No. 22-4544

IN THE
United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRENT BREWBAKER,
Defendant-Appellant.

On Appeal from the
United States District Court for the Eastern District of North Carolina
No. 5:20-cr-00481-FL-1 (Hon. Louise Wood Flanagan)

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JURISDICTIONAL STATEMENT

Defendant-appellant Brent Brewbaker appeals from a judgment of conviction in a criminal case. The district court (Flanagan, J.) had jurisdiction under 18 U.S.C. § 3231 and entered judgment on September 8, 2022. JA2663.[1] Brewbaker filed a timely notice of appeal on September 22, 2022. JA41. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court erred in declining to dismiss the Sherman Act count for failure to state an offense.

II. Whether Section 1 of the Sherman Act is unconstitutionally vague, facially or as applied.

III. Whether, by permitting the government to try the charged per se Section 1 offense, the district court plainly violated Brewbaker's due-process and jury-trial guarantees.

[1] "JA" refers to the Joint Appendix. "Br." refers to the Brief of Appellant.

IV. Whether alleged errors in the Section 1 instructions and district court's response to a jury note plainly affected the fraud convictions.

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Eastern District of North Carolina, Brewbaker was convicted of conspiracy to rig bids under 15 U.S.C. § 1; conspiracy to commit mail and wire fraud under 18 U.S.C. § 1349; three counts of mail fraud under 18 U.S.C. § 1341; and wire fraud under 18 U.S.C. § 1343. JA2654-2655. The district court sentenced him to 18 months' imprisonment, to be followed by two years' supervised release, and assessed a fine of $110,000. JA2663-2670.

I. Legal Background

Section 1 of the Sherman Act bars "[e]very . . . conspiracy, in restraint of [interstate or foreign] trade." 15 U.S.C. § 1. Given the background law against which the Sherman Act was enacted, courts have long "understood § 1 to outlaw only *unreasonable* restraints." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018) (citation omitted).

Restraints subject to this prohibition are categorized as "horizontal" or "vertical." Horizontal restraints are imposed by agreement between actual or potential "competitors on the way in which they will compete with one another." *NCAA v. Bd. of Regents*, 468 U.S. 85, 99 (1984); *accord Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J.). Vertical restraints are "imposed by agreement between firms at different levels of distribution" on matters over which they do not compete. *Am. Express*, 138 S. Ct. at 2284.

Restraints "can be unreasonable in one of two ways." *Am. Express*, 138 S. Ct. at 2283. Some restraints are unreasonable per se based on their inherently anticompetitive "nature and character." *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 64-65 (1911); *see, e.g., NCAA v. Alston*, 141 S. Ct. 2141, 2156 (2021). These per se-unlawful restraints include horizontal agreements to fix prices or rig bids. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (price fixing); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 318 (4th Cir. 1982) (bid rigging). "Restraints that are not unreasonable per se are judged under the 'rule of reason,'" which

generally requires "a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition." *Am. Express*, 138 S. Ct. at 2284 (cleaned up). "[N]early every . . . vertical restraint . . . should be assessed under the rule of reason." *Id.*

Bid rigging—namely, "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party"—is price fixing "of the simplest kind." *Portsmouth*, 694 F.2d at 318, 325. Such conduct deprives buyers "of the benefits of a competitive bidding process," *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1160 (4th Cir. 1986), and can be "[e]ven more egregiously contrary to vital competition among businesses" than simple price fixing, *Portsmouth*, 694 F.2d at 317.

The mail- and wire-fraud statutes, 18 U.S.C. §§ 1341 & 1343, are "limited to protecting property rights, and thus reach (and only reach) any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *United States v. Adler*, 186 F.3d 574, 576 (4th Cir. 1999) (cleaned up). 18 U.S.C. § 1349 proscribes conspiracies to violate the mail- and wire-fraud statutes.

II. Factual Background

1. The North Carolina Department of Transportation (NCDOT), which maintains North Carolina's roads and bridges, uses aluminum structures, including aluminum retaining walls (or "aluminum headwalls"), to connect roads over rivers and streams. JA1765, JA2108-2109. These structures facilitate the flow of water and prevent storm water from washing out roads. JA1810, JA1815, JA2108-2109. Using taxpayer funds, NCDOT contracts with private companies to design, fabricate, engineer, and help install these aluminum structures. JA1764-1767, JA1850-1852, JA1876, JA2108-2110.

JA1811, Ex.18.

NCDOT generally awards these projects through a competitive bidding process, which is designed to get the best value for taxpayers. JA1764-1769. As an NCDOT procurement director put it, "competition is the cornerstone of public procurement." JA1777. For contracts awarded through bidding, each bidder must provide an Execution Certification, affirming (*inter alia*) that its bid is submitted "competitively and without collusion." JA1775; *see also* JA1767, JA1777-1778, JA1782. NCDOT disqualifies unsigned bids, and, as the bid form states, "[f]alse certification is a class I felony." JA1775-1776. Bids remain sealed until the bidding window has closed. JA1768. NCDOT awards the project to the lowest bid that meets the project specifications. JA1768-1769.

2. Brewbaker was a manager for Contech Engineered Solutions, LLC (Contech). JA2223. Contech's primary business was manufacturing and selling corrugated steel and corrugated aluminum pipe and plate. JA1844-1845. But Contech also performed NCDOT aluminum-structure projects. JA2112-2114, JA2120-2122. Starting in roughly 2009, Brewbaker was responsible for Contech's aluminum-

structure-project bids in North Carolina. JA2107-2108, JA2223-2224, JA2232.

Contech generally competed with Pomona Pipe Products (Pomona) and Lane Enterprises, Inc., for NCDOT aluminum-structure projects. JA1773, JA2229. Pomona derived roughly 60 to 70 percent of its revenue from aluminum-structure projects, the vast majority of which it performed in North Carolina. JA1817. Pomona also was an exclusive distributor for certain Contech aluminum products. JA1845-1846. When Pomona performed NCDOT aluminum-structure projects, it would buy the aluminum pieces it needed—pipes, plates, and the like—from Contech and then fabricate the aluminum structures in the field; Pomona also would provide design, engineering, installation, and transportation services for the projects. JA1849-1852, JA1886-1887, JA2113-2114.

Before Brewbaker assumed responsibility for Contech's bids on NCDOT aluminum-structure projects, Contech competed vigorously for those projects and sometimes won them. JA2106-2108, JA2120-2122, JA2138-2139. Brewbaker's predecessor, Lambert Sutton, explained that he "always bid to win" because he was "bidding . . . to get the jobs."

JA2102, JA2138-2139. Sutton never submitted an intentionally losing bid and never obtained Pomona's bid price before submitting Contech's bid. JA2139. Indeed, there was no reason to obtain a competitor's bid ahead of time, and doing so would have been "wrong." JA2138-2140. Instead, Sutton's bids were based solely on Contech's time, costs, and desired profit and were designed to be "competitive." JA2113-2114, JA2139.

But from roughly 2009 through June 2018, Brewbaker orchestrated a conspiracy to eliminate that competition. JA2229-2232. Before submitting an aluminum-structure-project bid to NCDOT, Brewbaker—or a subordinate, at his direction—would obtain Pomona's bid price. JA2229-2230. Often, Brewbaker would call Donald Joyce, Jr., President of Pomona, or Pomona's office manager, Jennifer Fields, for Pomona's price. JA1809, JA1825-1826, JA1985-1986, JA1995. When Brewbaker was unavailable, LuAnne Workman, a Contech sales coordinator, would obtain the price from Joyce or Fields. JA2229-2230, JA2318-2319. With Pomona's price in hand, Brewbaker would create an intentionally higher, losing Contech bid—adding "a little bit" to Pomona's price, or having Workman add approximately ten percent.

JA2230, JA2314-2315. Brewbaker then would have Workman sign and submit Contech's intentionally losing bid. JA2309-2310.

Joyce considered Contech "a competitor" on NCDOT aluminum-structure projects. JA2072. He provided Pomona's bid price on the understanding that Brewbaker would use the information—as Brewbaker promised—to submit a higher, losing Contech bid. JA1860-1861, JA2074. And as Joyce observed, "the results always were higher." JA2074. Joyce went along with the bid rigging because "Contech was a big supplier," JA1827, and he "did not want to cause any friction with Contech," JA2072; as Joyce explained, it would have been a "severe problem" if Contech had stopped selling aluminum to Pomona, JA1845. Brewbaker believed that NCDOT required at least three bids before awarding a project, and, without a Contech bid, typically Pomona and Lane would be the only bidders. JA1826, JA2069.

Brewbaker "wanted [Pomona] to win the bid" on NCDOT aluminum-structure projects because Contech supplied Pomona with the aluminum for the projects. JA2315-2316. Aluminum comprised a large share of Pomona's bid, and Contech thus made "[p]lenty" of money" from Pomona's aluminum-structure work. JA1843. And

Brewbaker earned bonuses based on Contech's company-wide performance. JA2183-2186, JA2192-2198. Thus, in Brewbaker's words, it was "[s]weet" for him when Pomona won bids. JA2338.

