No. _____

In The
Supreme Court of the United States

CHRISTOPHER D. LISCHEWSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sherman Act, 15 U.S.C. § 1, prohibits any contract or combination "in restraint of trade or commerce." This Court has long held that Congress intended that language to incorporate common-law principles, and thus to prohibit only those arrangements that have an "unreasonable" anticompetitive effect. An unreasonable anticompetitive effect is thus an element of a Sherman Act offense. Lower courts, however, have held that in criminal antitrust prosecutions, that element need not be submitted to a jury or proven beyond a reasonable doubt. They have held that the element of unreasonableness may be satisfied either by the application of a conclusive presumption or by a judicial finding that the defendant's conduct falls within judicially-created categories of conduct deemed illegal per se.

The question presented is whether the operation of the per se rule in criminal antitrust cases violates the constitutional principle that every element of an offense must be submitted to a jury and proven beyond a reasonable doubt.

STATEMENT OF RELATED CASES

- *United States v. Christopher D. Lischewski*, No. 18-cr-00203-EMC, U.S. District Court for the Northern District of California. Judgment entered on June 30, 2020.
- *United States v. Christopher D. Lischewski*, No. 20-10211, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on July 7, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Lischewski respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit's opinion is reproduced at App. 1-8.

JURISDICTION

The Ninth Circuit issued its opinion on July 7, 2021. Because the judgment of the lower court was issued prior to July 19, 2021, the deadline for filing this petition was extended to 150 days under this Court's orders relating to COVID-19. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 15, Section 1 of the United States Code states, in pertinent part:

> Every 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, is declared to be illegal. Every person who shall make any

> contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

INTRODUCTION

The Fifth and Sixth Amendments mandate that a defendant may not be convicted of a crime unless a jury finds each element of the offense beyond a reasonable doubt. "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000). In the *Apprendi* line of cases, this

Court has rigorously applied that principle across numerous contexts. It has rejected attempts by lower courts to create exceptions.

And yet an exception remains in criminal antitrust law. Although this Court has held that the Sherman Act prohibits only unreasonable restraints of trade, lower courts have held that juries need not find an unreasonable restraint of trade to convict a defendant of a criminal antitrust violation. For those cases receiving judicially created and approved per se treatment, lower courts have thus created an antitrust exemption to *Apprendi* doctrine. Using the same rationales, they have also exempted per se case cases from the intent requirement this Court adopted in *United States v. U.S. Gypsum Co*., 438 U.S. 422 (1978).

Lower courts have relied on various legal fictions to justify this exemption. They have stated that the Sherman Act does not have an element of unreasonableness—even though this Court has repeatedly held that it does. They have stated that the per se doctrine does not rely on a conclusive presumption—even though this Court has repeatedly described it as just that. They have stated that it is "as if" the Sherman Act defines specific per se offenses—even though the statute does no such thing. None of this is consistent with *Apprendi* doctrine, nor is it consistent with this Court's recent antitrust jurisprudence.

Leading antitrust scholars have recognized the problem. As the former Chair of the ABA Antitrust Section recently wrote, "the executive branch weaponizes

per se illegality to deny jury consideration of the key criminal elements of intent and unreasonableness." Henry, *Per Se Antitrust Presumptions in Criminal Cases*, 2021 Colum. Bus. L. Rev. 114, 116. The practice of per se treatment in criminal cases "directly contradicts Supreme Court" case law rejecting conclusive presumptions and requiring a jury finding on all elements. *Id*.

The judicial creation of per se crimes raises serious separation of powers and nondelegation problems as well. "[L]egislators may not abdicate their responsibilities for setting the standards of the criminal law by leaving to judges the power to decide the various crimes includable in a vague phrase." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (internal quotation marks and alteration omitted). Yet in antitrust law, that is precisely what has happened. Congress enacted only a very vague phrase, and courts have accepted the delegation of authority to define specific antitrust crimes—some with elements of reasonableness and intent, and some without.

The status quo is untenable. The legal fictions created by lower courts to allow per se prosecutions have survived too long—and they have survived only because they have evaded this Court's review. This Court should grant review, and it should adopt a simple solution that comports with the Constitution: If Congress wishes to create specific per se offenses, it may do so, but unless and until that happens, no person may be convicted of a criminal antitrust offense unless a jury

finds proven beyond a reasonable doubt an unreasonable restraint of trade and criminal intent.

STATEMENT OF THE CASE

1. Petitioner Christopher Lischewski is the former CEO of Bumble Bee Seafoods.

On May 16, 2018, the Government indicted petitioner. The indictment alleged a single count of conspiring to fix prices in violation of the Sherman Act, 15 U.S.C. § 1. More specifically, the indictment alleged that, between 2010 and 2013, petitioner had organized a conspiracy to fix prices with Bumble Bee's two chief competitors in the canned tuna industry, StarKist and Chicken of the Sea. The indictment alleged that the conspiracy "was an unreasonable restraint" of interstate trade.

