No. 19-288

In the Supreme Court of the United States

JAVIER SANCHEZ, GREGORY CASORSO, AND MICHAEL MARR, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is reprinted at 760 Fed. Appx. 533. A pretrial order of the district court (Pet. App. 14-36) is not published in the Federal Supplement but is available at 2017 WL 1540815. A prior pretrial order of the district court (Pet. App. 6-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2019. A petition for rehearing was denied on April 3, 2019 (Pet. App. 47-48). On June 19, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 1, 2019. On July 17, 2019, Justice Kagan further extended the time to and including August 30, 2019, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioners were convicted of conspiring to suppress and restrain competition by rigging bids in public foreclosure auctions, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Pet. App. 2. Petitioner Sanchez was sentenced to 21 months of imprisonment, to be followed by three years of supervised release, and was fined $88,140. C.A. E.R. 78-79, 82. Petitioner Casorso was sentenced to 18 months of imprisonment, to be followed by three years of supervised release, and was fined $20,000. *Id.* at 94-95, 98. Petitioner Marr was sentenced to 30 months of imprisonment, to be followed by three years of supervised release, and was fined $1,397,061.59. *Id.* at 68-67, 72. The court of appeals affirmed. Pet. App. 1-5.

1. Section 1 of the Sherman Act proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1. In light of the background law against which it was enacted, this Court has long "understood § 1 'to outlaw only *unreasonable* restraints'" of trade. *Ohio* v. *American Express Co.*, 138 S. Ct. 2274, 2283 (2018) (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 10 (1997)); see, *e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1, 60 (1911).

Restraints of trade "can be unreasonable in one of two ways." *American Express*, 138 S. Ct. at 2283. "A small group of restraints are unreasonable *per se* because" of their anticompetitive effects. *Ibid.* Such categorically unreasonable restraints of trade include "agreements among competitors to fix prices" or to rig bids.

Leegin Creative Leather Prods., Inc. v. *PSKS, Inc.*, 551 U.S. 877, 886 (2007); see, *e.g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("[P]rice-fixing agreements are unlawful *per se* under the Sherman Act."); *United States* v. *Joyce*, 895 F.3d 673, 677 (9th Cir. 2018) ("[B]id rigging is a form of horizontal price fixing."). "Restraints that are not unreasonable *per se* are judged under the 'rule of reason,'" which "requires courts to conduct a fact-specific assessment" to determine a restraint's "'actual effect' on competition." *American Express*, 138 S. Ct. at 2284 (citations omitted); see, *e.g.*, *Leegin*, 551 U.S. at 885-886 (elaborating rule-of-reason analysis).

2. Petitioners owned and operated a business that purchased properties at public foreclosure auctions in California. Gov't C.A. Br. 2, 5-7 (citing trial evidence). From 2008 to 2011, petitioners conspired with other buyers to rig the bidding at hundreds of such auctions. *Id.* at 7. The conspirators used verbal and nonverbal signals to agree not to bid (or to stop bidding) on a particular property, thereby causing the property to sell for an artificially low price. *Id.* at 7-8. As compensation for not bidding on the property, conspirators received a portion of the difference between the public sale price and a higher, more competitive price determined at a subsequent private auction among the conspirators. *Id.* at 8. The result was that the conspirators inflated their profits, while homeowners and their creditors received less than they would have from a competitive auction. *Id.* at 7; see Pet. 4 (acknowledging petitioners' "coordinated bidding").

A grand jury indicted petitioners for violating Section 1 of the Sherman Act by conspiring to rig bids at

hundreds of public auctions in Alameda County, California. C.A. E.R. 587-590. In a separate count, the grand jury charged petitioners Marr and Sanchez with violating Section 1 by conspiring to rig bids at auctions in Contra Costa County. *Id.* at 593-595. Petitioners filed a pretrial motion asking the district court to adjudicate the Section 1 counts under the rule of reason, rather than the rule that price-fixing agreements are per se unlawful. Pet. App. 7-12. The court denied petitioners' motion because the charged "conduct falls squarely within the per se category of bid-rigging, which is widely recognized as a form of price-fixing." *Id.* at 8.

Petitioners raised the issue again through motions in limine and proposed jury instructions. See Pet. App. 16-21, 30-32. Specifically, petitioners asked the district court to instruct the jury, based on the rule of reason, that the "challenged bid rigging is illegal under Section 1 of the Sherman Act only if you find beyond a reasonable doubt that the competitive harm substantially outweighed the competitive benefit." C.A. E.R. 527. Petitioners also asked the court to add, as an element of the offense, that "the conspiracy resulted in an unreasonable restraint of trade." *Id.* at 524. Petitioners contended that applying the per se rule would violate their due process rights by relieving the government of its burden to prove an "element" of the charged crime—unreasonableness—beyond a reasonable doubt. *Id.* at 499-520.