3. Brewbaker received regular training on compliance with the antitrust laws, which instructed him to avoid this very conduct. JA2126, JA2137, JA2189-2190, JA2201-2205. For example, guidance made available to Brewbaker advised that, if Contech and a dealer were providing quotes on the same project, it would be "unacceptable" to get "competitive information" from dealers. JA2126-2137, JA2186-2189. Similarly, training found on Brewbaker's computer explained that, if "[a] county wants to buy Bridge Plank from a Dealer, but needs to get at least two bids," Contech "can be a second bidder" but "cannot agree with the Dealer to supply a higher bid" and its price "should be independent of any price the Dealer may supply." JA2241-2244.

Brewbaker took steps to conceal his bid rigging and fraud. He, or Workman at his direction, manipulated the percentage increase above Pomona's bids to make it appear that Contech had competed with Pomona. JA2236-2237, JA2314-2315 (Brewbaker told Workman that "if it was ten percent exactly every time, it would be a red flag noticeable

by [NCDOT]"). Also, Brewbaker advised Fields that he preferred to communicate by phone rather than email, JA1998, JA2289, and he told Joyce that he would delete text messages with Pomona's prices, JA1873, JA2280.

4. During the period of the conspiracies, Pomona won almost 100 percent of the NCDOT aluminum-structure projects. JA2234. This amounted to over 300 contracts, totaling $23,980,594, for projects on which Contech submitted an intentionally losing bid while falsely certifying that its bid was non-collusive. JA2235, JA2290.[2] NCDOT would not have awarded any of those contracts, or paid out taxpayer funds to Pomona, had it known of the scheme. JA1778-1779.

III. Procedural Background

A. Pretrial Proceedings

In October 2020, a grand jury indicted Brewbaker and Contech on the six counts described above. JA44-62. Count One was the focus of the defendants' pretrial challenges. Count One alleged that Brewbaker,

[2] Mailings and an email sent in connection with some of these contracts—JA1758, JA1770 (Count Three); JA1758, JA1770 (Count Four); JA1758, JA1770 (Count Five); JA1759, JA2239-2240 (Count Six)—were the basis for the substantive fraud counts.

Contech, and their co-conspirators knowingly conspired "to suppress and eliminate competition by rigging bids to NCDOT for aluminum structure projects." JA50. Specifically, after obtaining Pomona's bid prices, Contech and Brewbaker "submitted intentionally losing bids at manipulated percentages above [Pomona's] total bid price for the same project to make it appear to NCDOT that [Contech] and [Brewbaker] had competed, when, in fact, they knew that [Contech]'s bid was intended to lose." JA50-51. Count One charged that this conspiracy was "a *per se* unlawful, and thus unreasonable, restraint of interstate trade" in violation of 15 U.S.C. § 1. JA50.

Contech moved to "apply" the rule of reason to the charged per se violation. JA63-64. Although acknowledging that bid-rigging among competitors is per se illegal, Contech argued that the charged conduct was not bid rigging because it did not involve "bid rotation." JA75. According to Contech, the indictment instead sought to "extend" per se illegality to "a new paradigm"—what Contech called a "manufacturer's additional bid." JA75-76. Contech argued that such conduct is "inherently governed by the rule of reason," JA78-79, and in the alternative, that the court could not sanction "expanding the per se

rule" without conducting an economic analysis of whether the conduct always or almost always harms competition, JA79, JA87. In support of the latter argument, Contech "invite[d]" the court to consider a variety of extra-indictment materials, including an affidavit from Professor Kenneth Elzinga, JA64, who opined that the charged conduct enhanced competition, JA137. Brewbaker filed a "concur[ring]" response. JA615.

The district court denied Contech's motion. Although acknowledging that there was no "clearly accepted or required procedural practice for bringing this type of motion," JA965, the court treated the motion as a motion to dismiss for failure to state an offense, JA967. As the court explained, "[t]he indictment charges a per se violation of the Sherman Act," but "Defendants contend that the conduct described . . . is not a per se unreasonable restraint of trade"; thus, the motion, "in effect, argues that the indictment has failed to state an offense constituting a per se Sherman Act violation." JA968. Accordingly, considering only the indictment, the court reviewed whether the defendants had "'demonstrate[d] that the allegations therein, even if true, would not state an offense.'" JA968 (quoting *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004)).

The district court held that "the indictment allege[d] facts permitting an inference" that Contech, through Brewbaker, "engaged in an 'agreement between competitors pursuant to which contract offers [were] . . . submitted to . . . a third party,' that is, bid rigging." JA973 (quoting *Portsmouth*, 694 F.2d at 325). Specifically, the bid offers by Contech and Pomona to complete the NCDOT projects were "contract offers." *Id.* And despite the defendants' argument that Contech did not act as Pomona's competitor in this context, "in submitting bids for the same project, [Pomona] and []Contech acted as facially competing for award of the project, for which they would have been competing except for the alleged illegal agreement between the two." JA973-974. Thus, "all the elements of the Fourth Circuit's definition of bid rigging ha[d] been alleged: Contech formed an agreement with its fellow bid competitor [Pomona], pursuant to which bids to complete infrastructure projects, contract offers, were submitted to a third[]party, NCDOT." JA974.

Having concluded that Count One stated a per se offense, the district court rejected as "inapposite" Contech's argument that the rule of reason should apply because the bid rigging allegedly was done to

avoid "undercut[ting] [Contech's] dealer's price" and allegedly "had . . . economic benefits." JA974. As the court explained, "[a]lthough the conduct may allegedly be procompetitive, there is no need to look at economic impact as described in the Elzinga affidavit because where a practice is per se illegal, like bid rigging is, 'further inquiry on the issues of intent or the anti-competitive effect is not required.'" *Id.* (quoting *Brinkley*, 783 F.2d at 1162).

Finally, the district court rejected the defendants' arguments that the charged restraint did not qualify as per se illegal because (1) bid rigging allegedly requires bid rotation; and (2) Contech and Pomona had a "manufacturer-distributor relationship," so their bid-rigging should be treated as a vertical, "dual-distribution" arrangement subject to the rule of reason. The court explained that the first argument was foreclosed by *Portsmouth* and *Brinkley*. JA976-979. The court was not persuaded by the second argument because, "in their roles as separate bidders for NCDOT projects, defendant Contech and [Pomona] facially competed for award of the projects"; thus, "their arrangement to not compete in this process necessarily was horizontal in nature." JA979. Specifically, even "presuming" that the defendants' arrangement

"resembled" a dual-distribution system, the orientation of a restraint depends upon "'the relevant agreement in restraint of trade,'" and here the charged agreement "restrained horizontal business activity: submitting bids." JA983-984 (*quoting United States v. Apple, Inc.*, 791 F.3d 290, 325 (2d Cir. 2015)).

After the district court issued its ruling, Contech pleaded guilty, pursuant to a plea agreement, to Counts One and Two, and the government dismissed the remaining counts against it. JA19. The court sentenced Contech to pay a fine of $7 million and $1,533,988 in restitution. JA23.

Shortly before trial, Brewbaker moved to dismiss Count One, arguing (*inter alia*), that Section 1 "is unconstitutionally vague as applied to him." JA1077. Specifically, he contended that Section 1 "provides no direction about how to administer the statute in the context of bid rigging allegations (or any other Sherman Act offense)." JA1081. He also contended that courts have not provided "clear-cut, uniform definitions for bid rigging." JA1090.

The district court denied the motion. The court reasoned that, at the time of Brewbaker's alleged conduct, Section 1, as interpreted by

the courts, "gave him fair notice of the conduct it punishes and was not so standardless as to invite arbitrary enforcement." JA1339. Specifically, "[l]ong before" Brewbaker's conduct, the Fourth Circuit had clearly defined bid rigging in *Portsmouth* and *Brinkley*, and Count One alleged just such conduct. JA1339-1340.

B. Trial

The government called eight fact witnesses: an NDCOT procurement director; Pomona's President; other Pomona and Contech employees; and a special agent who participated in the government's investigation. JA1762-2365. At the close of the government's evidence, Brewbaker moved for a judgment of acquittal, arguing that the government failed to prove, for Count One, that he agreed with Pomona to rig bids; and for Counts Two through Six, that he intended to defraud NCDOT or that NCDOT was deprived of property. JA2374-2392. The district court denied the motion. JA1690-1701.

