No. 24-124

In the Supreme Court of the United States

BRENT BREWBAKER, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Cross-petitioner was convicted of committing a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, by participating in a horizontal agreement to rig bids. Cross-petitioner was also convicted of committing mail fraud, wire fraud, and conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 1349. The questions presented are as follows:

1. Whether the application of the per se rule in a criminal antitrust case violates the nondelegation doctrine, the Fifth Amendment's prohibition on vague criminal statutes, or the right to trial by jury.

2. Whether an alleged error in the jury instructions on the Sherman Act count tainted cross-petitioner's convictions on the fraud counts.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a)* is reported at 87 F.4th 563. An order of the district court (Pet. App. 36a-47a) is available at 2022 WL 391310. An additional order of the district court (Pet. App. 48a-77a) is available at 2021 WL 1011046.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 2023. A petition for rehearing was denied on February 15, 2024 (Pet. App. 78a). On April 29, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June

* This brief uses "Pet." and "Pet. App." to refer to the petition for a writ of certiorari and appendix in No. 23-1365, and "Cross-Pet." to refer to the conditional cross-petition for a writ of certiorari.

14, 2024. On May 31, 2024, the Chief Justice further extended the time to and including July 12, 2024. The petition in No. 23-1365 was filed on June 28, 2024, and was placed on this Court's docket on July 2, 2024. The conditional cross-petition for a writ of certiorari in No. 24-124 was filed on August 1, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government's petition for a writ of certiorari in No. 23-1365 describes (at 2-9) the background of this case. This statement provides additional context relating to the questions presented in the conditional cross-petition for a writ of certiorari.

1. A federal grand jury in the Eastern District of North Carolina indicted cross-petitioner Brent Brewbaker and his employer Contech Engineered Solutions on one count of committing a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to rig bids. See Pet. App. 85a-87a. The grand jury also indicted cross-petitioner and Contech on three counts of mail fraud, in violation of 18 U.S.C. 1341; one count of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1349. See Pet. App. 87a-96a.

Contech and cross-petitioner filed a motion asking the district court to apply the rule of reason to the Sherman Act count. See Pet. App. 48a & n.1. Because the indictment alleged only a per se violation, the court construed that filing as a motion to dismiss the indictment's Sherman Act count for failure to state an offense. See *id.* at 55a-57a. The court denied the motion, concluding that the charged agreement constituted a per se violation of Section 1. See *id.* at 48a-77a.

After Contech pleaded guilty, cross-petitioner filed another motion to dismiss the Sherman Act count. See Pet. App. 7a, 36a. Cross-petitioner argued, as relevant here, that Section 1 is void for vagueness. See *id.* at 36a, 40a. The district court denied the motion, observing that this Court had rejected a vagueness challenge to Section 1 in *Nash* v. *United States*, 229 U.S. 373 (1913). See Pet. App. 40a-46a.

At the end of cross-petitioner's trial, the district court instructed the jury to "consider each count separately." C.A. J.A. 2588. The court added that "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." *Ibid.*

In instructing the jury on the Sherman Act count, the district court stated that Section 1 "makes unlawful certain agreements that, because of their harmful effects on competition, are an unreasonable restraint on trade and always illegal, without inquiry about the precise harm they have caused or the business excuse for their use." C.A. J.A. 2592. "Included in this category of unlawful agreements," the court continued, "are agreements to rig bids." *Ibid.*

In instructing the jury on the fraud counts, the district court noted the indictment's allegation that cross-petitioner had fraudulently certified that Contech's bids had been submitted "competitively and without collusion." C.A. J.A. 2601. During deliberations, the jury asked for a "Court-defined explanation of 'collusion.'" *Id.* at 2641. With cross-petitioner's assent, the court answered: "There isn't a legally defined explanation of collusion[.] * * * I remind you to consider all the facts and circumstances in evidence in reaching your understanding of the crime charged, and consider all of the

Court's instructions as a whole as you continue in your deliberations." *Id.* at 2645; see *id.* at 2644.

The jury found cross-petitioner guilty on all counts. See Judgment 1-2. The district court sentenced him to 18 months of imprisonment, to be followed by two years of supervised release, and imposed a fine. See Judgment 3-4, 7-8.

2. The Fourth Circuit reversed cross-petitioner's conviction on the Sherman Act count, affirmed his convictions on the fraud counts, and remanded for resentencing. See Pet. App. 1a-35a.