The district court denied petitioners' requests. Pet. App. 14-36. The court described the "77 years of controlling authority, under [*Socony-Vacuum*, *supra*] and its progeny, recognizing that price-fixing is conclusively presumed to be unreasonable and constitutes per se unreasonable restraint of trade under Section 1." Pet.

App. 16. The court also relied on the Ninth Circuit's controlling decision in *United States* v. *Manufacturers' Ass'n of the Relocatable Building Industry*, 462 F.2d 49 (1972), which explained that application of the per se rule in a criminal prosecution "does not operate to deny [the defendant] a jury decision as to an element of the crime charged," but instead "circumscribe[s] the definition of 'reasonableness,'" *id.* at 52. The district court added that every court of appeals to address the question has agreed with the Ninth Circuit. Pet. App. 19-20 (citing cases from the Second, Third, Fifth, Seventh, and Eleventh Circuits).

At the close of the trial, the district court instructed the jury that "agreements to rig bids" are categorically unlawful "without inquiry about the precise harm they have caused or the business excuse for their use." Pet. App. 42. The jury found petitioners guilty on all charges. *Id.* at 2. The court sentenced petitioner Sanchez to 21 months of imprisonment, to be followed by three years of supervised release, and fined him $88,140; petitioner Casorso to 18 months of imprisonment, to be followed by three years of supervised release, and fined him $20,000; and petitioner Marr to 30 months of imprisonment, to be followed by three years of supervised release, and fined him $1,397,061.59. C.A. E.R. 68-69, 72, 78-79, 82, 94-95, 98.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-5. As relevant here, the court determined that it was bound by *Manufacturers* and rejected petitioners' claim that intervening decisions of this Court had undermined *Manufacturers*. *Id.* at 2-3. The court of appeals explained that this Court "has continued to recognize categories of per se violations," *id.* at 3 (citing, *inter alia*, *American Express*, 138 S. Ct. at

2283), and that this Court's "decisions relating to mandatory evidentiary presumptions in criminal law [are] irrelevant," because "the per se rule is not an evidentiary presumption," *ibid.*

ARGUMENT

Petitioners contend (Pet. 9-21) that application of the per se rule in criminal antitrust prosecutions is inconsistent with the constitutional requirement to prove every element of a charged crime beyond a reasonable doubt. The court of appeals correctly rejected that contention, reiterating its longstanding recognition that "the per se rule is not an evidentiary presumption." Pet. App. 3. Petitioners acknowledge (Pet. 16-20) that every other court of appeals that has addressed their contention has likewise rejected it. Petitioners accordingly seek (Pet. 20-21) a broad reconsideration of criminal antitrust principles that have been settled for decades. This Court's review is unwarranted.

1. The court of appeals correctly recognized that the per se rule is an interpretation of the Sherman Act, not an evidentiary presumption, and that it can be constitutionally applied in a criminal antitrust prosecution.

As explained above, Section 1 of the Sherman Act, which may be enforced criminally and civilly, proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1; see 15 U.S.C 4, 15a. In interpreting the "language of" Section 1 in a case alleging price fixing by railroads, this Court initially indicated that its prohibition covered *any* agreement that restrained trade. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897). The Court subsequently clarified its reading of the statutory "language * * * , guided by the

principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country[,] they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911). Specifically, the Court interpreted Section 1's prohibition of agreements in "restraint of trade" to encompass "the standard of reason which had been applied at the common law and in this country"—that is, prohibit only *unreasonable* restraints of trade. *Id.* at 60; see *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 531 (1983) ("Congress intended the [Sherman] Act to be construed in the light of its common-law background.").

At the same time, the Court reiterated its earlier holding that price-fixing agreements by their "nature and character" categorically fall "within the purview of" Section 1 because they necessarily "operate[] to produce the injuries which the statute forbade." *Standard Oil*, 221 U.S. at 64-65 (citing *Trans-Missouri Freight*, *supra*); see *Arizona* v. *Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982) ("*Standard Oil* recognized that inquiry * * * ended once a price-fixing agreement was proved."). That position reflected the common-law view that certain categories of restraints were sufficiently pernicious that "there is [no] question of reasonableness open to the courts with reference to" them—including price fixing, and thus bid rigging. *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 238 (1899) (quoting *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898) (Taft, J.), aff'd 175 U.S. 211 (1899)). To entertain a reasonableness inquiry into such contracts, the Court emphasized, would substitute "a judicial ap-

preciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made." *Standard Oil*, 221 U.S. at 65.