Brewbaker called two fact witnesses: Pomona's Vice President and its office manager. JA2395-2459. After the district court denied his renewed motion for judgment of acquittal, JA2661, Brewbaker argued in closing that the alleged bid rigging was simply "a one-way

sharing of information," which was done for "legitimate reasons," JA2536, JA2538-2539. He asserted that neither Contech nor Pomona viewed the other "as a competitor." JA2548. Instead, he claimed, they had "a partnership effort to work on these structure bids," JA2528, and Brewbaker "was doing [the sharing] so his bid would be prepared to compete against Lane's if Pomona's got disqualified," JA2530. On the fraud counts, Brewbaker argued that he did not intend to defraud NCDOT and that NCDOT did not pay extra for aluminum-structure projects. JA2528-2529.

In instructing the jury on Count One, the district court stated (as relevant here) that the government must prove that there was "a conspiracy to suppress and eliminate competition by rigging bids to the [NCDOT]" and that Brewbaker "knowingly joined" the conspiracy. JA2592. The court defined bid rigging (*inter alia*) as "any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party." JA2597. The court specified that "the exchange of information about bid prices is not, by itself, illegal" and that "[t]here may be other legitimate reasons that would lead competitors to exchange [such] information." JA2593-2594.

The court cautioned that, "[i]f there was, in fact, a conspiracy as charged," the jury need not be concerned with any "justifications" for the conspiracy. JA2593.

In instructing the jury on the fraud-conspiracy count (Count Two), the district court described the indictment as charging (as relevant here) that Brewbaker knew that the "certifications submitted with each bid stating that the bids had been submitted competitively and without collusion" were "false, fraudulent, and misleading." JA2600-2601.

Brewbaker did not request an instruction that the bid-rigging, even if proven, was not per se illegal because it was ancillary to a separate, legitimate collaboration. JA1491-1618.

During deliberations, the jury requested an explanation of "'collusion,'" the term used in Count Two. JA2641. The district court rejected the government's proposal to provide bid rigging as an example of collusion. JA2641-2645. Instead, consistent with Brewbaker's observation that "there is not . . . a statutory or regulatory definition in North Carolina law about what collusion is," JA2642, and with Brewbaker's specific assent, JA2643-2644, the court instructed that "[t]here isn't a legally defined explanation of collusion" and that the jury

should "consider all the facts and circumstances in evidence" and "all of the Court's instructions as a whole," JA2645.

The jury found Brewbaker guilty on all counts, JA2653-2656, and the district court imposed judgment, JA2663-2670.

This appeal ensued. The district court denied bail pending appeal, JA43, as did this Court.

IV. Rulings Under Review

Brewbaker challenges (Br.19-49, 54-62) the district court's denial of Contech's motion to apply the rule of reason to Count One and his motion to dismiss Count One on vagueness grounds. JA985, JA1342. Brewbaker also contends (Br.49-53, 62), in an unpreserved argument, that the per se rule is an unconstitutional conclusive evidentiary presumption on two ostensible elements of a Section 1 offense. And, in another unpreserved argument, Brewbaker challenges (Br.63-64) the district court's instructions on bid rigging, JA2592-2598, and the court's response to the jury note about the fraud-conspiracy count, JA2645, contending that ostensible errors in these instructions tainted his fraud convictions.

SUMMARY OF ARGUMENT

I. The district court correctly concluded that the Sherman Act count stated a per se violation of Section 1. The allegations that Contech and Pomona submitted facially competing bids for aluminum-structure projects but agreed that Contech's bids would always be higher described conduct falling squarely within this Court's definition of bid rigging. That the conspirators also had a vertical relationship—Pomona was a distributor of Contech's aluminum pieces—did not change the horizontal character of their agreement to rig bids on aluminum-structure projects.

The district court likewise correctly declined to consider Contech's evidence of "procompetitive justification" and make a threshold determination of whether the per se rule or the rule of reason applied to the facially-valid indictment charging a per se offense. Indeed, to do so in this criminal antitrust case would have infringed on the fact-finding function of the jury and also would have flouted longstanding antitrust jurisprudence, which recognizes that Congress condemned certain restraints, like bid rigging, categorically.

II. Brewbaker insists that the per se rule is unconstitutionally vague in criminal prosecutions generally, in bid-rigging cases specifically, and in his case particularly. In *Nash v. United States*, 229 U.S. 373 (1913), however, the Supreme Court rejected the argument that the Sherman Act was void for vagueness in a criminal prosecution, and *Nash* remains good law. This Court's clear definition of per se-illegal bid rigging forecloses the second argument. The third fails too, for various reasons, including because Brewbaker was trained to avoid the very conduct of which he was convicted.

III. In an unpreserved argument, Brewbaker contends that the per se rule operates as a conclusive evidentiary presumption that relieves the government of its burden of proving two ostensible elements of a Section 1 offense—namely, factual unreasonableness and knowledge of likely anticompetitive effects. But the Supreme Court long has recognized that the per se rule is an interpretation of the Sherman Act—i.e., of which restraints of trade categorically fall within Section 1's prohibition—and that the reasonableness of a particular restraint is not an issue for the jury in a per se case. All six circuits to have decided jury-right challenges to the per se rule thus have rejected

them. And this Court's own precedent forecloses Brewbaker's argument that the per se rule relieves the government from having to show "criminal intent."

IV. In another unpreserved argument, Brewbaker insists that ostensible errors in the bid-rigging instructions and the district court's response to the jury note affected the jury's consideration of the fraud counts. But the instructions and response were correct. And Brewbaker also cannot show that they affected the fraud counts given (*inter alia*) the court's directive to the jury to consider each count separately.

ARGUMENT

I. The District Court Correctly Concluded that the Per Se Rule Governed the Sherman Act Count.

Brewbaker contends that the district court erred in declining to dismiss the Sherman Act count for failure to state a per se offense.[3]

[3] Brewbaker does not challenge the district court's decision to treat the motion to apply the rule of reason as a motion to dismiss for failure to state an offense; he thus has abandoned any such challenge. *United States v. Hassan*, 742 F.3d 104, 128 n.17 (4th Cir. 2014). Indeed, he acknowledges (Br.36) that, had the court granted the motion, it "would have dismissed the Sherman Act charge." And he argues (Br.47) that the court "reversibly erred . . . by not dismissing the Sherman Act charge." *See also* Br.49 (same).

Specifically, he argues (Br.36-40, 45-49) that the indictment, on its face, alleged a restraint properly subject to the rule of reason—namely, either a vertical, "dual distribution arrangement," or a horizontal, "collaborative venture." He also argues (Br.20-35, 40-45) that the court was required to consider Contech's evidence of "procompetitive justification" and make a threshold determination of whether the per se rule or the rule of reason applied to the per se offense charged in the indictment. He is wrong on both scores.

A. Standard of Review

This Court reviews de novo a district court's legal conclusions in resolving a pretrial motion to dismiss an indictment. *United States v. Kaixiang Zhu*, 854 F.3d 247, 253 (4th Cir. 2017).

Unpreserved claims of trial error are reviewed for plain error only. *Puckett v. United States*, 556 U.S. 129, 135 (2009). Under this test, the appellant bears the burden of showing (1) unwaived error; (2) that is "clear or obvious, rather than subject to reasonable dispute"; and (3) that "affected the appellant's substantial rights," which usually means it "affected the outcome of the district court proceedings." *Id.* (internal quotation marks omitted). If these three prongs are met, "the court of

appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (cleaned up). "Meeting all four prongs is difficult, as it should be." *Id.* (internal quotation marks omitted).

B. The Per Se Rule, the Ancillary-Restraints Doctrine, and Other Joint-Venture Defenses

1. The Supreme Court has long interpreted Sherman Act Section 1's prohibition against "conspirac[ies] . . . in restraint of trade," 15 U.S.C. § 1, to mean that certain types of restraints are categorically—or per se—illegal. The "nature and character" of these agreements render them "within the purview of" Section 1's prohibition because they necessarily "operate[] to produce the injuries which the statute forbade." *Standard Oil*, 221 U.S. at 64-65. "As to these classes of restraints, . . . Congress . . . determined its own criteria of public harm and it [i]s not for the courts to decide whether in an individual case injury ha[s] actually occurred." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959).

Per se-illegal categories of restraints are illegal in and of themselves because, "[i]f successful, these conspiracies concentrate the

power to set prices among the conspirators, including the 'power to control the market and to fix arbitrary and unreasonable prices.'" *Apple*, 791 F.3d at 326 (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)). "And even if unsuccessful or 'not . . . aimed at complete elimination of price competition,' the conspiracies pose a 'threat to the central nervous system of the economy' by creating a dangerously attractive opportunity for competitors to enhance their power at the expense of others." *Id.* (quoting *Socony-Vacuum*, 310 U.S. at 224 n.59).