2. The canned tuna market is a competitive and low-margin business. The price charged by tuna manufacturers including Bumble Bee is largely a function of the wholesale price of albacore and skipjack tuna—and that wholesale price can fluctuate considerably. Moreover, tuna manufacturers do not sell their product directly to the public, but instead sell most of their product to large retail outlets such as Walmart, Kroger, and Albertsons, who also sell their own private label brands of canned tuna. Those large customers have substantial monopsony powers in purchasing, and they negotiate aggressively with the canned tuna manufacturers. In short, the canned tuna manufacturers face

considerable pricing pressure from both their suppliers and their customers.

In some cases, due to particular features of their market, the manufacturers would even sell canned tuna below cost. If a manufacturers' market share fell below fifteen percent, it risked having its brand removed from the shelves of the major retailers. Chicken of the Sea was the smallest of the three manufacturers, and its market share at times barely exceeded the fifteen percent threshold. As a result, it regularly sold its tuna below cost—because otherwise it would risk being forced out of the market entirely.

These pressures began to build in 2010. Beginning in late 2010, the wholesale price of tuna began to rise. In 2011 and 2012, for example, the wholesale price that Bumble Bee paid for albacore tuna rose from a low of $2175 per ton to a high of $3200 per ton. (The wholesale price represents more than 70% of the cost of a can of tuna.) Meanwhile, in late 2010, the three manufacturers began a price war. Bumble Bee lowered its prices in one segment of the market to capture share from StarKist, and StarKist responded with aggressive pricing in another segment to capture share from Bumble Bee. Chicken of the Sea, for its part, often sold below cost simply to remain on shelves—in 2011 and 2012, the period of the alleged anticompetitive conspiracy, Chicken of the Sea actually lost money. Coupled with the rapid increase in fish costs, all three companies experienced financial pressures.

3. The government alleged that, in response to these pressures, the three companies entered into a price-fixing conspiracy. And the government alleged that petitioner orchestrated that conspiracy. At trial, the government relied heavily on four cooperating witnesses: two sales and marketing executives who worked under petitioner at Bumble Bee, a sales executive at StarKist, and the CEO of Chicken of the Sea. These four cooperating witnesses offered testimony about the alleged conspiracy and petitioner's role in that conspiracy.

According to the government, the conspiracy had three components. First, in late 2010, petitioner instructed his subordinates to negotiate a "truce" in the price war between Bumble Bee and StarKist. Pursuant to that agreement, Bumble Bee agreed to compete less aggressively in StarKist's main product segment, and StarKist agreed to compete less aggressively in Bumble Bee's main product segment.

Second, the companies agreed to coordinate the "list prices" for tuna that were sent to customers. According to the government, during 2011 and 2012, at petitioner's behest, his subordinates approached executives from the two competitors and agreed to raise their list prices. Third, the companies also agreed to coordinate the discounts and thus the "net prices" paid by customers. According to the cooperating witnesses, the companies provided guidance to their sales departments limiting the amount of discounts that could be offered to customers and, in some cases, eliminating certain types of discounts. The cooperating witnesses

testified that petitioner approved of and oversaw these efforts.

In short, the government presented evidence that during the period of the indictment, petitioner and Bumble Bee conspired with StarKist and Chicken of the Sea to raise the price of canned tuna.

4. The defense presented evidence that the market remained intensely competitive during the period of the alleged anticompetitive conspiracy.

The defense presented an expert witness who presented unrebutted testimony that the prices charged by Bumble Bee generally rose and fell in accordance with wholesale tuna prices. When wholesale tuna prices rose, so did the prices charged by Bumble Bee, and when wholesale tuna prices fell, Bumble Bee's also fell. The expert's analysis showed that this dynamic was true for years prior to the alleged conspiracy, and it remained true during the period of the alleged conspiracy, 2010 through 2013.

The expert's analysis also showed that the three companies did not charge the same prices. Chicken of the Sea, the smallest and at times most desperate market participant, consistently undercut the other two manufacturers. StarKist, while charging more than Chicken of the Sea, generally priced below Bumble Bee for the same products. And the prices actually paid by customers also varied: pricing data showed both inter-customer and intra-customer variation. The expert's analysis showed that canned tuna pricing had the characteristics of a competitive market. Indeed, during

the period of the alleged conspiracy, the retail price of canned tuna was *lower* than historical data would have predicted.

Other evidence, including contemporaneous documentary evidence, suggested that the market remained fiercely competitive. In fact, the documentary evidence during the period of the alleged conspiracy included numerous statements from Lischewski and his alleged coconspirators *complaining* about how competitive the market was.

For example, in an August 2011 presentation to the Bumble Bee board of directors, the two executives who later cooperated with the government described the intense competitive environment. They reported to the board that Bumble Bee "continue[d] to face an extremely challenging environment with [Chicken of the Sea] having replaced StarKist as the primary aggressor over the last quarter." They told the board that "[c]ompetitive pressure is unabating," and that their competitors had engaged in "extremely aggressive pricing activity." This report came months into the alleged conspiracy—at a time when, according to the government, petitioner had orchestrated an industry-wide conspiracy to fix prices.

Numerous other documents struck a similar tone. For example, in a June 2011 email, petitioner **c**omplained that the competition "has been dumping prices at outrageous levels during a period of unprecedented fish price increases. Total stupidity rei[g]ns." Again, this complaint about excessive competition came in the

middle of the price-fixing conspiracy petitioner supposedly orchestrated.