The Court applied that settled interpretation of Section 1 to a criminal prosecution in *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). There, the government prosecuted multiple individuals and corporations for forming "a combination to fix and maintain uniform prices for the sale of sanitary pottery." *Id.* at 394. The district court instructed "the jury[] that if it found the agreements or combination complained of, it might return a verdict of guilty without regard to the reasonableness of the prices fixed." *Id.* at 395. In issuing that charge, the court rejected the defendants' request for an instruction that the jury could convict only if it found "an undue and unreasonable restraint of trade." *Ibid.* This Court subsequently held that the district court "correctly withdrew from the jury the consideration of the reasonableness of the" charged price-fixing conspiracy. *Id.* at 396; see *id.* at 407.

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

instruction was correct, and the defendants' proposed charge "rightly refused," because "[w]hether the prices actually agreed upon were reasonable or unreasonable was immaterial." *Id.* at 401.

The Court applied the same approach to the criminal prosecution for a price-fixing conspiracy in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). As in *Trenton Potteries*, the district court in *Socony-Vacuum* instructed the jury that it could find guilt "if [the alleged] illegal combination existed," regardless of "how reasonable or unreasonable" it might be. *Id.* at 210. This Court upheld the instruction on the ground that "it would *per se* constitute" such an unlawful "restraint if price-fixing were involved," and no reasonableness instruction was therefore required. *Id.* at 216; see *id.* at 254. The Court explained that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act." *Id.* at 218; see *id.* at 212 (citing *Trans-Missouri Freight*, *supra*). "Whatever economic justification particular price-fixing agreements may be thought to have," the Court added, "the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 226 n.59.

As those decisions illustrate, the per se rule is an interpretation of the Sherman Act; it provides that certain anticompetitive conduct falls "within the purview of" Section 1 as a matter of law because it categorically constitutes an unreasonable restraint of trade. *Standard Oil*, 221 U.S. at 65; see *id.* at 59-60 (interpreting the "language of" Section 1 in light of the common law).

Thus, when courts "describe[] conduct as *per se* unreasonable," they merely give "definition" to the statutory prohibition, *United States* v. *Manufacturers' Ass'n of the Relocatable Bldg. Indus.*, 462 F.2d 49, 52 (9th Cir. 1972), much as they do when they interpret the scope of other federal criminal laws, see, *e.g.*, *Salman* v. *United States*, 137 S. Ct. 420, 429 (2016). And because per se unreasonable conduct falls within Section 1's prohibition "as a matter of law," there is no question of reasonableness to submit to the jury. *Trenton Potteries*, 273 U.S. at 400. Rather, the question for the jury—in a criminal or civil antitrust case—is simply whether the unreasonable conduct "occurred." *United States* v. *Koppers Co.*, 652 F.2d 290, 294 (2d Cir.) (quoting Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 18 (1978)), cert. denied, 454 U.S. 1083 (1981); see, *e.g.*, *In re Cox Enters., Inc.*, 871 F.3d 1093, 1097 (10th Cir. 2017) ("Under a per se rule, plaintiffs prevail simply by proving that a particular contract or business arrangement * * * exists.").

2. The courts below correctly applied those well-settled principles. Petitioners were charged with "rigging bids," Pet. App. 2, a "form of horizontal price fixing," *United States* v. *Joyce*, 895 F.3d 673, 677 (9th Cir. 2018), which is a per se violation of Section 1, see pp. 2-3, 7-10, *supra*. The district court accordingly correctly instructed the jury that "[i]f there was, in fact, a conspiracy as charged in the indictment, it was illegal." Pet. App. 43. And the court of appeals correctly upheld the convictions based on that instruction. *Id.* at 3.

Petitioners concede (Pet. 4) that they engaged in "coordinated bidding," which they acknowledge (Pet. 15) is a per se violation of Section 1. They further concede (*ibid.*) that the jury instruction in this case would have

been permissible in a civil action. They contend (*ibid.*), however, that constitutional due process and jury-right principles require a different result in a criminal case—namely that a jury must be permitted to find per se unreasonable conduct to be reasonable. That position lacks merit.[1]

First, petitioners' reading conflicts with this Court's decisions in *Trenton Potteries* and *Socony-Vacuum*. In those criminal antitrust cases, the courts of appeals had adopted the view that petitioners advance here—that criminal defendants are entitled to a jury instruction on the reasonableness of their price-fixing schemes—and this Court rejected that view. See pp. 8-10, *supra*. This Court has never suggested that its decisions in those cases are infirm in any way, let alone that they have been overruled. To the contrary, the Court has reiterated in later criminal antitrust cases that certain conduct is "regarded as *per se* illegal because of its unquestionably anticompetitive effects." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 440 (1978) (citing *Socony-Vacuum*, *supra*). And as petitioners acknowledge (Pet. 16-20), lower courts have uniformly applied the per se rule in criminal antitrust prosecutions without requiring a jury instruction on the reasonableness of per se unreasonable conduct. See *United States* v. *Giordano*, 261 F.3d 1134, 1143-1144 (11th Cir. 2001) (collecting cases). Indeed, since *Socony-Vacuum*, no court has adopted petitioners' position. See *id.* at 1143