In challenging his conviction on the Sherman Act count, cross-petitioner renewed his arguments that the agreement alleged in the indictment does not constitute a per se violation of Section 1, and that the Fifth Amendment's prohibition on vague criminal statutes precludes this criminal prosecution. See Cross-Pet. C.A. Br. 19-49, 54-62. In his opening brief, petitioner also argued for the first time that the per se rule violates the Fifth and Sixth Amendments by creating a conclusive evidentiary presumption. See *id.* at 49-53. And he argued for the first time in his reply brief that Section 1 violates the nondelegation doctrine. See Cross-Pet. C.A. Reply Br. 19-23.

The court of appeals held, in accordance with cross-petitioner's argument, that the agreement alleged in the indictment does not constitute a per se violation of Section 1. See Pet. App. 8a-31a. That holding is the subject of the government's petition for a writ of certiorari in No. 23-1365. See Pet. 9-24. The court of appeals accordingly reversed petitioner's conviction on the Sherman Act count. See Pet. App. 2a, 31a, 34a-35a. The court did not reach cross-petitioner's constitutional challenges to his Sherman Act conviction.

In challenging his fraud convictions, cross-petitioner asserted that the district court had instructed the jury that his agreement was "always illegal" under the Sherman Act; that the court's instruction was erroneous; and that the error had "infected" the jury's verdicts on the fraud counts. Cross-Pet. C.A. Br. 63-64 (citations omitted). The court of appeals rejected that argument. The court observed that "the fraud instructions did not incorporate or reference the Sherman Act instructions"; that the fraud count did not "depend on finding [cross-petitioner] guilty under the Sherman Act"; and that the district court had "specifically instructed the jury that they 'must consider each count separately' and that guilt on one count 'shouldn't control your verdict as to the other counts.'" Pet. App. 32a (citation omitted).

The United States filed a petition for rehearing, which the court of appeals denied. See Pet. App. 78a.

ARGUMENT

Cross-petitioner argues (Cross-Pet. 4-22) that his criminal prosecution violates multiple constitutional provisions and that a purported error in the district court's instructions on the Sherman Act count infected his convictions on the fraud counts. Neither of those issues warrants this Court's review. The Court should grant the government's petition for a writ of certiorari in No. 23-1365 but should deny the conditional cross-petition.

A. Cross-Petitioner's Constitutional Challenges Do Not Warrant This Court's Review

Cross-petitioner argues (Cross-Pet. 4-14) that the application of Section 1 in this criminal case violates the nondelegation doctrine, the Fifth Amendment's prohibition on vague criminal statutes, and the right to trial

by jury. This Court has previously rejected nondelegation and vagueness challenges to Section 1, and the courts of appeals that have considered the issue have uniformly rejected jury-right challenges. This case also would be a poor vehicle for considering those constitutional challenges. The Court recently denied two petitions for writs of certiorari raising similar issues, see *Lischewski* v. *United States*, 142 S. Ct. 2676 (2022) (No. 21-852); *Sanchez* v. *United States*, 140 S. Ct. 909 (2020) (No. 19-288), and the Court should follow the same course here.

1. More than a century ago, this Court rejected, as "clearly unsound," the claim that Section 1 improperly delegates "legislative power" to courts. *The Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 69 (1911). The Court observed that the term "restraint of trade" had "origin[ated] in the common law" and was "familiar in the law of this country prior to and at the time of the adoption" of the Sherman Act. *Id.* at 50-51. The Court held that Section 1 incorporates that "well-known meaning" and carries forward the standards that "had been applied at the common law." *Id.* at 59-60. It then explained that, in applying those standards to particular cases, courts exercise judicial rather than legislative power. See *id.* at 69-70. Cross-petitioner does not mention that nondelegation holding, let alone explain why it should be overruled.

Cross-petitioner's arguments lack merit in any event. Cross-petitioner argues (Cross-Pet. 4) that the *Standard Oil* Court rejected a purportedly "literal reading" of the term "restraint of trade," under which "every contract" would violate Section 1. See 221 U.S. at 63. But this Court ordinarily interprets a legal term of art to bear its specialized legal meaning. See, *e.g.*,

United States v. *Castleman*, 572 U.S. 157, 163 (2014). The Court's adherence to that interpretive practice does not suggest, as cross-petitioner argues (Cross-Pet. 4-5), that Section 1 grants federal courts freewheeling "power to define crimes."