5. Petitioner took the stand in his defense, and he denied participating in any price-fixing conspiracy. He denied directing his employees to engage in a conspiracy, and he denied any knowledge of their coordination with Bumble Bee's competitors. He testified about the fierce and unrelenting competition that characterized the industry.

He also sought to present evidence that any coordination by his employees failed to have any anticompetitive effect. He sought to present evidence of economic benefits and lack of harm that flowed from the alleged restraint on trade.

But petitioner was not allowed to present that evidence. Prior to trial, the district court rejected the defense's motion to treat this as a rule of reason case. The defense proffered evidence to support that defense, including expert and other testimony demonstrating that the alleged agreement had no effect on competition and caused no harm to consumers. But the district court excluded that evidence, holding that no evidence regarding "lack of overcharge as a result of price fixing agreement" would be admitted. It ruled that, because this was a per se case, such evidence was irrelevant.

The district court also rejected jury instructions on reasonableness proposed by the defense. Instead, it primarily used instructions proposed by the Government, many of which were based on ABA Model Instructions. Through these instructions, the district

court informed the jury that it could not consider reasonableness, and that if it found that the petitioner agreed to fix prices, that an unreasonable anticompetitive effect was conclusively presumed.

It instructed the jury as follows:

> Section 1 of the Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are unreasonable restraints of trade. Conspiracies to fix prices are deemed to be unreasonable restraints of trade and therefore illegal, without consideration of the precise harm they have caused or any business justification for their use.
>
> Therefore, if you find that the government has met its burden with respect to each of the elements of the charged offense, you need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any, done by it. It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If there was, in fact, a conspiracy to fix the prices for canned tuna as alleged, it was illegal.

App. 9. The defense likewise requested an instruction on criminal intent. That too was rejected by the trial court.

The district court thus told the jury what the government did *not* need to prove: Actual harm to

consumers. But then the government stood up in closing argument and repeatedly argued that the conspiracy had harmed consumers. In the government's words, petitioner had "stole[n] a few cents at a time" from consumers around the country. And, as noted above, petitioner had been barred from presenting evidence to the contrary pursuant to the district court's pretrial ruling that evidence regarding procompetitive effects was irrelevant.

Given this entirely one-sided presentation of evidence and pro-government jury instructions, the jury's guilty verdict was a foregone conclusion. The district court sentenced petitioner to a term of forty months imprisonment plus a fine and other sanctions. Petitioner surrendered without seeking bail on appeal, and he remains in custody.

6. Petitioner timely appealed his conviction to the Ninth Circuit. He argued, inter alia, that the jury instructions violated his Fifth and Sixth Amendment rights because they allowed a conviction without a finding of the essential element of unreasonableness. He conceded, however, that his argument was foreclosed by Ninth Circuit precedent including *United States v. Manufacturers' Ass'n of Relocatable Building Industry*, 462 F.2d 49 (9th Cir. 1972).

In *Manufacturers' Ass'n*, the Ninth Circuit upheld a challenge to the per se rule in a criminal case. The court held that removing the reasonableness element from the jury's consideration was not problematic in the antitrust context. More recently, the Ninth Circuit

has continued to uphold the rule of *Manufacturers' Ass'n* against claims that it is inconsistent with this Court's intervening line of cases including *Apprendi* and its progeny. *See United States v. Sanchez*, 760 Fed. App'x 533, 535 (9th Cir. 2019) (holding that *Manufacturers' Ass'n* remains good law). In short, petitioner preserved his challenge to the per se rule both at trial and on appeal.

Based on petitioner's concession regarding *Manufacturers' Ass'n*, the Ninth Circuit summarily rejected his claim on appeal. "Lischewski acknowledges we are bound by precedent upholding the per se rule and raises this issue only to preserve it for further review." App. 2.

In sum, the Ninth Circuit, like several other lower courts, has held that the per se rule in antitrust cases can be reconciled with this Court's modern constitutional criminal jurisprudence. Using a variety of sometimes circuitous rationales, these courts have found that, notwithstanding the usual requirements of the Fifth and Sixth Amendments, juries do not need to find the element of unreasonableness in a Sherman Act prosecution. Lower courts have created an antitrust exception to the Fifth and Sixth Amendments. That exception removes both reasonableness and intent from the jury's consideration. That exception was the basis on which petitioner was tried and convicted, and it was the basis on which his conviction was affirmed.

REASONS FOR GRANTING CERTIORARI

This Court has never determined whether the per se rule in criminal antitrust cases can be reconciled with this Court's modern constitutional criminal procedure jurisprudence, especially *Apprendi* doctrine. It should grant certiorari to settle this question, and it should clarify that in all types of antitrust cases, a defendant cannot be convicted without submitting the element of reasonableness to the jury.

A. The Fifth and Sixth Amendments Require that in Antitrust Prosecutions, the Element of Unreasonableness Must be Submitted to the Jury.

The question presented in this case arises from the intersection between *Apprendi* doctrine and the per se rule in antitrust cases. Under *Apprendi* doctrine, which interprets the Fifth and Sixth Amendment, a defendant cannot be found guilty unless a jury finds each element beyond a reasonable doubt. But under the per se rule, a defendant may be found guilty of a Sherman Act violation without a jury finding on the element of unreasonableness, because that element is conclusively presumed. The question is whether the latter can be reconciled with the former—and the answer is that it cannot.