Courts historically have considered three types of restraints to be core per se-illegal restraints. They are agreements among competitors to fix prices, *e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980); rig bids, *e.g.*, *Portsmouth*, 694 F.2d at 318; or allocate markets, *e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990). Just three years ago, Congress expressly confirmed courts' longstanding per se treatment of these restraints, agreeing that "[c]onspiracies among competitors to fix prices, rig bids, and allocate markets are categorically and irredeemably anticompetitive and contravene the competition

policy of the United States." 15 U.S.C. § 7a note (Findings; Purpose of 2020 Amendment).

At issue in this case is bid rigging, a form of price fixing. *Portsmouth*, 694 F.2d at 318. As the Supreme Court has explained, "price fixing is contrary to the policy of competition underlying the Sherman Act" and therefore "its illegality does not depend on a showing of its unreasonableness"—meaning actual anticompetitive effect. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956); *accord, e.g., NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998) ("antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances"); *United States v. Gravely*, 840 F.2d 1156, 1161 (4th Cir. 1988) (under per se rule, "there is no need for the prosecution to prove an adverse effect on competition"). Likewise, "[i]n cases involving behavior such as bid rigging, . . . the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'" *United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981) (citation omitted). For such restraints, the government "need prove only that [the challenged

behavior] occurred in order to win [its] case." *Id.* (quoting Robert H. Bork, *The Antitrust Paradox* 18 (1978)).[4]

2. When an indictment alleges an agreement among competitors to rig bids, the case proceeds under the per se rule—with two exceptions that the jury may consider if requested by the defense and sufficiently supported by admissible evidence. First, when a legitimate joint venture (or similar business collaboration) restricts activities outside of the collaboration, that restraint will be evaluated under the rule of reason if it satisfies the two requirements of "the ancillary restraints doctrine." *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006); *see also Rothery Storage*, 792 F.2d at 224. The restraint must be (1) "subordinate and collateral," *Rothery*, 792 F.2d at 224, to a "legitimate business collaboration, such as a business association or joint venture," *Dagher*, 547 U.S. at 7, and (2) "reasonably necessary" to achieving that collaboration's procompetitive objective, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), *aff'd as modified in other part*, 175

[4] Market definition—which aids in assessing whether a restraint has the potential for actual adverse effects on competition—is not required for per se-illegal restraints. *See FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 430 (1990).

U.S. 211 (1899); *accord United States v. Aiyer*, 33 F.4th 97, 115-16 (2d Cir. 2022); *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment). Such a restraint is described as "ancillary" rather than "naked." *Dagher*, 547 U.S. at 7.

The second exception arises in other contexts in which "the restraint at issue was imposed in connection with some kind of potentially efficient joint venture." *Apple*, 791 F.3d at 326. This type of joint-venture defense exists, for instance, when a joint venture creates a new product, and the restraint on competition is "necessary to market the product at all." *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979). In *Broadcast Music*, the Supreme Court recognized that, to offer a venture product for sale, the venture must, for practical reasons, "set the price of" that product. Such restraints are termed "core activity of the joint venture itself." *Dagher*, 547 U.S. at 7-8.[5]

[5] In the unique context of sports leagues, the Supreme Court also has applied the rule of reason to otherwise-per-se-illegal restraints because they arose in "an industry" in which some "horizontal restraints on

C. The District Court Correctly Held that the Sherman Act Count Stated a Per Se Violation of Section 1.

1. To obtain dismissal of an indictment under Rule 12(b)(3)(B)(v), a defendant must "demonstrate that the allegations therein, even if true, would not state an offense." *Thomas*, 367 F.3d at 197. "An indictment is sufficient if it states each of the essential elements of the offense." *United States v. Lockhart*, 382 F.3d 447, 449 (4th Cir. 2004). It need not use "precise language," *United States v. Mathis*, 932 F.3d 242, 257 (4th Cir. 2019), or "magic" words, *Clemons v. United States*, 137 F.2d 302, 304 (4th Cir. 1943). Instead, an indictment generally need only "set forth the offense in the words of the statute itself." *United States v. Perry*, 757 F.3d 166, 171 (4th Cir. 2014) (internal quotation marks omitted). In ruling on the sufficiency of an indictment, a court "is ordinarily limited to the allegations contained in the indictment." *United States v. Engle*, 676 F.3d 405, 415 (4th Cir. 2012).

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competition are essential if the product is to be available at all." *Bd. of Regents*, 468 U.S. at 100-02 (exempting from per se liability league's television plan, though a "naked restraint on price and output"); *see Alston*, 141 S. Ct. at 2157 (recognizing *Bd. of Regents* declined to apply per se rule "only" for this reason).

Count One charged Brewbaker with knowingly participating in a "*per se* unlawful" violation of Section 1: a conspiracy to rig bids. JA50.[6] Bid rigging is "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party." *Portsmouth*, 694 F.2d at 325; *see also id.* at 325 n.18 ("[C]ollusive bidding is an agreement between competitors in a bidding contest to submit identical bids or, by preselecting the lowest bidder, to abstain from all bona fide effort to obtain the contract." (internal quotation marks omitted)). There is no "requirement that coconspirators agree to reciprocate by submitting complementary bids on future projects." *Id.* at 325. Instead, "where two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint of trade." *Brinkley*, 783 F.2d at 1161.

Here, the indictment described "an agreement between competitors in a bidding contest" to "abstain from all bona fide effort to obtain the contract" by "preselecting the lowest bidder." *Portsmouth*,

[6] Count One also charged the interstate-commerce element of a Section 1 violation. JA52.

694 F.2d at 325 n.18. Specifically, Count One alleged that (1) during the period of the conspiracy, Contech and Pomona "regularly submitted bids for aluminum structure projects in response to bid solicitations from NCDOT"; and (2) during the same period, Contech and Pomona, "by prior arrangement, rigged those bids so that [Contech] would submit an intentionally higher bid." JA47, 50. The indictment likewise described how the bid-rigging agreement was carried out. As Count One explained, (1) Brewbaker often "called [Pomona] directly to obtain [Pomona's] bid prices for aluminum structure projects prior to submitting a bid on behalf of [Contech] to NCDOT"; (2) Pomona employees—who "understood that he and [Contech] would use [Pomona's] total bid price to ensure that [Contech] submitted rigged bids to NCDOT that were intentionally higher than [Pomona's] bids"—"provided this information" to Brewbaker; and (3) Contech and Brewbaker then "submitted intentionally losing bids at manipulated percentages above [Pomona's] total bid price for the same project, to make it appear to NCDOT that [Contech] and [Brewbaker] had competed, when, in fact, they knew that [Contech's] bid was intended to lose." JA47-51. The indictment thus stated each element of a bid-

rigging offense: as the district court put it, "an agreement" between Contech and "its fellow bid competitor [Pomona], pursuant to which bids to complete infrastructure projects, contract offers, were submitted to a third party, NCDOT." JA974. *See Brinkley*, 783 F.2d at 1160 (when a co-conspirator, which had decided not to compete for the contract, "contacted Brinkley requesting a safe number to bid and he consented to give them one . . . , at that point, there was an agreement," and that agreement was "clearly bid rigging" and "*per se* violative of 15 U.S.C § 1").

2. Brewbaker's arguments to the contrary are unavailing.

a. That Count One did not use the word "competitors" (Br.46) is of no moment. The indictment contained numerous allegations (*supra* Section I.C.1.) that Contech and Pomona competed for NCDOT aluminum-structure projects; indeed, Brewbaker himself acknowledges (Br.36) that "the Indictment alleged" that Contech and Pomona "competed at the distribution level." As the district court explained, "in submitting bids for the same project, [Pomona and Contech] acted as facially competing for award of the project, for which they would have been competing except for the alleged illegal agreement between the

two." JA974. Moreover, the allegations that Brewbaker and Contech conspired with Pomona "to suppress and eliminate *competition*" and engaged in "*per se* unlawful" bid rigging, JA50 (emphasis added), necessarily allege that Contech and Pomona were competitors. *See Portsmouth*, 694 F.2d at 325 (defining bid rigging as an "agreement between competitors"); *see also United States v. Wicks*, 187 F.3d 426, 429 (4th Cir. 1999) ("charging a legal term of art in an indictment sufficiently charges the component parts of the term"). In short, by alleging that Pomona and Contech competed for aluminum-structure projects, and by invoking the elements of a per se offense, Count One readily conveyed that Pomona and Contech were competitors. *See, e.g.*, *United States v. White*, 475 F.2d 1228, 1253 (4th Cir. 1973) ("It is sufficient if the indictment sets forth the essential facts constituting the crime charged with words of similar import.") (internal quotation marks omitted).

b. Brewbaker's argument (Br.47) that Count One alleged a vertical rather than a horizontal agreement misconstrues both the allegations and the law. The indictment described two relationships, each based on a different product. In the first (a vertical relationship),

Contech and Pomona acted as manufacturer and dealer, respectively, of *aluminum pieces*: Contech sold aluminum pieces to Pomona. JA46. In the second (a horizontal relationship), Contech and Pomona acted as competitors: They both bid on NCDOT *aluminum-structure projects*. JA47. Contrary to Brewbaker's repeated assertions (Br.36, 39, 47), the indictment did not allege that coordinating bids on NCDOT contracts was "part of" the conspirators' "'[manufacturer-distributor] relationship.'" *Compare* Indictment ¶7 (JA46) ("[Pomona] served as a dealer for [Contech]. As part of that relationship, [Contech] regularly sold *aluminum pieces* . . . to [Pomona]."), *with* Indictment ¶8 (JA46) ("[Contech], [Pomona], and others submitted bids for NCDOT *aluminum structure projects*.") (emphases added).

