No. 98-852

In the Supreme Court of the United States

OCTOBER TERM, 1998

MIJA S. ROMER AND KHEM C. BATRA, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence at trial supported the jury's finding that petitioners' bid-rigging conspiracy had the nexus to interstate commerce required by the Sherman Act, 15 U.S.C. 1.

2. Whether petitioners adequately preserved their objections to the district court's refusal to give two jury instructions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet App. 1-23) is reported at 148 F.3d 359. The opinion of the district court denying petitioners' motions for judgments of acquittal (C.A. App. 1391-1398) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1998. A petition for rehearing was denied on July 21, 1998 (Pet. App. 24-25). On October 8, 1998, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 19, 1998. The petition for a writ of certiorari

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

STATUTE AND RULE INVOLVED

1. The Sherman Act, 15 U.S.C. 1, provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal.

2. Rule 30 of the Federal Rules of Criminal Procedure provides, in relevant part:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Mija S. Romer and Khem C. Batra were convicted of various offenses stemming from their participation in a conspiracy to rig bids at real-estate foreclosure auctions. Both were convicted of violating Section 1 of the Sherman Act, 15 U.S.C. 1. In addition, Romer was convicted of bank fraud, in violation of 18 U.S.C. 1344, and tax fraud, in violation of 18 U.S.C. 371. Batra was sentenced to three years' probation, with a special condition of 90 days' imprisonment to be followed by three months' home detention. Romer was sentenced to concurrent terms of 18 months' imprisonment on each count, followed by a total of three years' super-

vised release. Pet. App. 2-3, 5; C.A. App. 1473-1474, 1482.[1] The court of appeals affirmed. Pet. App. 1-23.

1. Romer and Batra participated in a conspiracy to limit bidding competition at public foreclosure auctions on residential property in Fairfax County, Virginia. At the public auctions, a designated member of the conspiracy bid on the property, while the other members refrained from bidding. If the designated member won the bid, a second, private auction was held among the conspirators. The difference between the sale price at the public auction and the higher sale price at the secret auction was then divided among the conspirators. The effect of the conspiracy was to lower artificially the prices that lenders, lien holders, and homeowners received as a result of the auctions and to divide among the conspirators the amount that would otherwise have gone to those victims. Pet. App. 3; C.A. App. 95-96, 124-128, 198.

Under Virginia law, in order for property to be sold at foreclosure under a deed of trust, a public auction must be conducted. Va. Code Ann. § 55-59(7) (Michie 1995). The sale generates funds to pay the lender who holds a deed of trust on the property, to pay any other creditors who hold liens on the property, and, if there are enough proceeds, to pay the former owner of the property. The lender initiates the foreclosure, appointing the trustee to conduct the sale by auction. After the sale, the trustee delivers a trustee's deed to the successful buyer and disburses funds received from the buyer to lenders, lien holders, and former owners. The

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[1] Both defendants were also ordered to pay restitution, and Romer was ordered to pay a fine. The district court found that Batra was unable to pay a fine. Pet. App. 5; C.A. App. 1437-1439, 1476-1477, 1484-1485.

parties stipulated that foreclosure proceedings on 12 properties subject to the conspiracy were initiated by lenders located outside Virginia and that the proceeds from 11 properties subject to the conspiracy were remitted out-of-state. Pet. App. 3; C.A. App. 51-53, 78-80, 92.

2. After the jury found both petitioners guilty on the Sherman Act count, the district court denied petitioners' motions for judgments of acquittal, which contended that the evidence failed to establish the requisite nexus between petitioners' bid-rigging conspiracy and interstate commerce. The court ruled that there was sufficient evidence to support the jury's findings that petitioners' activities either were in the flow of interstate commerce or substantially affected interstate commerce. C.A. App. 1391-1398.

3. The court of appeals affirmed petitioners' convictions. Pet. App. 1-23.

a. The court of appeals rejected petitioners' contention that the government had failed to prove the interstate commerce element of the Sherman Act offense. The court explained that this Court has articulated two alternative tests to guide in answering the "general question * * * whether the activities under alleged restraint have a sufficient nexus with interstate commerce." Pet. App. 7 (quoting *United States* v. *Foley*, 598 F.2d 1323, 1329 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980)). The government thus may establish that interstate commerce nexus by showing "either [1] that the defendants' activity itself is in interstate commerce or, [2] if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *Ibid.* (quoting *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 242 (1980)).