1. Among the most important rights in the canon of constitutional criminal procedure are the Fifth and Sixth Amendment rights attached to elements of a criminal offense.

Those two amendments contain a triad of rights derived from the common law. First, under the Grand Jury Clause of the Fifth Amendment, in all federal cases, every element of an offense must be found by a grand jury and alleged in an indictment. *Hamline v. United States*, 418 U.S. 87, 117 (1974). Second, under the Jury Trial Clause of the Sixth Amendment, every element of an offense must be found by the petit jury at trial. *See Duncan v. Louisiana*, 391 U.S. 145, 155-58 (1968). Third, under the Due Process Clause of the Fifth Amendment, every element of an offense must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).[1]

This Court simply summed up that triad of rights in *Jones*: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 232 (1999). The following year in *Apprendi* this Court re-stated the same principle: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

2. This Court's recent jurisprudence interpreting the Fifth and Sixth Amendments has revolutionized

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[1] In this case, the government did allege the element of unreasonableness in the indictment. But at trial, it refused to submit that element to the jury.

modern American criminal practice. Of course, all the underlying rights pertaining to elements were long established by the Constitution and this Court's prior case law. But what made the *Apprendi* line of cases revolutionary was this Court's insistence that the doctrine be applied logically and rigorously—even where that application would upend long-standing practices.

For example, for most of the twentieth century, lower courts held that the element of "materiality" in fraud and false statement cases could be determined by judge rather than jury. This doctrine was predicated on the idea that materiality is a question of law rather than a factual question. *See United States v. Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992) (Posner, J.). But in *Gaudin*, this Court rejected that dichotomy. It held that under the Fifth and Sixth Amendments, the answer was "simple": "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality." *United States v. Gaudin*, 515 U.S. 506, 511 (1995).

Even after *Gaudin* and *Apprendi*, some lower courts continued to suggest that "jurisdictional elements" are not subject to the usual requirements of the Fifth and Sixth Amendments, again reasoning that such elements are legal elements. *See United States v. Mujahid*, 799 F.3d 1228, 1237 (9th Cir. 2015). This Court likewise rejected that idea. "Both kinds of elements must be proved to a jury beyond a reasonable

doubt; and because that is so, both may play a real role in a criminal case." *Torres v. Lynch*, 578 U.S. 452, 467 (2016).

Most significantly and most famously, *Apprendi* doctrine applied the Fifth and Sixth Amendment to sentencing enhancements and sentencing guidelines, both state and federal. Lower courts had held that "sentencing factors" are not "elements" and may thus be decided by a judge, by a preponderance of evidence. In *Apprendi* and *Blakely*, this Court rejected that logic. Any fact "essential to the punishment" is governed by the procedural protections in the Bill of Rights. *Blakely v. Washington*, 542 U.S. 296, 304 (2004) (quoting 1 J. Bishop, *Criminal Procedure* § 87, p. 55 (2d ed. 1872)).[2]

In all these situations, legislatures and prosecutors—enabled by lower courts—had sought to evade the requirements of the constitution by reclassifying an essential fact as *not-an-element*. *See Apprendi*, 530 U.S. at 500 (Thomas, J., concurring) ("All of these constitutional protections turn on determining which facts constitute the 'crime'—that is, which facts are the 'elements' or 'ingredients' of a crime."). The revolution of *Apprendi* was in this Court's recognition that "labels do not afford an acceptable answer." *Id*. at 494 (internal quotation marks omitted, alteration removed).

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[2] This Court has similarly applied the *Apprendi* rule to death penalty sentencing, *Ring v. Arizona*, 536 U.S. 584 (2002), to criminal fines, *Southern Union v. United States*, 567 U.S. 343 (2012), and to mandatory minimums, *Alleyne v. United States*, 570 U.S. 99 (2013).

If a *fact* is essential to punishment, then it must be treated as an *element* for the purposes of the Fifth and Sixth Amendments. Other than the exception for prior convictions,[3] this Court has not recognized any exception to that principle in the years since *Apprendi*.

3. And yet there is, somehow, an exception for the Sherman Act. That exception exists not because it has been approved by this Court. That exception exists because lower courts have held that, even though unreasonableness is a necessary component of a Sherman Act violation, it need not be submitted to a jury and proven beyond a reasonable doubt in per se cases. A straightforward application of Fifth and Sixth Amendments requires that, before a defendant can be convicted of a criminal antitrust offense, a jury must find beyond a reasonable doubt that he engaged in an unreasonable restraint of trade.

The text of the Sherman Act, 15 U.S.C. § 1, prohibits any contract or combination "in restraint of trade or commerce." The text is sparse, but Congress intended to incorporate common-law principles. The statutory terms "took their origin in the common law." *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911); *see also* VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1501 (3d ed. 2010). And under the common law, a "restraint of trade" was "synonymous with" an "*undue* restraint in trade." *Standard Oil*, 221 U.S. at 61 (emphasis added); *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (common

[3] *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

law did not reach acts that were "reasonably necessary" to the legitimate operation of business").