Cross-petitioner also cites this Court's statement in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), that "courts have been left to give content" to Section 1. Cross-Pet. 4 (quoting *Apex Hosiery*, 310 U.S. at 489). But that statement shows only that Section 1, like any other statute, requires judicial "interpret[ation]." *Apex Hosiery*, 310 U.S. at 489. And in *Apex Hosiery*, the Court reaffirmed its previous decisions construing the term "restraint of trade" in accordance with the "common law." *Id.* at 500 (citation omitted); see *ibid.* (stating that "common law doctrines" give "a content and meaning to the statute").

Cross-petitioner next relies (Cross-Pet. 5) on this Court's decision in *United States* v. *Kozminski*, 487 U.S. 931 (1988). But he ignores the *Kozminski* Court's statements that "the Sherman Act * * * does not authorize courts to develop standards for the imposition of criminal punishment" and that the statute itself, interpreted in light of its history, establishes an "objective standard" for courts to apply. *Id.* at 951.

Cross-petitioner asserts (Cross-Pet. 9) that Section 1 improperly delegates to courts the power to "create" per se rules. But at the time when Congress enacted the Sherman Act, the per se rule and the rule of reason formed part of "the common law and the law of this country." *Standard Oil*, 221 U.S. at 49; see *id.* at 58. The per se rule against bid rigging, in particular, was an established common-law rule when the statute was enacted. See Pet. 10-11. Resolving this case involves

the application of that established rule, not the creation of a new rule. Contrary to cross-petitioner's suggestion (Cross-Pet. 10), moreover, the per se rule and rule of reason do not define "separate" criminal offenses. Section 1 creates only one offense—*i.e.*, entering into an agreement in restraint of trade—and violating the per se rule is "one of two ways" to commit that offense. *Ohio* v. *American Express Co.*, 585 U.S. 529, 540 (2018).

Finally, cross-petitioner argues (Cross-Pet. 6 n.2) that the common law is irrelevant to the interpretation of the Sherman Act. But this Court has long read the term "restraint of trade" in light of that term's common-law background. See, *e.g.*, *NCAA* v. *Alston*, 594 U.S. 69, 81 (2021); *American Express*, 585 U.S. at 540; *Associated General Contractors* v. *Carpenters*, 459 U.S. 519, 531 (1983); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688-690 (1978); *Apex Hosiery*, 310 U.S. at 500; *Standard Oil*, 221 U.S. at 59-60. In the cases that cross-petitioner cites (Cross-Pet. 6 n.2), this Court concluded that a *separate* common-law rule—the "rule against restraints on alienation"—has only "slight relevance" to the interpretation of the term "'restraint of trade.'" *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 887-888 (2007); see *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 732 (1988); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977). But the government's argument here relies on the common-law rules relating to restraints of trade, not on the separate rule against restraints on alienation.

2. In *Nash* v. *United States*, 229 U.S. 373 (1913), this Court rejected the contention that Section 1 is "so vague as to be inoperative on its criminal side." *Id.* at 376. The Court explained that "the common law as to

restraint of trade" provides sufficient guidance about the statute's meaning. *Id.* at 377. In this case, for example, the longstanding per se rule against bid rigging gave cross-petitioner ample notice that his conduct was unlawful. See *Leegin*, 551 U.S. at 886 ("[T]he *per se* rule can give clear guidance for certain conduct.").

Cross-petitioner notes (Cross-Pet. 12) that Congress has increased the punishment for violating Section 1 since *Nash* was decided. But the Court's analysis in *Nash* did not rest on the severity of the punishment. See *Nash*, 229 U.S. at 377. The Court there stated that the relevant vagueness standards applied not only to offenses that could result in "a fine or a short imprisonment," but also to offenses that are punishable by "death." *Ibid.* And outside the Sherman Act context, the Court has continued to rely on *Nash*'s vagueness analysis. See, *e.g.*, *Johnson* v. *United States*, 576 U.S. 591, 605 (2015).

Cross-petitioner also cites (Cross-Pet. 5-6) *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921), in which this Court held that a criminal law forbidding "unreasonable" prices was void for vagueness. *Id.* at 86 (citation omitted); see *id.* at 89-93. That decision is inapposite. Because the common law did not prohibit unreasonable prices, it could not provide any guidance about the proper application of the statute at issue in *L. Cohen Grocery*. But because the common law has long prohibited restraints of trade, it can provide significant guidance about how to apply Section 1. See *Rucho* v. *Common Cause*, 588 U.S. 684, 716 (2019) (noting that the Sherman Act "'origin[ated] in the common law'" and that "[j]udges began with a significant body of law about what constituted a violation") (citation omitted).