The court of appeals concluded that the foreclosure auctions in which petitioners participated "were interstate transactions of the most fundamental sort," notwithstanding that the auctions occurred in Virginia, involved Virginia real property, and were conducted by a Virginia trustee. Pet. App. 8. The court observed that "[t]he driving force behind each auction was the financial interest of an out-of-state lender, who initiated the auction to recover the balance of an outstanding debt." *Ibid.* The trustee who conducted the auction, while himself local, was "a mere resident agent, appointed by the [out-of-state] lender to conduct the auction on the lender's terms." *Ibid.* It was thus the out-of-state "lender who initiated the foreclosure, who directed the terms of the auction, and who, at the close of each sale, received across state lines some portion of the proceeds in satisfaction of its interest in the property." *Ibid.*

The court of appeals next rejected petitioners' alternative argument that, even if the foreclosure auctions themselves were interstate in nature, petitioners' participation was not "integral" to or "inseparable" from the auctions, and thus not within the flow of interstate commerce under *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 784 (1975). The court explained that petitioners "were not convicted of rigging bids at hypothetical auctions they did not attend," but of rigging bids at particular auctions that "they not only attended, but at which they were the successful bidders." Pet. App. 9. Accordingly, said the court, petitioners "assumed a role that was not only integral to but inseparable from the interstate sale of property." *Ibid.*

The court of appeals further held that *United States* v. *Lopez*, 514 U.S. 549 (1995), does not cast doubt on

whether the Sherman Act, as applied to the sort of activity at issue in this case, is within Congress's regulatory power under the Commerce Clause. The court noted that this Court stated in *Lopez* that an Act of Congress is a valid exercise of the commerce power if the law contains a "jurisdictional element which . . . ensure[s], through case-by-case inquiry, that the [activity] in question affects interstate commerce." Pet. App. 9 (quoting *Lopez*, 514 U.S. at 561). The court observed that the Sherman Act contains such a jurisdictional element and that the requisite inquiry had been conducted in this case into whether a sufficient nexus existed between petitioners' activity and interstate commerce. *Ibid.*

b. The court of appeals also rejected petitioners' claim that the district court erred in declining to give two of their proposed jury instructions. The court noted that petitioners had failed to object at trial to the district court's refusal to give the requested instructions. Pet. App. 12. The court therefore reviewed petitioners' challenges only for plain error. *Ibid.*; see Fed. R. Crim. P. 30.

The court of appeals held that the district court did not err in refusing to give petitioners' first requested instruction, a definition of the term "joint venture" taken from *Black's Law Dictionary*. The court explained that the instruction "threatened to confuse the jury's understanding of applicable law." Pet. App. 12. The court also determined that petitioners' point was adequately made by another instruction, which informed the jury that "forming a partnership or an agreement to bid on a contract [is not] necessarily a violation of the [Sherman A]ct." *Ibid.*

As for petitioners' second requested instruction, which would have informed the jury that bid-rigging

violates the Sherman Act only if it involves "an agreement between competitors," the court of appeals suggested that the district court's refusal to give the instruction "may have been erroneous." Pet. App. 12-13. But the court found it unnecessary to resolve the question. The court explained that petitioners could not meet their burden of establishing actual prejudice, as is necessary for reversal under the plain error standard, see *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993), because "there was no evidence on which a properly instructed jury could have concluded that [petitioners] and their cohorts were anything but competitors." Pet. App. 13.[2]

ARGUMENT

1. Petitioners urge the Court to grant the petition for certiorari in order to resolve "confusion among circuit court opinions concerning the line of demarcation between intrastate and interstate commerce" in criminal prosecutions under the Sherman Act. Pet. 8. But petitioners do not support that assertion with any citation to any opinion of any other circuit that even involves a prosecution under the Sherman Act, much less any opinion that evinces any tension among the circuits over the application of the Sherman Act's interstate commerce element in similar circumstances. Indeed, in the only other reported opinion addressing the application of the interstate commerce element of the Sherman Act in a prosecution for bid-rigging at real-estate foreclosure sales, the district court held, on