In other words, any business combination or contract restrains trade in some sense. The Sherman Act necessarily only prohibits those combinations that *unreasonably* restrain trade. Thus, in *Standard Oil*, this Court held that Sherman Act violations must be judged by "*the standard of reason* which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute." *Standard Oil*, 221 U.S. at 60 (emphasis added); *see also National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).

Conduct does not violate the Sherman Act unless it unreasonably restrains trade and suppresses competition. "[T]his Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Or, as Justice Brandeis wrote a century ago, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). That fact—an unreasonable restraint of trade—divides legal and illegal conduct. It is an essential component of a Sherman Act violation.

The question is whether that element must be found by a jury in criminal antitrust prosecutions. As in *Gaudin*, the answer should be simple. "The

Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is [unreasonableness]; respondent therefore had a right to have the jury decide [unreasonableness]." *Gaudin*, 515 U.S. at 511. But rather than applying that straightforward principle, lower courts have determined that an unreasonable restraint of trade is a factor to be determined by judges instead of juries.

This Court should grant review to determine whether the Fifth and Sixth Amendment rights to have a jury determine each essential fact beyond a reasonable doubt apply to the Sherman Act.

B. The Fifth and Sixth Amendments Also Bar Conclusive Presumptions in Criminal Cases.

1. A corollary of the Fifth and Sixth Amendments is that conclusive presumptions are unconstitutional. Conclusive presumptions—which tell the jury that if it finds some predicate fact, it must find an element—were a fixture of common-law practice in both civil and criminal cases. But that common-law practice violates the Constitution when applied to elements in criminal cases.

As this Court held in *Francis v. Franklin*, the Constitution "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a

crime." 471 U.S. 307, 313 (1985). In fact, any mandatory presumption, whether conclusive or rebuttable, violates the Due Process Clause. *Id*. at 314. The prohibition against conclusive presumption is a corollary of *Apprendi* doctrine. Both flow from the same provisions of the Bill of Rights, and both reflect the fundamental principle that a jury must determine every element of an offense beyond a reasonable doubt—and it cannot be instructed that it *must* make such a finding.

A jury instruction including a conclusive presumption violates a defendant's rights. "Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." *Carella v. California*, 491 U.S. 263, 265 (1989) (per curiam); *see Sandstrom v. Montana*, 442 U.S. 510, 517 (1979).

In short, this Court has repeatedly rejected conclusive presumptions as conflicting with a "straightforward" application of the constitutional presumption of innocence and right to a jury trial. *Francis*, 471 U.S. at 313.

2. The application of that principle to Sherman Act prosecutions should be no less straightforward. But once again, it has not been straightforward. Lower courts have held that the rule of *Carella* and *Francis* does not apply to the Sherman Act. Lower courts have endorsed this exception based on this Court's civil cases discussing per se antitrust violations.

As explained above, the Sherman Act prohibits only unreasonable restraints of trade. But as a practical reality, this Court has noted that the inquiry into reasonableness can be "complex" and "entails significant costs." *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 343 (1982). It requires, among other things, "expert understanding of industrial market structures." *Id*. It can even require "incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been reasonable." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

Therefore, as a matter of convenience and "litigation efficiency," this Court has created a series of "*per se* rules," covering certain types of business practices. *Maricopa Cty.*, 457 U.S. at 343-44; VII Areeda & Hovenkamp, *Antitrust Law* ¶ 1511b (3d ed. 2010) ("The value of the per se rule lies in the reduction of the private and institutional costs of litigation, which can be considerable.").

This Court has thus endorsed a conclusive presumption of unreasonableness that applies to certain civil antitrust cases. For certain classes of conduct, once the plaintiff proves that the defendant engaged in a specified business practice, there is "a *conclusive presumption* that the restraint is unreasonable." *Maricopa Cty.*, 457 U.S. at 344 (emphasis added).

3. This conclusive presumption is not particularly problematic when applied to *civil* antitrust cases.

Evidentiary presumptions are common in civil cases, *see* Fed. R. Evid. 301 & adv. comm. notes, and civil cases do not implicate the constitutional rights guaranteed by the Fifth and Sixth Amendments. The question is whether the presumption of this Court's per se antitrust doctrine may be transferred from the civil realm into the criminal law.

This Court has never closely considered that question. Almost all of this Court's cases endorsing the per se rule and its conclusive presumption are civil cases. In fact, nearly all of this Court's cases interpreting the Sherman Act *at all* are civil cases. Criminal antitrust prosecutions are relatively rare (though they appear to be gaining more frequency). Consequently, this Court has not had the opportunity to consider whether the conclusive presumption in per se cases is consistent with *Francis*, *Carella*, and *Apprendi*.

This Court has not applied a per se rule in a criminal case since *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945). That decision, of course, predated *Francis*, *Carella*, and *Apprendi*—as indeed it predates all of this Court's modern constitutional criminal procedure jurisprudence. It is an understatement to say that the per se rule, when applied to criminal prosecutions, does not fit comfortably with that modern body of case law. The per se rule is justified by efficiency, but that rationale has far less force when a criminal defendant's constitutional rights—and his liberty—are at stake. The right to jury trial "has never been efficient; but it has always been free." *Ring*, 536 U.S. at 607.