It is not uncommon for companies to have both vertical and horizontal agreements—as would occur, for instance, if GM sold spark plugs to Ford and the companies then agreed to fix prices on the cars they both sold. In applying Section 1 in such cases, courts determine the orientation of the restraint by looking to the challenged agreement. *See, e.g., United States v. Gen. Motors Corp.*, 384 U.S. 127, 132-38, 140-41, 144-46 (1966) (vertically-related manufacturer enforced horizontal

restraint agreed upon by distributors); *Klor's,* 359 U.S. at 212-13 (horizontal agreement among suppliers organized by vertically-related retailer); *see also Palmer*, 498 U.S. at 47, 49-50 (market-division agreement horizontal even though one of two competitors also became licensee of other).

In *Apple*, for example, the Second Circuit affirmed a judgment against Apple for a per se violation of Section 1. 791 F.3d at 296-98. Through distribution agreements with electronic-book (ebook) publishers participating in its iBookstore, Apple had organized a price-fixing conspiracy among the publishers. *Id.* at 304-08. Apple argued that the per se rule should not apply because the distribution agreements were vertical. *Id.* at 321. But the court cautioned that "the Sherman Act outlaws *agreements* that unreasonably restrain trade and therefore requires evaluating the nature of the restraint, rather than the identity of each party who joins in to impose it, in determining whether the per se rule is properly invoked." *Id.* at 297. There, the challenged restraint was "the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices." *Id.* at 323. And under *General Motors* and *Klor's*, that agreement was per

se illegal even though Apple was vertically related to the publishers. *Id.* at 322-23. As the court explained, horizontal price-fixing agreements are per se illegal because they pose a "threat to the central nervous system of the economy," and that threat "is just as significant when a vertical market participant organizes the conspiracy." *Id.* at 323 (quoting *Socony-Vacuum*, 310 U.S. at 224 n.59).

Here, the district court properly "[l]ook[ed] to the relevant agreement" and concluded that the agreement "restrained horizontal business activity: submitting bids." JA984. That agreement was one to coordinate bids on aluminum-structure projects—projects that involved not just aluminum pieces, but also the design, fabrication, and installation of aluminum structures. JA45-46; *see also* JA983. Although "there [were] aspects of [Pomona and Contech's] relationship that [were] vertical," "[t]he alleged agreement restrained how the two companies would compete against one another in the bidding process, a horizontal arrangement." JA984-985.

Brewbaker's related argument—that the district court should have treated the bid rigging as vertical because the agreement ostensibly was part of a "dual distribution arrangement" (Br.36-40)—

fails for similar reasons. Dual distributors are firms that distribute their products "through a distributor and independently." *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997). When a dual-distributing manufacturer imposes a restraint on its distributor—for instance, requiring the distributor to sell the product at a certain price or limiting the distributor's sales to a certain territory—courts generally treat the restraint as vertical despite the manufacturer's presence at the distributor level. *See, e.g., PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420-21 & n.8 (5th Cir. 2010) (collecting cases). As the Seventh Circuit explained, such restraints are "restriction[s] on distribution" of the manufacturer's product, and dual distribution does not transform them into horizontal restraints. *Ill. Corp. Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 753 (1989); *see also, e.g.*, *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir. 2006) (restraint vertical notwithstanding "the relationship had horizontal elements"); *Elecs. Commc'ns*, 129 F.3d at 244 ("this is essentially a dispute about the way one product is distributed"); *Int'l Logistics Grp., Ltd. v. Chrysler Corp.*, 884 F.2d 904, 906 (6th Cir. 1989) (defendant's "marketing policies" did not "impose restraints upon

parties at the same competitive level"); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1230 (8th Cir. 1987) (challenged restraints were "vertical distributorship contracts").[7]

Here, as the district court correctly observed, the indictment did not describe a dual-distribution arrangement. Such arrangements involve distribution by a manufacturer and dealer of "the same product." JA983. But "the actual 'product[s]' defendant Contech is alleged to offer as a manufacturer and as a bidder differ: as a manufacturer, defendant Contech provides aluminum pieces to [Pomona]; as a bidder on NCDOT projects, defendant Contech provides

[7] This Court has not explicitly addressed how to classify restraints in the dual-distribution context. In *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16-17 (4th Cir. 1981) (per curiam), this Court treated as vertical a restraint imposed by a manufacturer on its dealers, where the restraint "redound[ed] primarily to the benefit of the manufacturer as a result of increased interbrand competition." The manufacturer was a dual distributor, *see Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 754 (D. Md. 1980) (stating that Michelin and Rice "compete[d] at the wholesale level . . . in a dual distribution system"), and this Court and others have understood *Rice* as applying—and limited—to the dual-distribution context. *See, e.g., Hampton Audio Elecs., Inc. v. Contel Cellular, Inc.*, 966 F.2d 1442, at *3 (4th Cir. 1992) (per curiam) (unpublished table decision) (stating that *Rice* addressed "[d]ual distributorships"); *Barnosky Oils, Inc. v. Union Oil Co. of Cal.*, 665 F.2d 74, 80 n.10 (6th Cir. 1981) (same); *Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 663 F.2d 405, 409 (2d Cir. 1981) (same).

installation and completion of aluminum structures." *Id.* (quoting *Elecs. Commc'ns*, 129 F.3d at 243). In addition, the challenged agreement did not restrict Pomona's marketing of Contech's aluminum pieces—for instance, by imposing a minimum resale price or limiting Pomona to certain customers or territories. Instead, the agreement prevented Contech from bidding lower than Pomona for NCDOT aluminum-structure projects. The restraint thus was horizontal: It "restrained how the two companies would compete against one another in the bidding process." JA985. *See Brinkley*, 783 F.2d at 1161; *see also United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992) ("[T]he decisive circumstance in defining 'competitors' is the simple fact that [defendant] submitted a bid for the . . . contract. Despite its ultimate inability to perform the contract, [defendant] held itself out as a competitor for the purposes of rigging what was supposed to be a competitive bidding process.").

c. For the first time on appeal,[8] Brewbaker argues (Br.29, 45-46) that, even if the restraint was horizontal, the district court should have

[8] In his motion to dismiss on vagueness grounds, Brewbaker noted the indictment's allegation that Pomona was a distributor of Contech's aluminum products and stated: "Mr. Brewbaker *contends* that his

dismissed Count One because the indictment ostensibly showed that the bid rigging was "ancillary to a collaborative venture." The district court did not err, much less plainly err, in failing sua sponte to dismiss Count One on this ground. The indictment contained no allegation that the bid rigging was subordinate and collateral to the dealership relationship, much less that the bid rigging was reasonably necessary to achieve any procompetitive objective of that relationship. To the contrary, the indictment alleged (*inter alia*) that Pomona served as a dealer for Contech *before* the parties began rigging NCDOT bids, JA46, 50, and that the bid rigging was designed to "eliminate," not promote, competition by "mak[ing] it appear" that Contech had competed "when, in fact, . . . [Contech's] bid was intended to lose," JA50-51. *See, e.g.*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and their Application* ¶1908b (4th ed. 2022) (a "restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful").

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bidding conduct was one that was ancillary" to the "the manufacturer-distributor relationship." JA1090 (emphasis added). He did not argue that the indictment established an ancillarity defense exempting Count One from the per se rule.

D. The District Court Correctly Declined to Consider Contech's "Procompetitive Justification" and Economic Evidence.

Brewbaker argues that, in ruling on the motion to dismiss Count One, the district court was required to consider his "procompetitive justification" for the bid rigging, as well as economic evidence of alleged lack of anticompetitive effects, and make a threshold determination of whether to apply the per se rule to the facially-valid indictment charging a per se offense. Brewbaker's argument is both procedurally and substantively flawed. The court had no such duty in this criminal antitrust case.

1. Federal criminal prosecutions are governed by a different set of procedural rules than federal civil cases. Among other things, an indictment controls the proceedings in a criminal case more strictly than a complaint controls a civil case. Although a court may evaluate whether the indictment "state[s] an offense," Fed. R. Crim. P. 12(b)(3)(B)(v), "[a] defendant has no right to judicial review of a grand jury's determination of probable cause to think a defendant committed a crime," *Kaley v. United States*, 571 U.S. 320, 333 (2014). Rather, "an indictment . . . if valid on its face, is enough to call for trial of the

charges on the merits." *United States v. Wills*, 346 F.3d 476, 488-98 (4th Cir. 2003) (cleaned up).