[2] Petitioners raised several other arguments in the court of appeals, including an argument that the district court had erred in admitting certain evidence. The court rejected those arguments (Pet. App. 10-11, 13-23), which petitioners have not raised again in this Court.

facts similar to those here, that the interstate commerce element was satisfied. *United States* v. *Guthrie*, 814 F. Supp. 942, 944-946 (E.D. Wash. 1993), aff'd, 17 F.3d 397 (9th Cir. 1994) (Table). This Court denied a petition for certiorari, 513 U.S. 823 (1994), which raised the interstate commerce issue. See Petition in *Guthrie* v. *United States*, No. 93-2047.

Nor does this case disregard "any distinction between interstate and intrastate commerce." Pet. 8. The jury, the district court, and the court of appeals all carefully considered whether, under the alternative tests articulated by this Court, see *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), petitioners' bid-rigging conspiracy had the nexus to interstate commerce that the Sherman Act requires. See Pet. App. 6-9; C.A. App. 1391-1398 (district court opinion); see also C.A. App. 1294-1310, 1312-1321 (proceedings relating to jury's deliberations on interstate commerce issue). There is no reason for this Court to review that application of settled law to the particular facts of this case. See Sup. Ct. R. 10.

In any event, the evidence at trial was more than sufficient to establish, beyond a reasonable doubt, that the foreclosure auctions, which were the subject of petitioners' bid-rigging conspiracy, both were in the flow of interstate commerce and substantially affected interstate commerce under *McLain*.[3]

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[3] Petitioners suggest (Pet. 8-9) that the interstate commerce analysis varies in civil and criminal antitrust cases. While the quantum of proof is different, the interstate commerce inquiry is the same. See, *e.g.*, *United States* v. *Aquafredda*, 834 F.2d 915, 917-918 (11th Cir. 1987) (criminal antitrust case applying *McLain* standards), cert. denied, 485 U.S. 980 (1988); *United States* v. *Fischbach & Moore, Inc.*, 750 F.2d 1183, 1191-1192 (3d Cir. 1984) (same), cert. denied, 470 U.S. 1029 (1985).

The "Flow of Commerce" Test: This Court has explained that an activity is in the flow of interstate commerce if it is "an integral part of an interstate transaction." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 784-785 (1975); see also *McLain*, 444 U.S. at 244 (describing *Goldfarb* as a flow of commerce case). Activities in the flow of commerce "need have but minimal impact upon the commerce to 'affect' it, since by definition they are a very part of the stream." *United States* v. *Foley*, 598 F.2d 1323, 1329 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); see also *Goldfarb*, 421 U.S. at 785 ("once an effect is shown, no specific magnitude need be proved"). The evidence presented at trial amply satisfied that standard.[4]

The foreclosure sales that were subject to petitioners' conspiracy were, as the court of appeals put it, "interstate transactions of the most fundamental sort." Pet. App. 8. The parties stipulated that the lenders that initiated 12 of those foreclosure sales were located outside Virginia. C.A. App. 51-53. The trustees who conducted the foreclosure auctions were selected by the out-of-state lenders and acted pursuant to instructions from those lenders, including bidding instructions. *Id.* at 79-80, 82, 113-116. Some of the auctions were advertised outside Virginia, and some of the prospective bidders came from outside Virginia. *Id.* at 81-82, 100. The trustee disbursed the proceeds of each sale to the out-of-state lender for whom the trustee foreclosed; the

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[4] Petitioners argue (Pet. 8, 10) that the court of appeals cast its net too broadly when it stated that it was appropriate to "consider * * * all other conceivable links with interstate commerce" (Pet. App. 8). But the court, in fact, considered only the parties directly linked to the foreclosure process, such as the foreclosing out-of-state lenders. See *ibid.*

parties stipulated that proceeds from 11 of the sales subject to the conspiracy were remitted out-of-state. *Id.* at 51-53. Any surplus proceeds were paid first to lien holders and then to former owners, whether located in Virginia or elsewhere. *Id.* at 92. This case is thus analogous to *Goldfarb*, which recognized that purchases of homes in Fairfax County, Virginia, were interstate transactions, principally because such purchases were often financed by out-of-state lenders. 421 U.S. at 783-784; cf. *United States* v. *Robertson*, 514 U.S. 669, 671-672 (1995) (per curiam) (activities of a gold mine were in interstate commerce where, *inter alia*, some of the gold from the mine was transferred out-of-state).