C. Lower Courts' Attempts to Justify the Per Se Rule in Criminal Cases Do Not Withstand Scrutiny.

1. The tension between the per se rule and the requirements of the Fifth and Sixth Amendments is apparent. Lower courts have resolved those tensions by adopting a variety of convoluted rationales to justify per se treatment in criminal cases. In short, they have created legal fictions.

The Ninth Circuit, for example, has held that the conclusive presumption of the per se rule is not actually a conclusive presumption. According to the Ninth Circuit's decision in *Manufacturers' Ass'n*—the very decision that provided the ultimate basis for petitioner's conviction in this case—the "*per se* rule does not establish a presumption." 462 F.2d at 52. Instead, "[w]hen the Court describes conduct as *per se* unreasonable, [it does] no more than circumscribe the definition of 'reasonableness.'" *Id.*

That statement cannot be squared with this Court's per se cases, which have repeatedly stated that the per se doctrine operates as a conclusive presumption. In *Maricopa County*, this Court stated that the per se rule is "a conclusive presumption that the restraint is unreasonable." 457 U.S. at 344. As far back as *Standard Oil*, this Court used the same language, describing the rule as a "conclusive presumption." 221 U.S. at 65. It has continued to use that phrase throughout the last century. *See, e.g.*, *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (stating that price-

fixing is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984) ("In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.").

Moreover, in criminal antitrust cases, courts regularly give jury instructions that explicitly describe the per se rule as a "conclusive presumption." *See, e.g.*, United States' Proposed Final Jury Instructions at 31, *United States v. Atlas Iron Processors, Inc.*, No. 97-00853-CR (S.D. Fla. 1999), *aff'd sub nom. United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001) (quoting ABA, Sample Jury Instructions in Criminal Antitrust Cases 149 (1984)).

In this case, the jury was instructed that price-fixing agreements are "are deemed to be unreasonable . . . without consideration of the precise harm they have caused," and therefore that the jury "need not be concerned with whether the agreement was reasonable or unreasonable." That instruction is a conclusive presumption—the jury was told that all price-fixing agreements are necessarily deemed to be unreasonable, so did not need to make any finding of unreasonableness.

The Ninth Circuit's claim that the per se rule is not a conclusive presumption is a denial of reality, the judicial equivalent of stating *ceci n'est pas une pipe*. It also runs counter to this Court's repeated insistence

that when it comes to a defendant's Fifth and Sixth Amendment rights, "labels do not afford an acceptable answer." *Apprendi*, 530 U.S. at 494. And yet once again, lower courts have sought to evade the constitution by playing labeling games.

2. The Ninth Circuit is not alone. Other lower courts have been similarly creative when trying to explain why a jury need not find an unreasonable restraint of trade or intent in order to convict a defendant in a criminal antitrust case.

The Second Circuit has suggested that the element of unreasonableness does not exist at all. According to that court, "[s]ince the Sherman Act does not make 'unreasonableness' part of the offense, it cannot be said that the judicially-created per se mechanism relieves the government of its duty of proving each element of a criminal offense under the Act." *United States v. Koppers Co*., 652 F.2d 290, 294 (2d Cir. 1981); *see United States v. Fischbach & Moore, Inc*., 750 F.2d 1183, 1195-96 (3d Cir. 1985).

The Second Circuit's approach appears to be grounded in a simplistic textualism: since the text of 15 U.S.C. § 1 does not include the word "unreasonable," it is not an element of the offense. That would mean that this Court's rule-of-reason cases are all wrongly decided. The Second Circuit's logic also flies in the face of this Court's repeated statements that, although the text does not include the word "unreasonable," Congress intended to incorporate common-law principles,

and thus "intended to outlaw only unreasonable restraints." *Khan*, 522 U.S. at 10.

Federal fraud statutes provide an apt analogy. The word "materiality" does not appear in the statutes, yet this Court has held that Congress intended to incorporate common-law doctrine, and thus that materiality is an essential element of the offense. *Neder v. United States*, 527 U.S. 1, 20 (1997). It would be absurd at this point for lower courts to suggest that materiality is not "part of the offense." *Koppers Co.*, 652 F.2d at 294. And yet that is exactly what lower courts have done in the antitrust context.

3. The Seventh Circuit's "solution" is perhaps the boldest in terms of re-reading both the statute and this Court's antitrust cases. Faced with a challenge to the conclusive presumption of unreasonableness in a bid-rigging case, the Seventh Circuit swept away any constitutional concerns stating: "It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.'" *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979); *accord Giordano*, 261 F.3d at 1144.

That is a remarkable statement, one that should offend any jurist with a commitment to textualism. Courts cannot resolve problems in statutory interpretation by reading the statute "as if" it says something else. A court's responsibility is to "apply faithfully the law Congress has written," not to "rewrite" its text. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

"As if" reasoning would eviscerate the protections of the Bill of Rights. The same logic could apply to any criminal statute. Consider again the fraud statutes and the element of materiality. Materiality is an element of fraud, *Neder*, 527 U.S. at 20, and it is an element that must be found by a jury, *Gaudin*. 515 U.S. at 511. But a lower court could attempt to evade that holding with "as if" rationales. It could hold, for example, that in a fraud prosecution charging false statements of earnings in a public company's financial report, all statements in the report are per se material. It could therefore hold that the materiality element need not be submitted to the jury: "It is as if the fraud statute reads: 'A misstatement of earnings in a financial report is illegal.' "

That chain of reasoning, which would remove the materiality element from a jury's consideration, is obviously inconsistent with *Neder* and *Gaudin*. Even if it were true that misstatements of earnings are always material, the element of materiality still would have to be found by a jury. This Court would never allow an "as if" statement of statutory interpretation to evade the clear holdings of *Neder* and *Gaudin*. And yet that chain of reasoning is no different from the rationale adopted by the Seventh Circuit and other lower courts in criminal antitrust cases.