In addition, given the "'the inviolable function of the jury' in our criminal justice system," *United States v. Sampson*, 898 F.3d 270, 281 (2d Cir. 2018), the federal criminal procedural rules strictly limit courts' ability to assess the viability of the government's case. Before trial, the defendant may raise by motion only a "defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). There is no procedural mechanism in a criminal case, akin to summary judgment in the civil context, which allows courts to make a pretrial sufficiency evaluation of the government's evidence. *See United States v. Bailey*, 444 U.S. 394, 412 n.9 (1980); *United States v. Weaver*, 659 F.3d 353, 355 (4th Cir. 2011).

Here, as shown *supra* (Section I.C.) the district court properly concluded that Count One adequately alleged a horizontal bid-rigging conspiracy. For that reason, the government was entitled to present its per se charge to the jury without any pre-trial determination of the sufficiency of its evidence. *See Costello v. United States*, 350 U.S. 359, 363 (1956). As the Second Circuit recently held in rejecting the same

argument Brewbaker makes here, "in a criminal antitrust case, a district court has no pretrial obligation to consider a defendant's evidence of competitive effects in order to determine whether or not the indictment properly charges an actual *per se* offense." *Aiyer*, 33 F.4th at 117. Thus, the district court committed no procedural error in declining to consider Brewbaker's proffered evidence and decide which antitrust rule should apply to the facially-valid per se charge.

2. Brewbaker also is wrong as a matter of substantive antitrust law. Having determined that Count One properly charged conduct qualifying as bid rigging under Fourth Circuit law, the district court correctly declined to "look at economic impact" because, "where a practice is per se illegal, like bid rigging is, 'further inquiry on the issues of intent or the anti-competitive effect is not required.'" JA974 (quoting *Brinkley*, 783 F.2d at 1162). *See also, e.g.*, *Cont'l Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 209 (4th Cir. 2001).

Indeed, Supreme Court precedent long has barred courts from considering evidence and arguments prohibited by the per se rule in determining whether the rule applies. In *Arizona v. Maricopa County*

Med. Soc'y, 457 U.S. 332 (1982), for instance, the respondents made a claim similar to Brewbaker's—namely, that "the per se rule is inapplicable because their agreements are alleged to have procompetitive justifications." *Id.* at 351. The Court held that this "argument indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some." *Id.*; *accord, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *United States v. Sealy, Inc.*, 388 U.S. 350, 357-58 (1967). Or, as *Socony-Vacuum* put it in a criminal case: "Whatever economic justification particular price-fixing agreements may be thought to have, 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." 310 U.S. at 224 n.59.

3. The cases on which Brewbaker relies are inapposite. None is a criminal case involving an attack on an indictment. All are distinguishable on other grounds, too, or simply mischaracterized.

Board of Regents does not state that determining the "'orientation'" (Br.26) of an agreement often requires consideration of evidence. Indeed, *Board of Regents* does not contain the word "orientation." *Board of Regent*'s statement that per se rules "may" require considerable inquiry into market conditions to justify a presumption of anticompetitive conduct refers to restraints like "tying," which "may have procompetitive justifications that make [them] inappropriate to condemn without considerable market analysis." *Bd. of Regents*, 468 U.S. at 104 n.26; *see also, e.g.*, *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986) (discussing "market power" showing required for per se-illegal group boycotts). No such inquiry is required for core per se categories like price fixing or bid rigging. Nor are courts *permitted* to "examine the economic justification" of "particular application[s]" of such per se rules. *Maricopa*, 457 U.S. at 349-50 & n.19.

Rice was an appeal from a civil bench trial involving a dual-distribution restraint. 483 F. Supp. at 754, 762. In that context (*supra* n.7), *Rice* stated that "a conspiracy among dealers and their supplying manufacturer for the purpose of retail price maintenance that would

benefit the dealers" would be horizontal and per se illegal, whereas "one involving the same parties but redounding primarily to the benefit of the manufacturer" would be vertical and analyzed under the rule of reason. 638 F.2d at 16. *Rice* did not suggest that a finding of anticompetitive "purpose" (Br.26) is required to apply the per se rule to any agreement among parties who are in some sense "vertically related" (Br.20). Such a requirement would be inconsistent with longstanding Supreme Court precedent. *See Apple*, 791 F.3d at 297, 322-23 (citing *General Motors* and *Klor's*); *see also Nat'l Elec. Contractors Ass'n v. Nat'l Constructors Ass'n*, 678 F.2d 492, 501 (4th Cir. 1982). Nor did *Rice* suggest that an "evidentiary inquiry" (Br.27) is required to assess whether an indictment states a per se offense.[9]

Brewbaker's remaining cases involve rule-of-reason claims, *e.g.*, *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 759, 764-65 (1999); or cases assessing defenses to the per se rule in civil summary-judgment and trial contexts, *e.g.*, *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health*

[9] Similarly, *Koppers* (Br.39) did not suggest that a court must consider "evidence" in determining whether an indictment states a per se offense. *Koppers* held only that the trial court did not err in refusing to give a jury instruction on vertical restraints because the *trial* evidence did not support such a theory. 652 F.2d at 296.

Sys., 922 F.3d 713, 725-31 (6th Cir. 2019) (ancillary-restraints defense).[10]

In short, the district court did not err in declining to assess Brewbaker's competitive-effects evidence and decide whether that evidence counseled in favor of applying the rule of reason to this facially-valid per se charge. "To hold otherwise would be to unconstitutionally infringe upon the factfinding function of the jury in a criminal trial, and likewise cause the per se rule to lose all the benefits of being per se." *Aiyer*, 33 F.4th at 120 (cleaned up).

4. For the first time on appeal, Brewbaker argues (Br.33-35, 44-45) that the district court violated due process by accepting the grand jury's allegations, which he deems an "ex parte" presentation; or by failing to give him a meaningful pretrial opportunity to challenge those allegations, which he claims is required under *Mathews v. Eldridge*, 424

[10] Only two of the civil cases involved motion-to-dismiss rulings. In *Lumber Liquidators, Inc. v. Cabinets to Go, LLC*, 415 F. Supp. 3d 703, 710, 713 (E.D. Va. 2019), a breach-of-contract action, the court declined to find the agreement unenforceable as per se illegal, where the complaint alleged that the restraint was ancillary. In *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1038-40 (N.D. Cal. 2013), the court held that it could not decide whether eBay's ancillarity defense exempted the claim from per se treatment until the parties had conducted discovery on the agreement's formation and character.

U.S. 319 (1976). He cannot show error, much less obvious error, because his arguments are foreclosed by *Kaley*. *See* 571 U.S. at 328 ("The grand jury gets to say—without any review, oversight, or second-guessing—whether probable cause exists . . . ."); *see also id.* at 333-41 (even if *Mathews* applied to criminal procedural rules, there is "no right to revisit the grand jury's finding").[11]

II. Brewbaker's Vagueness Challenge Fails.

Brewbaker also advances various arguments (Br.54-62) that Section 1's per se rule—in general and applied to his case—is unconstitutionally vague. All fail because the Supreme Court and this Court have given clear notice that Brewbaker's conduct was per se unlawful.

[11] Of course, a defendant may challenge a facially-valid per se charge at trial, including (*inter alia*) by presenting evidence, and seeking a jury instruction, on a defense to per se illegality—such as the ancillary-restraints doctrine. *See Aiyer*, 33 F.4th at 120-23. Indeed, Brewbaker did so unsuccessfully in his evidentiary presentation, Rule 29 motions, and arguments to the jury, though he chose not to press an ancillarity defense.

A. Standard of Review

This Court reviews the constitutionality of a statute de novo but reviews unpreserved arguments for plain error. *United States v. Chong Lam*, 677 F.3d 190, 201-02 (4th Cir. 2012).

B. The Per Se Rule Is Not Vague Facially or as Applied to Brewbaker.

1. Though styled as an "as applied" challenge (Br.44), Brewbaker's appeal raises, in part, a meritless facial challenge, Br.54, 56 ("statute is . . . unconstitutionally vague as applied to . . . all[] criminal prosecutions").

A criminal statute is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). As the Supreme Court has held, the Sherman Act provides such notice.

Over a century ago, in *United States v. Nash*, 229 U.S. 373 (1913), the Supreme Court held that Section 1 of the Sherman Act is not unconstitutionally vague. There, the defendants challenged their Sherman Act convictions on the ground that "the statute was so vague as to be inoperative on its criminal side." *Id.* at 376. The Court rejected

this argument, reasoning that, although Section 1 "contains in its definition an element of degree as to which estimates may differ," "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Id.* at 376-377; *see also United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439 (1978) ("[I]n *Nash*[,] . . . the Court held that the indeterminancy [sic] of the Sherman Act's standards did not constitute a fatal constitutional objection to their criminal enforcement.").