3. Courts of appeals have uniformly rejected cross-petitioner's remaining constitutional contention: that Section 1's per se rule violates the Fifth and Sixth Amendments by creating a conclusive evidentiary presumption. See *United States* v. *Koppers Co.*, 652 F.2d 290, 293-294 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195-1196 (3d Cir. 1984), cert. denied, 470 U.S. 1029, and 470 U.S. 1085 (1985); *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 683-684 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1104-1106 (7th Cir.), cert. denied, 444 U.S. 840 (1979); *United States* v. *Manufacturers' Ass'n of the Relocatable Building Industry*, 462 F.2d 49, 52 (9th Cir. 1972); *United States* v. *Giordano*, 261 F.3d 1134, 1143-1144 (11th Cir. 2001).

The Fifth Amendment's Due Process Clause and the Sixth Amendment's Jury Trial Clause preclude the application of "conclusive" "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, 317 (1985). But the per se rule is a legal standard, not an evidentiary presumption. See *Giordano*, 261 F.3d at 1143-1144. The rule concerns the range of primary conduct that falls "within the purview of the statute," not the evidence that prosecutors must introduce in order to secure convictions. *Standard Oil*, 221 U.S. at 65. "It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.'" *Brighton*, 598 F.2d at 1106.

Cross-petitioner notes (Cross-Pet. 8) that in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 344

(1982), a civil case, this Court described the per se rule as a "conclusive presumption." But the Court's use of that term in a civil case does not suggest that the per se rule creates the type of conclusive *evidentiary* presumption that the Court has disapproved in criminal cases. In this context, the term "conclusive presumption" instead means that "the law as it was made" by Congress treats some types of restraints as inherently anticompetitive. *Standard Oil*, 221 U.S. at 65. Per se bans on certain types of agreements, in other words, are "statutory commands" that follow from "interpretations of the Sherman Act." *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990) (*Trial Lawyers*).

Cross-petitioner argues (Cross-Pet. 8) that Section 1 prohibits unreasonable restraints of trade and that the per se rule "take[s] the element of unreasonableness away from the jury." Under both the common law and Section 1, however, "[r]estraints can be unreasonable in one of two ways." *American Express*, 585 U.S. at 540. An agreement can qualify as an unreasonable restraint because of its "nature or character" (the per se rule) or because the "surrounding circumstances" show that the restraint harms competition (the rule of reason). *Standard Oil*, 221 U.S. at 58. A court that instructs the jury on the per se rule therefore does not take an element away from the jury; rather, it instructs the jury on what the statute means.

Cross-petitioner also argues that, under the United States' view of the statute, "criminal defendants 'would bear the burden' of proving their innocence, and the court * * * would decide the dispositive factual questions." Cross-Pet. 12 (citation omitted). That is incorrect. When a court holds that a charged agreement is

per se unlawful, it simply recognizes that Section 1 makes that type of agreement "illegal as a matter of law." *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 400 (1927). The government bears the burden of proving the elements of the crime—including the facts that the charged agreement existed and that the defendant knowingly joined that agreement—beyond a reasonable doubt. See C.A. J.A. 2592 (jury instructions on Sherman Act count). The defendant, meanwhile, bears the burden of proving any affirmative defense, such as the ancillary-restraints defense. See *Deslandes* v. *McDonald's USA, LLC*, 81 F.4th 699, 705 (7th Cir. 2023), cert. denied, 144 S. Ct. 1057 (2024); Pet. 16-17. Nothing about that framework requires defendants to prove their own innocence or authorizes courts to resolve factual disputes.

At bottom, cross-petitioner's argument rests on the premise that an agreement violates Section 1 only if it actually harms competition, and that the per se rule requires a court to presume such harm "for the sake of business certainty and litigation efficiency." Cross-Pet. 7 (brackets and citation omitted). That conception of the per se rule is flawed. A "reduction in administrative costs cannot alone justify" application of the per se rule. *Leegin*, 551 U.S. at 895. Nor does Section 1 require a case-by-case showing of actual harm to competition. Rather, certain agreements categorically fall "within [Section 1's] purview" because of their inherently anticompetitive "nature and character." *Standard Oil*, 221 U.S. at 64-65; see *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940) (explaining that Section 1 prohibits certain types of agreements "because of their actual or potential threat to the central nervous system of the economy").