4. Lower courts have adopted a variety of legal fictions to avoid applying the Fifth and Sixth Amendment principles to criminal antitrust cases. Those legal fictions cannot co-exist with *Apprendi* doctrine. They

are also inconsistent with this Court's modern antitrust doctrine.

This Court's own doctrine defining the overall division between per se and rule-of-reason cases has shifted over the year. Fifty years ago, at the "zenith of the per se concept," this Court spoke in terms of "rigidly defined categories." Henry, *supra*, at 142. But in more recent cases, this Court has admitted that there is "often no bright line separating per se from Rule of Reason analysis." *NCAA*, 468 U.S. at 104 n.26. In *NCAA*, this Court held that even traditionally per se categories such as price-fixing must be analyzed for reasonableness where the alleged restrictions may have legitimate consumer benefits. *Id*. at 100-01.[4]

A few years later in *California Dental*, this Court noted that, rather than being separated into two artificially distinct classes, anticompetitive conduct must be viewed on a "spectrum." *California Dental Ass'n v. FTC*, 526 U.S. 756, 780 (1999) (quoting Areeda, *Antitrust Law* ¶ 1507, p. 402 (1986)). "The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear." *Id*. at 779; *see* VII Areeda & Hovenkamp, *supra*, at ¶ 1511.

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[4] The NCAA opinion also recognized that even in arrangements traditionally classified as per se illegal, there may be "special characteristics of a particular industry" that render the arrangement reasonable and thus legal. *Id*. at 101 n.21. That is precisely the sort of showing that petitioner sought to make at trial—but he was not allowed even to argue that point to the jury.

Lower courts' approach to criminal antitrust cases is premised on the notion that there are two discrete and clearly delineated categories of antitrust cases. That approach cannot be reconciled with the complex realities of the economic marketplace. It also cannot be reconciled with this Court's more recent, more nuanced antitrust jurisprudence. Lower courts' interpretation of the per se rule is stuck in the 1970s.

D. Lower Courts' Treatment of Per Se Criminal Cases Has Also Eviscerated This Court's Holding in *Gypsum*.

1. As described above, lower courts have refused to require juries to find an unreasonable restraint of trade in antitrust prosecutions. And for the same reasons, they have also removed from the jury's consideration the intent element of *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978).

A requirement of intent is the norm in criminal law. This is no "provincial or transient" notion, but rather a "universal and persistent" feature of Anglo-American criminal law. *Morissette v. United States*, 342 U.S. 246, 250 (1952). Thus, when interpreting a criminal statute, this Court starts "from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72

(1994)). This Court has applied that presumption even when the statutory text is silent as to mens rea. *See Staples v. United States*, 511 U.S. 600 (1994).

In *Gypsum*, this Court applied those principles to the Sherman Act. Citing *Morissette*, it held that "intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices." 438 U.S. at 435.

In so holding, this Court recognized that the Sherman Act must be interpreted differently for civil and criminal cases. It noted that most of its antitrust cases were civil, *id*. at 439, and that in civil cases, it had allowed proof of a violation based solely on anticompetitive effect, without a showing of purpose, *id*. at 436 n.13. But it held that the holdings of civil cases could not be transferred to criminal antitrust prosecutions without modification. Criminal antitrust prosecutions require a showing of intent. *Id*. at 446.

2. Lower courts, however, have refused to apply *Gypsum* requirement to per se cases. According to the Ninth Circuit, for example, "the intent requirement of *Gypsum* does not apply to charges of per se violations of the antitrust laws." *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991). Lower courts have explained that applying *Gypsum* in per se cases "would reopen the very questions of reasonableness which the per se rule is designed to avoid." *Koppers Co*., 652 F.2d at 296 n.6.

As a practical matter, this means that unreasonableness and intent are never submitted to a jury. The Department of Justice has decided, as a matter of executive discretion, that it will only prosecute per se cases. *See* FTC and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* 3-4 (2000). Or rather, it has decided that prosecutors may only pursue a criminal antitrust action after prosecutors themselves determine that the facts demonstrate a "hardcore" antitrust violation justifying per se treatment. Henry, *supra*, 2021 Colum. Bus. L. Rev. at 144-48. The entire inquiry as to what violations are "hardcore" enough to justify punishment requires factfinding—but it is factfinding performed by prosecutors rather than juries.

In sum, prosecutors determine whether a combination deserves per se treatment. Lower courts have held that in per se cases, neither unreasonableness nor intent need be submitted to the jury. *Gypsum* is thus a dead letter in practice.

