Section 1 claim, the government was able to obtain convictions here without proving it. Indeed, petitioners were not allowed to try to demonstrate at trial that their conduct was reasonable. Instead, the jury was simply instructed that the agreements at issue here (agreements to rig bids) are "conclusively presumed to be illegal," so it "need not be concerned with whether the agreement was reasonable or unreasonable." Pet.App.42-43.

That constitutionally troubling result is not the product of anything in Section 1 itself. It is instead a product of the judicially crafted "*per se*" rule. Today, unreasonableness may be established in a Section 1 claim "in one of two ways." *Am. Express*, 138 S. Ct. at 2283. The majority of restraints are judged under the "rule of reason," which "requires courts to conduct a fact-specific assessment of market power and market structure … to assess the [restraint]'s actual effect on competition." *Id.* at 2284 (internal citations and quotations omitted). Under the "rule of reason," courts undertake a searching analysis of the "facts peculiar to the business," the "condition before and after the restraint was imposed," and the "nature" and "history of the restraint" to determine whether the restraint is unreasonable—*i.e.*, whether it "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). A small number of restraints, however, are presumed to

be unreasonable "*per se*." As the Court has explained, this *per se* rule operates as a "conclusive presumption that the restraint is unreasonable." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 344 (1982).

The *per se* rule's origins date back to 1927, when the Court determined that because "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition," such agreements "may well be held to be in themselves unreasonable." *United States v. Trenton Potteries*, 273 U.S. 392, 397 (1927). Having made this categorical determination, the Court concluded that it could skip the otherwise necessary "minute inquiry whether a particular price is reasonable or unreasonable as fixed." *Id.* Since that time, the Court has determined that a narrow group of agreements may be "presumed unreasonable without inquiry into the particular market context in which it is found." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 100 (1984).

While this Court has had many cases addressing the scope of the *per se* rule in the civil context, it has not applied the *per se* rule in the criminal context since 1945. *See United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945). Yet the government continues to prosecute antitrust defendants under the *per se* rule, and lower courts continue to approve its use. The *per se* rule thus routinely operates to relieve the government of its obligation to prove an essential element—indeed, in many cases, *the* essential element—of a Section 1 claim.

II. This Court Should Grant The Petition And Hold That The *Per Se* Rule Cannot Be Constitutionally Applied To Criminal Defendants.

The *per se* rule runs headlong into protections guaranteed by the Fifth and Sixth Amendments. The *per se* rule operates as a conclusive presumption as to "unreasonableness," yet this Court has repeatedly held that such presumptions are unconstitutional in the criminal context. While lower courts have struggled to reconcile those seemingly irreconcilable propositions, their efforts have proven in vain.

The basic problem is that the *per se* rule is not grounded in the notion that activities covered by the rule are *in fact* always unreasonable. To the contrary, this Court has been quite candid that the "match between the presumed and the actual is imperfect." *Maricopa Cty.*, 457 U.S. at 344. And the Court has been equally candid that many applications of the rule are a product less of economic realities than of a desire to foster "business certainty and litigation efficiency." *Id.* In other words, in the name of certainty and efficiency, the Court has "tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Id.*; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (noting that *per se* rules "can … prohibit[] procompetitive conduct the antitrust laws should encourage").

Perhaps that would be a permissible approach for Congress to take when defining the scope of federal crimes in clear statutory terms. But Section 1 "does not, in clear and categorical terms, precisely identify

the conduct which it proscribes." *Gypsum*, 438 U.S. at 438. There is no clear dividing line in the text of the Sherman Act between conduct that should be condemned as unreasonable "*per se*," and conduct that warrants fullblown "rule of reason" analysis. In the absence of any clear congressional command, a judicial rule that tips the scale in favor of predictability and efficiency conflicts with "the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." *Morissette*, 342 U.S. at 275. Indeed, it is a "fundamental value determination of our society … that it is far worse to convict an innocent man than to let a guilty man go free." *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (internal quotations omitted). Thus, the constitutionally protected right to a jury trial "has always outweighed"—and must continue to outweigh—"the interest in concluding trials swiftly." *United States v. Booker*, 543 U.S. 220, 244 (2005).

Application of the *per se* rule in criminal prosecutions is particularly problematic given the rule's ever-shifting scope. This Court has recognized that "the boundaries of the doctrine of *per se* illegality should not be immovable," *Leegin*, 551 U.S. at 900, and it has repeatedly narrowed the circumstances in which the rule applies. Indeed, precisely because the economic foundations of the rule have proven shaky in many applications, the Court over the past 40 years has limited, narrowed, or even overturned many of its decisions applying the rule. *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) and rejecting *per se* rule for

vertical non-price restrictions); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) and holding vertical maximum price fixing is not subject to *per se* rule); *Leegin,* 551 U.S. 877 (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) and holding vertical price restraints subject to rule of reason).

As those cases underscore, the *per se* rule by its nature necessarily—and often quite troublingly—sweeps in conduct that it is not at all clear Congress intended the statute to cover. While that may be a result that the Court is willing to tolerate in some civil contexts, it cannot stand with respect to criminal defendants. Allowing the government to obtain criminal convictions, punishable by prison time and massive fines, by requiring juries to presume that conduct satisfies the core element of a Section 1 claim is not an approach that the Constitution can tolerate. And it is a particularly pernicious problem because the *per se* rule undoubtedly leads many criminal antitrust defendants to settle rather than go through a trial in which the most critical issue has already been presumed in the government's favor. When "the theoretical underpinnings" of decisions construing the Sherman Act have been "called into serious question," this Court has not hesitated to reconsider them. *Khan*, 522 U.S. at 21. That is precisely the case here. This Court should grant certiorari and hold that the judicially crafted *per se* rule has no place in criminal antitrust prosecutions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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