Brewbaker's efforts to avoid *Nash* are unavailing. He contends that Section 1 fails the "modern vagueness test" (Br.60), but "modern" Supreme Court decisions continue to rely on *Nash* and its underlying principles. *E.g.*, *Johnson*, 576 U.S. at 603-04.[12] He claims *Nash* addressed only rule-of-reason prosecutions (Br.61), but *Nash* rejected the asserted vagueness of the Sherman Act as construed by *Standard*

[12] Indeed, lower courts continue to reject vagueness challenges to the per se rule in the "modern" era. *E.g.*, *United States v. Hui Hsiung*, 778 F.3d 738, 750 n.6 (9th Cir. 2015); *United States v. Manahe*, No. 2:22-CR-00013-JAW, 2022 WL 3161781, at *10 (D. Me. Aug. 8, 2022); *United States v. DaVita Inc.*, No. 1:21-CR-00229-RBJ, 2022 WL 266759, at *9 (D. Colo. Jan. 28, 2022); *United States v. Jindal*, No. CV 4:20-CR-00358, 2021 WL 5578687, at *10 (E.D. Tex. Nov. 29, 2021); *United States v. Aiyer*, 470 F. Supp. 3d 383, 402 n.23 (S.D.N.Y. 2020).

Oil, *Nash*, 229 U.S. at 376-77, which articulated both categorical and fact-specific standards for unreasonableness, *see Standard Oil*, 221 U.S. at 58 ("either from the nature or character of the contract" or "where the surrounding circumstances" establish unreasonableness). More basically, "[u]nless and until the Supreme Court overrules" *Nash*, the lower courts are "obliged to follow it." *United States v. Alicea*, 58 F.4th 155, 163 (4th Cir. 2023).

Even putting *Nash* aside, there is no merit to Brewbaker's contention that the Sherman Act "set a net large enough to catch all possible offenders, and le[ft] it to the court to step inside" and define the crime. Br.55-56 (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983) ("'offense' was created by the Judiciary")).[13] Simply put, the per se rule reflects a judicial interpretation of Section 1. *See infra* Section III.B.2.b. The statutory words "restraint of trade" "took their origin in the common law," *Standard Oil*, 221 U.S. at 50-51, and "at common

[13] Brewbaker has abandoned any argument that the per se rule violates the nondelegation doctrine. Anyway, even if the per se rule were a product of legislative delegation, Congress provided "an intelligible principle," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), by directing courts to draw on the common law, *e.g.*, *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 696 (1978).

law" certain categories of restraints were so pernicious that "there [was no] question of reasonableness open to the courts with reference" to them, *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 238 (1899). Thus, there is a "sufficiently settled" (Br.58) definition of the offense. And, in any event, modern vagueness doctrine recognizes that "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree." *Johnson*, 576 U.S. at 604 (quoting *Nash*, 229 U.S. at 376-77).

2. Brewbaker's argument that the per se rule is vague as applied to bid rigging fares no better—bid rigging does not "lack[] a sufficiently settled meaning" (Br.56-59). To provide due process, a criminal statute need only make it "reasonably clear at the relevant time that the defendant's conduct was criminal," and "clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statue." *United States v. Lanier*, 520 U.S. 259, 267 (1997). This Court's bid-rigging precedents do just that.

Here, since at least 1982, this Court has clearly defined per se-illegal bid rigging as "[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third

party." *Portsmouth*, 694 F.2d at 325; *see also Brinkley*, 783 F.2d at 1160. Brewbaker's conduct falls squarely within this Court's longstanding definition, *supra* Section I.C., dooming all variations of his vagueness challenge, *United States v. Hosford*, 843 F.3d 161, 170 (4th Cir. 2016). Moreover, this Court has long recognized that bid rigging is a "price-fixing agreement of the simplest kind," *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502, 508 (4th Cir. 2005), and Brewbaker's conduct also falls squarely within the Supreme Court's longstanding definition of per se-unlawful price fixing, *see Socony-Vacuum*, 310 U.S. at 223 ("a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price").

Brewbaker wrongly asserts (Br.57) that these precedents do not survive *Leegin*, 551 U.S. 877. While *Leegin* overturned the per se rule for vertical price fixing, it reaffirmed that rule's application to various horizontal restraints. *See* 551 U.S. at 886 ("per se rule can give clear guidance for certain conduct," including for "horizontal agreements among competitors to fix prices"). Because this Court's bid-rigging definition requires an "agreement between competitors," *Portsmouth*,

694 F.2d at 325, n.18; *see also Brinkley*, 783 F.2d at 1161, it was entirely unaffected by *Leegin*'s holding on vertical restraints.

Similarly, Brewbaker maintains (Br.57) that there is a "conflict" in the bid-rigging case law, but this argument rests on the same erroneous premise that *Portsmouth* conflicts with *Leegin*. He also cites a Seventh Circuit case interpreting U.S.S.G. § 2R1.1(b)(1)'s term "agreement to submit noncompetitive bids" to mean bid rotation (Br.56 (citing *United States v. Heffernan*, 43 F.3d 1144, 1145 (7th Cir. 1994))), but that case cannot help him because (1) *Heffernan* interpreted a Sentencing Guidelines' enhancement, not Section 1; (2) this Court rejected *Heffernan*'s interpretation in *United States v. Romer*, 148 F.3d 359, 371 (4th Cir. 1998), *overruled on other grounds as recognized in United States v. Strassini*, 59 F. App'x 550, 552 (4th Cir. 2003); and, anyway (3) *Heffernan* recognized that non-bid-rotation conspiracies on bid amounts constitute per se-unlawful price fixing, 43 F.3d at 1149-50.

3. Brewbaker's argument (Br.59-60) that Section 1 is unconstitutionally vague if applied to conduct that might be procompetitive—raised for the first time in his opening brief—is misplaced because it identifies no error, let alone plain error. *See*

Puckett, 556 U.S. at 135 (error must be "clear or obvious"). For more than a century—even before *Nash*—parties have been on notice that certain categories of agreements among competitors are categorically unlawful because of their "nature or character" (i.e., they necessarily eliminate competition among parties to the agreements), without an inquiry into "surrounding circumstances." *Standard Oil*, 221 U.S. at 58; *see also Addyston Pipe*, 175 U.S. at 238 (there is no "question of reasonableness [left] open to the courts"). The potential for some procompetitive effect is thus factually irrelevant for per se-illegal offenses. *Maricopa*, 457 U.S. at 351.

Ultimately, Brewbaker cannot complain that he lacked fair notice that his conduct violated Section 1. He was trained that, if Contech and a dealer were providing quotes on the same project, it would be "unacceptable" to get "competitive information" from that dealer. JA2130-JA2132. Moreover, he revealed his understanding that his conduct was improper by deleting texts and instructing his co-conspirators to avoid email. *E.g.*, JA1830, JA1998. He plainly "underst[ood] what conduct is prohibited." *Hosford*, 843 F.3d at 180.

III. Brewbaker Fails to Show that the District Court Plainly Violated His Due-Process and Jury-Trial Guarantees.

Brewbaker contends (Br.15, 20-21) that, in a Section 1 case, the per se rule operates to relieve the government of its burden of proving the ostensible elements of factual unreasonableness and knowledge of likely anticompetitive effects. Accordingly, he suggests, the district court should have sua sponte dismissed the Sherman Act count on this ground (Br.15, 49-53) or sua sponte instructed the jury on these "elements" (Br.62). Both suggestions fail for the same reason: Factual unreasonableness and knowledge of likely anticompetitive effects are not elements of a per se offense.

A. Standard of Review

Brewbaker first raised this argument in his post-judgment bail motion. Review thus is for plain error. *Lam*, 677 F.3d at 201. Where this Court has "yet to speak directly on a legal issue," "a district court does not commit plain error by following the reasoning of another circuit." *United States v. Strieper*, 666 F.3d 288, 295 (4th Cir. 2012).

B. Brewbaker Shows No Error, Much Less Plain Error

The Supreme Court long has recognized that the per se rule is an interpretation of the Sherman Act—i.e., of which restraints of trade

categorically fall within Section 1's prohibition. As all six circuits to have decided the question have held, the per se rule thus is not a conclusive evidentiary presumption of unreasonableness. And this Court's own precedent, which Brewbaker ignores, forecloses his argument that the per se rule relieves the government from having to show "criminal intent" (Br.50).

1. The Constitution's due-process and jury-trial guarantees prohibit the application of "evidentiary presumptions" that "have the effect of relieving the [government] of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *see, e.g.*, *United States v. Gaudin*, 515 U.S. 506, 514 (1995); *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979).