Section 1's per se rule is accordingly "analogous to *per se* restrictions" on "speeding" or "stunt flying." *Trial Lawyers*, 493 U.S. at 433. Although some instances of speeding and stunt flying "actually cause no harm," the per se rules against such conduct rest on the understanding that "every speeder and every stunt pilot poses some threat to the community." *Id.* at 433-434. The per se rule in antitrust law similarly reflects "a longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" *Id.* at 433 (citation omitted). The Fifth and Sixth Amendments no more preclude a categorical ban on such agreements than they prohibit categorical bans on speeding and stunt flying.

4. Because this Court has rejected nondelegation and vagueness challenges to Section 1, and the courts of appeals have uniformly rejected jury-right challenges, cross-petitioner's contentions do not warrant review. This case would in any event be an unsuitable vehicle for resolving those issues.

First, because the court of appeals reversed cross-petitioner's Section 1 conviction on statutory grounds, it did not reach his constitutional arguments. See p. 4, *supra*. Cross-petitioner identifies no sound reason for this Court—which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—to consider those issues in the first instance.

Second, cross-petitioner raised his jury-right challenge for the first time in his opening brief on appeal, and he raised his nondelegation challenge for the first time in his reply brief on appeal. See p. 4, *supra*. Because cross-petitioner did not raise those challenges in the district court, his contentions are, at best, reviewable for plain error. See Fed. R. Crim. P. 52(b). The

district court did not commit plain error by failing to adopt, on its own motion, a nondelegation claim that this Court has rejected or a jury-right claim that the courts of appeals have unanimously rejected.

Third, although cross-petitioner effectively asks this Court to overrule *Standard Oil* and *Nash* insofar as those decisions rejected nondelegation and vagueness challenges to Section 1, cross-petitioner "fail[s] to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall* v. *Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment). That "incomplete presentation is reason enough to refuse [cross-petitioner's] invitation to reexamine" the Court's precedents. *Ibid.*

5. Cross-petitioner states (Cross-Pet. 11) that "the unconstitutionality of the Section 1 criminal offense provides an alternative ground" for affirmance. But a party may defend a judgment on an alternative ground only if that ground was "properly raised below." *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Cross-petitioner did not properly raise the bulk of his constitutional claims in the district court. This Court also ordinarily "decline[s] to entertain" alternative grounds if those issues do not independently "justify the grant of certiorari." *United States* v. *Nobles*, 422 U.S. 225, 242 n.16 (1975). Cross-petitioner's constitutional claims do not independently warrant this Court's review.

Cross-petitioner also asserts (Cross-Pet. 14) that the Department of Justice's policy of generally reserving Section 1 criminal prosecutions for per se violations "tacitly recognizes the unconstitutionality of a 'rule of

reason' antitrust prosecution." That is incorrect. The policy rests on an exercise of prosecutorial discretion, not on a constitutional determination. This case, in any event, involves the per se rule rather than the rule of reason. Cross-petitioner's constitutional objections to a hypothetical rule-of-reason prosecution therefore have no bearing on this case.

B. Cross-Petitioner's Challenge To His Fraud Convictions Does Not Warrant This Court's Review

Cross-petitioner also argues (Cross-Pet. 17-21) that a purported error in the jury instructions on the Section 1 count tainted his convictions on the fraud counts. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. The court's fact-bound decision does not warrant further review.

1. The court of appeals correctly held that any purported error in the Section 1 instructions did not affect the fraud convictions. See Pet. App. 31a-34a. The "fraud instructions did not incorporate or reference the Sherman Act instructions." *Id.* at 32a. "Nor did the fraud counts depend on finding [cross-petitioner] guilty under the Sherman Act." *Ibid.* To the contrary, the district court "specifically instructed the jury that they 'must consider each count separately' and that guilt on one count 'shouldn't control your verdict as to the other counts.'" *Ibid.* (citation omitted). Courts generally presume that jurors "follow the instructions given them." *Ibid.* (citing *Franklin*, 471 U.S. at 324 n.9).

The court of appeals acknowledged that, when the jurors asked for an explanation of the term "collusion," the district court responded that "[t]here isn't a legally defined explanation of collusion" and reminded the jury to "consider all of the Court's instructions as a whole."