The petitioners' bidding at the auctions was, moreover, an "integral part" of the interstate foreclosure sales. Pet. App. 9. Without such bidding at public auction, which is required by Virginia law (Va. Code Ann. § 55-59(7) (Michie 1995)), the foreclosure process could not have proceeded. See *Goldfarb*, 421 U.S. at 784-785 (attorneys' services in conducting title searches, which were a necessary prerequisite to obtaining financing for home purchases, were an integral part of those interstate transactions); *Guthrie*, 814 F. Supp. at 946 (defendant's rigged bids at real-estate foreclosure sales were part of the flow of interstate commerce, because "the funds [defendant] tendered to the trustees at the foreclosure sales eventually made their way across state lines to the out of state banks").

The "Affecting Commerce" Test: This Court has held that the Sherman Act extends to activity, although not itself *in* interstate commerce, that nonetheless has "a substantial effect on interstate commerce." *McLain*, 444 U.S. at 242. That standard may be satisfied by demonstrating that the underlying commercial activity

subject to the anti-competitive restraint actually or potentially had a substantial effect on interstate commerce. *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322, 330-332 (1991); *McLain*, 444 U.S. at 242-243. In *McLain*, for example, the Court recognized that the activities of residential real-estate brokers in New Orleans, Louisiana, could have the requisite effect on interstate commerce. The Court explained that the brokers' activities "necessarily affect both the frequency and the terms of residential sales transactions," which could, in turn, affect the demand for financing and title insurance provided by interstate corporations. 444 U.S. at 245-246.

The evidence at trial was sufficient to establish that the foreclosure auctions in this case met the "affecting commerce" standard. The district court found that "[t]he nine auctions in which [petitioners] participated generated over one million dollars of proceeds to satisfy debts held by out-of-state lenders." C.A. App. 1397. The district court further found that petitioners' conspiracy itself had a potentially substantial impact on interstate commerce by "threaten[ing] the ability of lenders, creditors and former homeowners," some of whom were outside Virginia, "to fully recoup their losses." *Ibid.*

Finally, the court of appeals' decision affirming petitioners' Sherman Act convictions is not, as petitioners claim (Pet. 12-14), inconsistent with *United States* v. *Lopez*, 514 U.S. 549 (1995), which held that the Gun-Free School Zones Act of 1990 exceeded Congress's authority under the Commerce Clause. In *Lopez*, the Court distinguished statutes, such as the Sherman Act, that contain a "jurisdictional element which would ensure, through case-by-case inquiry," the requisite nexus with interstate commerce, from the statute at issue in

that case, which contained no such jurisdictional element. 514 U.S. at 561. As the court of appeals concluded, *Lopez* provides no basis for petitioners to escape liability under the Sherman Act. Pet. App. 9.

2. Petitioners further contend (Pet. 14) that this case implicates a conflict among the courts of appeals "as to what constitutes a preservation of an objection to a jury instruction" under Rule 30 of the Federal Rules of Criminal Procedure. No such circuit conflict exists.

Rule 30 requires that a party make a specific and timely objection to the district court's refusal to give a jury instruction:

> No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection.

Fed. R. Crim. P. 30. As the First Circuit has explained, Rule 30 "means what it says," *i.e.*, that "[a] party may not claim error in the judge's charge to the jury unless that party 'objects' after the judge gives the charge but before the 'jury retires,' and, when objecting the party must 'stat[e] . . . distinctly the matter to which that party objects and the grounds of that objection.'" *United States* v. *Wilkinson*, 926 F.2d 22, 26 (1st Cir.) (Breyer, J.), cert. denied, 501 U.S. 1211 (1991).