2.a. In one of its first Sherman Act cases, the Supreme 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. of N.J. 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." *Id.* at 64-65 (citing *Trans-Missouri Freight*, 166 U.S. 290). That interpretation reflected the common-law principle that certain kinds of anticompetitive restraints, including price fixing, and thus bid rigging, were categorically unlawful, with no "question of reasonableness [left] open to the courts." *Addyston Pipe*, 175 U.S. at 238 (quoting *Addyston Pipe*, 85 F. at 293).

The Supreme Court applied that settled interpretation of Section 1 to a criminal prosecution of price fixing in *Trenton Potteries*. There, 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." 273 U.S. 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." *Id.* The Supreme Court subsequently held that the district court "correctly withdrew from the jury the

consideration of the reasonableness of the" charged conspiracy. *Id.* at 396; *see id.* at 407.

The Supreme Court explained that the "aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *Id.* at 397. Accordingly, such agreements "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." *Id.* The Court emphasized that it has "always [been] assumed that uniform pricefixing 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.

The Supreme Court took the same approach in *Socony-Vacuum*, which also involved the criminal prosecution of price fixing. Again, the district court instructed the jury that it could find guilt "if [the alleged] illegal combination existed," regardless of "how reasonable or unreasonable" it might be. 310 U.S. at 210. The Supreme 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 also id.* at 212 (citing *Trans-Missouri Freight*, 166 U.S. 290). "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 224 n.59.

b. As these 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); *see also Aiyer*, 33 F.4th at 120 (noting "the absence of a 'reasonableness' element in a *per se* violation"). It instead reflects the basic principle that juries resolve 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 also, 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").

Indeed, all six circuits to address the jury-right issue have upheld the constitutionality of the per se rule's application in criminal cases. *See United States v. Lischewski*, 860 F. App'x 512 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2676 (2022); *United States v. Sanchez*, 760 F. App'x 533 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 909 (2020); *United States v. Giordano*, 261 F.3d 1134, 1143-44 (11th Cir. 2001) (rejecting argument that per se rule creates unconstitutional presumption in violation of Supreme Court's decision in *Francis v. Franklin* because argument "in effect asks us to overrule *Socony-Vacuum*"); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1196 (3d Cir. 1984); *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. 1981); *Koppers*, 652 F.2d at 293 (rejecting argument that per se rule "improperly withdrew the question of reasonableness from the jury by the use of a conclusive presumption"); *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979) (per se rules "are substantive rules

of law, not evidentiary presumptions"); *Mfr.'s Ass'n*, 462 F.2d at 52 (per se rule "does not operate to deny a jury decision as to an element of the crime").

The Supreme Court and this Court have occasionally referred to the per se rule as a "conclusive presumption" or with similar phrases. *E.g.*, *Maricopa*, 457 U.S. at 344; *Nat'l Elec.*, 678 F.2d at 501 n.13. But none of those references indicates that the rule creates an *evidentiary* presumption of the kind giving rise to constitutional concerns in criminal cases. Indeed, the per se rule "is not even a rule of evidence." *Mfr.'s Ass'n*, 462 F.2d at 52.

Brewbaker likewise is wrong (Br.52-53, 61) that the per se rule is not an "interpretation[] of the statute" but instead an "evolving" judicial creation aimed at "efficiency and business certainty." The per se rule manifestly is an "interpretation[] of the Sherman Act"—a "statutory command[]." *Superior Ct. Trial Lawyers*, 493 U.S. at 432 n.15, 433; *see also, e.g.*, *Trenton Potteries*, 273 U.S. at 400 (per se rule applies "the law as it was made" by Congress"); *Standard Oil*, 221 U.S. at 59-60 (interpreting the "language of" Section 1 in light of the common law); *Koppers*, 652 F.2d at 294 ("the Sherman Act does not make

'unreasonableness' part of the offense"); *Brighton Bldg.*, 598 F.2d at 1106 ("It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.'"); *Mfr.'s Ass'n*, 462 F.2d at 52 (the Supreme Court has "interpreted" Section 1 as enunciating "two distinct rules of substantive law"). And the Court has rejected the suggestion that "administrative advantages" could be "sufficient in themselves to justify the creation of per se rules." *Leegin*, 551 U.S. at 895 (cleaned up).[14]

Finally, Brewbaker is wrong to suggest (Br.52) that the treatment of horizontal price fixing and bid rigging has not been "static." Such conduct "has been consistently analyzed as a per se violation for many decades." *Superior Ct. Trial Lawyers*, 493 U.S. at 436 n.19. And in those cases where the Supreme Court has modified application of the per se rule in particular circumstances, it has demonstrated its unwavering commitment to per se illegality of agreements among competitors to fix prices, rig bids, or allocate markets. *See, e.g.*, *Leegin*, 551 U.S. at 886 (acknowledging that "the per se rule can give clear

[14] These precedents foreclose Brewbaker's related suggestion (Br.51-53) that the per se rule is an offense created by the judiciary. *See also supra* n.13.

guidance for certain conduct," and "[r]estraints that are per se unlawful include horizontal agreements among competitors to fix prices or to divide markets" (citations omitted)); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734 (1988) (confirming that "a horizontal agreement to divide territories is per se illegal"); *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.28 (1977) (same). *See also* 15 U.S.C. § 7a note (confirming courts' longstanding per se treatment of "[c]onspiracies among competitors to fix prices, rig bids, and allocate markets").

3. This Court's own precedent forecloses Brewbaker's argument (Br.21, 50) that the jury should have been required to find that "the defendant knew that [his] conduct would unduly undermine competition." *Brinkley* held that the per se rule does not "remove[] from the jury the duty to find [an intent] to produce [anticompetitive] effects." 783 F.2d at 1162; *see also id.* (stating that *Gypsum* "does not apply in the same manner in cases involving a per se violation, as it does in rule of reason cases"). Instead, in a per se case, the government need only prove "the defendants' intentional participation in the conspiracy." *Id.*; *see also id.* at 1161-62 (describing as "accurate

statement of the law" instruction that intent is established if "'defendant's act, knowingly done, resulted in an agreement . . . to rig bids'"). The district court here gave just such an instruction. JA1657 (government must prove that Brewbaker "knowingly joined this conspiracy").

IV. Brewbaker Fails to Show Plain Error Undermining His Fraud Convictions.

Brewbaker argues (Br.63-64) that the district court's allegedly erroneous bid-rigging instructions and jury-note response "infected" the jury's consideration of the fraud counts. He is wrong.

A. Standard of Review

Brewbaker first raised this argument in his post-judgment bail motion. Review thus is for plain error. *Lam*, 677 F.3d at 201.

B. Brewbaker Shows No Error, Much Less Plain Error

Brewbaker's argument fails because, as shown *supra*, the Section 1 instructions were not erroneous, let alone obviously so. In addition, even if they had been, Brewbaker fails to "demonstrate" that they "affected," *Puckett*, 556 U.S. at 135, the verdicts on the fraud counts. First, the fraud instructions did not depend on a finding that Brewbaker was guilty of bid rigging under Section 1. Indeed, the fraud

instructions did not even mention the Sherman Act count. JA1665-1684. Second, the court instructed the jury to consider "[e]ach charge, and the evidence pertaining to it, . . . separately," and cautioned: "the fact that you may find the defendant guilty or not guilty as to one of the counts shouldn't control your verdict as to the other counts." JA2588. Jurors, of course, are presumed to follow their instructions, so "any concerns of prejudicial spillover were mitigated." *United States v. Barringer*, 25 F.4th 239, 249 (4th Cir. 2022) (cleaned up).

Nor has Brewbaker shown that the court's response to the jury note about the meaning of "collusion" itself caused taint. Brewbaker *approved* the court's response, which (1) at Brewbaker's request, declined to identify bid rigging as "one form of collusion"; (2) consistent with Brewbaker's suggestion, stated that "[t]here isn't a legally defined explanation of collusion"; and (3) referred the jury to "all the facts and circumstances in evidence" and "all of the Court's instructions as a whole," JA2641-2645—which instructions, of course, told the jury to consider the counts separately. This case, then, is unlike *United States v. Lindberg*, 39 F.4th 151, 164-65 (4th Cir. 2002) (erroneous instruction on first count repeatedly incorporated into instruction on second count),

and there is no basis to depart from "the crucial assumption that jurors carefully follow instructions," *United States v. Rafiekian*, 991 F.3d 529, 550 (4th Cir. 2021) (cleaned up).

CONCLUSION

This Court should affirm Brewbaker's convictions.

Respectfully submitted.

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STATEMENT REGARDING ORAL ARGUMENT

The government does not object to Brewbaker's request for oral argument.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 12,977 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in Microsoft Word 2019, using 14-point New Century Schoolbook font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on May 4th, 2023, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for Brent Brewbaker.

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