Pet. App. 33a (emphasis and citations omitted). The court of appeals emphasized, however, that the instructions directed the jury "to consider each count separately." *Id.* at 34a. The court refused to "presume that the jury understood 'consider all of the Court's instructions as a whole' to mean 'abandon the Court's instruction to consider the counts separately.'" *Ibid.*

2. In challenging the court of appeals' decision, cross-petitioner argues that (1) "the district court told the jury that the alleged agreement supporting the Sherman Act charge was 'always illegal' under the antitrust laws"; (2) the court of appeals "found [an] error" in that instruction; (3) the purported error amounted to a "constitutional" rather than a statutory error; and (4) the court misapplied "the constitutional harmless-error test." Cross-Pet. 15, 16 n.7, 17 (citation omitted). Every step of that argument is incorrect.

Contrary to cross-petitioner's argument, the district court did not instruct the jury that cross-petitioner's *own* conduct was "always illegal." Cross-Pet. 19 (citation omitted). The court instead stated that "[t]he Sherman [A]ct makes unlawful certain agreements that, because of their harmful effect on competition, are an unreasonable restraint on trade and always illegal, without inquiry about the precise harm they have caused or the business excuse for their use." C.A. J.A. 2592. "Included in this category of unlawful agreements," the court explained, "are agreements to rig bids." *Ibid.* The court's instructions therefore indicated that agreements between competitors to rig bids violate the Sherman Act, while directing the jury to answer the factual question whether cross-petitioner had entered into such an agreement. The record does not support cross-

petitioner's assertion (Cross-Pet. 20) that the district court "directed the jury to find" him guilty.

Cross-petitioner is also wrong to argue (Cross-Pet. 16 n.7) that the court of appeals "found [an] error" in the jury instructions. The court of appeals' Section 1 analysis concerned the indictment, not the jury instructions. See Pet. App. 8a-31a. Cross-petitioner also has not alleged any error in the fraud instructions themselves, and the court determined that the Section 1 instructions "did not bear on"—*i.e.*, did not introduce error into—those otherwise valid instructions. *Id.* at 34a. Having concluded that the jury was properly instructed on the fraud counts, the court had no occasion to conduct any harmless-error analysis. That explains why the court "did not specify the harmlessness standard [that] applied." Cross-Pet. 16 n.7.

Cross-petitioner is likewise wrong to argue (Cross-Pet. 16 n.7) that the court of appeals found a "constitutional" error in the Sherman Act instructions, triggering the heightened harmless-error standard that applies to constitutional violations. See *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The court of appeals found only a statutory error: In the court's view, the indictment's Section 1 count failed to state a violation of the Sherman Act. See Pet. App. 31a. And the court of appeals did not find that error to be harmless; to the contrary, the court reversed cross-petitioner's Sherman Act conviction on the ground that the Section 1 count of the indictment was deficient. See *ibid.* Cross-petitioner now asserts (Cross-Pet. 16 n.7) that the district court committed a "Fifth Amendment error in allowing an indictment that failed to state an offense to proceed to trial." But cross-petitioner did not assert that constitutional error in his brief in the court of appeals, see

Cross-Pet. C.A. Br. 63-64; the court's opinion makes no mention of any such error; the court of appeals reversed the Sherman Act conviction on statutory grounds in any event; and the district court's failure to dismiss the Sherman Act count of the indictment does not impugn either the jury instructions on the fraud counts or the ensuing fraud convictions.

Finally, cross-petitioner is wrong to argue (Cross-Pet. 17) that the "constitutional harmless-error test" would have precluded the court of appeals from presuming that the jury followed its instructions. It is the "almost invariable assumption of the law," which this Court has "applied in many varying contexts," that "jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). Cross-petitioner identifies no sound basis for departing from that presumption when assessing harmlessness.

3. Cross-petitioner does not argue that the court of appeals' affirmance of his fraud convictions creates any circuit conflict. His fact-bound challenge to the court's decision does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

This case would also be a poor vehicle for considering cross-petitioner's contentions. Cross-petitioner's claim that the Section 1 instructions affected the fraud counts rests in part on the district court's statement, in response to the jury's question about "collusion," that the jury should "consider all of the Court's instructions." Cross-Pet. 15-16 (citations omitted). But the court made

that statement to the jury "[w]ith [cross-petitioner's] assent." Pet. App. 33a. After receiving the jury's question about collusion, the court informed both parties that it planned to tell the jury to "consider [all] of the Court's instructions as a whole." C.A. J.A. 2644. Cross-petitioner's counsel then stated: "However the Court prefers to deal with it is acceptable to us." *Ibid.* Doctrines such as waiver, forfeiture, and invited error preclude cross-petitioner from arguing now that the district court's response to the jury tainted the fraud convictions. See *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) ("[T]here would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted.").

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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