The colloquy on which petitioners rely (Pet. 6 n. 8) to demonstrate their objection to the district court's failure to give their requested instructions does not satisfy Rule 30. Petitioners merely made a general request for a jury instruction on "the defense's theory of the case." C.A. App. 1232-1233. They did not "distinctly" object to the district court's failure to give their requested instructions on "the need to prove that

Petitioners were competitors" or on "the law on partnership and joint bidding" (Pet. 15). Nor did they articulate any "grounds" to explain why the absence of those instructions was error. In these circumstances, the court of appeals correctly held that petitioners had "failed to object to the district court's denial of those requests," and accordingly reviewed petitioners' challenges to the district court's refusal to give the requested instructions only for plain error. Pet. App. 12-13.

Petitioners contend (Pet. 14-16) that the Fourth Circuit in this case "require[d] a strict, formalistic approach in determining the sufficiency of a properly lodged objection to a jury instruction."[5] They assert that cases from the Second and Ninth Circuits apply a more liberal standard. Pet. 16 (citing cases). But none of those cases involves circumstances similar to those here.

The Ninth Circuit recognizes "'a sole exception to the requirement of a formal, timely, and distinctly stated objection' when a proper objection would be a 'pointless formality.'" *United States* v. *Klinger*, 128 F.3d 705, 711 (1997) (quoting *United States* v. *Kessi*, 868 F.2d 1097, 1102 (9th Cir. 1989)). The court of appeals did not, however, find that the "pointless formality" exception was satisfied in either *Kessi* or *Klinger*, the two assertedly conflicting cases from the Ninth Circuit on which petitioners rely. Petitioners do not even attempt to demonstrate how that exception might be satisfied in this case.

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[5] Petitioners contend that the First Circuit has taken a similar approach in cases such as *United States* v. *O'Connor*, 28 F.3d 218, 221 (1994), and *Wilkinson*, 926 F.2d at 26.

Nor do the Second Circuit decisions relied on by petitioners demonstrate any circuit conflict. In *United States* v. *Masotto*, 73 F.3d 1233, 1237-1238 (2d Cir.), cert. denied, 519 U.S. 810 (1996), the court of appeals found that the defendant in a RICO prosecution had adequately preserved an objection to the district court's failure to give a jury instruction that contained certain "operation or management" language from *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993). The court noted that defense counsel's objection, after the jury instructions had been given, did not specifically mention the *Reves* "operation or management" language. But the court held that defense counsel's references to his proposed instruction, which had contained the *Reves* "operation or management" language, combined with his objection to the absence of "an instruction based on the [*Reves*] decision," were "sufficient to direct the district court to his contention." 73 F.3d at 1238; see also *Ostrowski* v. *Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 177-178 (2d Cir. 1992) (noting counsel's specific objection, after the jury was charged, to the district court's failure to give a "burden-shifting" instruction in accordance with *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989)). No similarly precise objection was made here.

Finally, even under the standard of review that petitioners urge, the court of appeals still would not have reversed their convictions, because the district court's failure to give the proposed instructions was not error at all or was merely harmless error. As for the proposed instruction defining "joint ventures," the instruction could properly have been rejected as potentially "confus[ing]" (Pet. App. 12), since no witness had used that term at trial to refer to petitioners' activities. And, as the court of appeals explained, that proposed instruction was unnecessary, because the district court

instructed the jury that "forming a partnership or *an agreement* to bid on a contract [is not] necessarily a violation" of the Sherman Act, an instruction that encompassed one-time arrangements such as joint ventures. *Ibid.* (emphasis added). As for the proposed instruction that the government must prove that petitioners were competitors, the instruction was not an accurate statement of the law, because potential competitors, as well as actual competitors, may violate the Sherman Act by rigging bids. See, *e.g.*, *United States* v. *Sargent Elec. Co.*, 785 F.2d 1123, 1127 (3d Cir.) ("actual or potential competitors"), cert. denied, 479 U.S. 819 (1986).[6] In any event, the court of appeals recognized that petitioners would not have been helped even if the proposed instruction had been given, "since there was no evidence on which a properly instructed jury could have concluded that [petitioners] and their cohorts were anything but competitors." Pet. App. 13.

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[6] The district court gave a correct definition of bid-rigging (C.A. App. 1205-1206), which closely followed the ABA Antitrust Section's *Sample Jury Instructions in Criminal Antitrust Cases* 19 (J.P. Kennedy et al. eds., 1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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