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[1] As a matter of prosecutorial discretion, the government brings criminal antitrust prosecutions only based on conduct that violates the per se rule. Antitrust Div., U.S. Dep't of Justice, *Antitrust Division Manual*, at III-12 (5th ed.), https://www.justice.gov/atr/file/761166/download (last visited Nov. 22, 2019).

(observing that petitioners' "argument in effect asks * * * to overrule *Socony-Vacuum*").

Petitioners' position also rests on a misunderstanding of the per se rule. Petitioners observe (Pet. 12-13) that 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). The per se rule, however, "is not an evidentiary presumption." Pet. App. 3. It does not affect what is required to prove a crime; rather, as discussed above, it is an interpretation of the Sherman Act—*i.e.*, of which restraints of trade fall "within the purview of" Section 1. *Standard Oil*, 221 U.S. at 65; see *Trenton Potteries*, 273 U.S. at 400; *Manufacturers*, 462 F.2d at 52; see also *United States* v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir.) ("It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.'"), cert. denied, 444 U.S. 840 (1979).[2]

Petitioners are similarly mistaken (Pet. 19-20) in characterizing the per se rule as simply "a rule of expediency" and "not [a rule of] substance." See also Due

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[2] As petitioners observe (Pet. 19), this Court and others have occasionally referred to the per se rule as a "conclusive presumption" or with similar phrases. See, *e.g.*, *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 344; *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). None of those references, however, indicates that the rule creates an *evidentiary* presumption of the kind this Court has disapproved. Indeed, the per se rule "is not even a rule of evidence." *Manufacturers*, 462 F.2d at 52.

Process Inst. Amicus Br. 3, 8. This Court has rejected the suggestion that "administrative advantages" could be "sufficient in themselves to justify the creation of *per se* rules." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 895 (2007) (citation and internal quotation marks omitted). Thus, the per se rule is not "only a rule of administrative convenience and efficiency." *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432 (1990) (citation and internal quotation marks omitted). Rather, "*per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding." *Id.* at 433. While some "violations of such rules actually cause no harm," the rules are "supported * * * by the observation that every speeder and every stunt pilot poses some threat to the community." *Id.* at 433-434. "So it is with * * * price fixing" and other per se unlawful agreements. *Id.* at 434. "Every such horizontal arrangement among competitors poses some threat to the free market," *ibid.*, because "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition," *Trenton Potteries*, 273 U.S. at 397.

Petitioners' request (Pet. 21) that they be allowed to argue to a jury that their price-fixing agreement was "actually pro-competitive" is thus irreconcilable with the per se rule itself, which petitioners do not purport to challenge. "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." *Socony-Vacuum,* 310 U.S. at 226 n.59. Petitioners' requested jury instruction was thus "rightly refused,"

because "[w]hether the prices actually agreed upon were reasonable or unreasonable was immaterial." *Trenton Potteries*, 273 U.S. at 401.

3. Petitioners identify no other basis for this Court's review. Neither petitioners nor their amici suggest that the court of appeals' decision conflicts with the decision of any other court of appeals. To the contrary, all six circuits to have considered similar challenges to applying the per se rule in criminal cases have endorsed its use. See *Giordano*, 261 F.3d at 1143-1144; *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183, 1195-1196 (3d Cir. 1984), cert. denied, 470 U.S. 1029, and 470 U.S. 1085 (1985); *United States* v. *Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *Koppers*, 652 F.2d at 293-294; *Brighton*, 598 F.2d at 1106; *Manufacturers*, 462 F.2d at 51-52. Indeed, while petitioners suggest that those courts have employed different reasoning, petitioners ultimately acknowledge (Pet. 16-20) that every court that has considered the question presented has resolved it against their position.

The petition thus boils down to a request that this Court broadly reexamine its criminal antitrust jurisprudence based on petitioners' assertion (Pet. 21) that the Court "has been inattentive to the special problems that arise in criminal proceedings." No need exists for the Court to grant that request. The Court's law in this area is well-settled, as evidenced by the uniformity in the lower courts. Petitioners' convictions for repeated and avowed rigging of auction bids—conduct that has been per se unlawful under Section 1 for more than a century—do not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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