E. Judicially-Defined Per Se Offenses Violate Separation of Powers, Nondelegation, and Fair Warning Principles.

1. Lower courts have held that there are multiple different antitrust offenses, some of which require proof of unreasonable anticompetitive effect, and some do not. As the Ninth Circuit has held, the Sherman Act creates "two distinct rules of substantive law: (1) certain classes of conduct, such as price-fixing, are,

without more, prohibited by the Act; (2) restraints upon trade or commerce which do not fit into any of these classes are prohibited only when unreasonable." *Manufacturers' Ass'n*, 462 F.2d at 52.[5] That solution has the ostensible effect of dissolving the *Apprendi* problem.

But it creates another problem that is equally pernicious: The solution rests entirely on forbidden judicially-created crimes.

Congress has never enacted a statute stating that there are two distinct antitrust offenses. It has never enacted a statute stating that there are some offenses called "per se violations" that do not require a showing of unreasonableness. It has never enacted a statute stating that there is a federal offense called "price-fixing"—or "bid-rigging" or "tying" or "market allocation." Nor has it enacted a statute defining what those terms even mean. In all these respects, "Congress has declared no policy, has established no standard, has laid down no rule." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

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[5] Once again, the claim that there are two distinct offenses is at odds with this Court's case law. "[P]er se and rule-of-reason analysis are but two methods of determining whether a restraint is 'unreasonable,' *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990); *see also United States v. Kemp Assocs.*, 907 F.3d 1264, 1275 (10th Cir. 2018) (rejecting the government's argument that the Sherman Act creates two discrete theories of liability).

All these policies, standards, and rules come from judicial opinions—all of these legal definitions and distinctions were created by the judicial branch, not the legislative branch. Worst yet, in practice most of these definitions are in effect created either by the Department of Justice or the ABA Antitrust Committee, then adopted by the judiciary through jury instructions and opinions approving those instructions. It is through this profoundly undemocratic process that per se offenses are created.

2. This process of judicial lawmaking in the antitrust arena violates the Constitution. The Constitution assigns "[a]ll legislative Powers" to Congress. Art. I, § 1. The division of authority mandated by the structure of the Constitution has particular salience when it comes to criminal lawmaking power. "The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty." *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

In short, the power to enact criminal laws belongs to Congress and to Congress alone. "Only the people's elected representatives in Congress have the power to write new federal criminal laws." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). Consequently, federal crimes are and must be "solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985). As Justice Scalia put it, "the notion of a common-law crime is utterly anathema" in our constitutional system. *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting).

And yet lower courts have adopted an antitrust doctrine that rests entirely on common-law crimes. They have evaded *Apprendi* rights by adopting definitions of federal offenses that have no textual basis whatsoever in federal statutes.

3. Judicially-created per se offenses also violate nondelegation doctrine, itself a close corollary of separation of powers doctrine. Under nondelegation doctrine, "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

Once again, that principle applies with particular force to the criminal law because the liberty of citizens is at stake. "[L]egislators may not 'abdicate their responsibilities for setting the standards of the criminal law' by leaving to judges the power to decide 'the various crimes includable in [a] vague phrase.' " *Sessions v. Dimaya*, 138 S. Ct. 1204, 1227 (2018) (Gorsuch, J., concurring in part and concurring in the judgment) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974), and *Jordan v. De George*, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting)).

That is exactly what has happened in the antitrust context. Congress drafted only a vague phrase, and then courts took it upon themselves to define numerous discrete criminal offenses under that phrase. That mode of lawmaking does not comport with separation-of-powers doctrine.

It may be that Congress *wanted* to delegate lawmaking power. As Senator Sherman said when describing his bill, "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case." 21 Cong. Rec. 2456, 2460 (1890). Whatever the merits of that sentiment, it does not relieve Congress of its obligation to define offenses. Drafting criminal antitrust laws may be hard work, but it is work that Congress must do.

4. Judicial creation of per se offenses also violates the fair warning requirement of the Due Process Clause. Crimes must be defined in advance with sufficient clarity. A law that "fails to give ordinary people fair notice of the conduct it punishes" violates the constitution. *Johnson v. United States*, 576 U.S. 591, 595 (2015). The judicially-created definitions of per se offenses are not static.

As numerous commentators have recognized, the definitions of per se offenses have evolved over time. For example, in 1966, this Court ruled that vertical intrabrand non-price restraints were subject to per se treatment. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). But then a decade later, relying on new understandings of the practice, this Court overruled that cases, and disavowed per se treatment. *Cont'l T.V., Inc. v. GTE Sylvania Inc*., 433 U.S. 36 (1977).

Continuing development and adaptation makes sense as matter of antitrust policy. Indeed, antitrust scholars routinely recommend that the definitions

should continue to evolve. "In some instances, the new insights unmask the competitive hazards of conduct previously deemed to be benign; in other cases, theory and experience demonstrate important benefits from behavior previously thought to be pernicious." Kovavic, *The Future Adaptation of the Per Se Rule of Illegality in U.S. Antitrust Law*, 2021 Colum. Bus. L. Rev. 34, 56 (2021).

The notion of evolution makes sense as a policy matter. But the evolving definitions of antitrust *by the judiciary* does not sit comfortably with the constitutional requirement of advance specification of crimes. Arguments for evolution and reform should be addressed to Congress, in part because principles of fair warning require clear advanced specification. Post-hoc examinations in the common-law fashion will not do.

* * *

Current criminal antitrust doctrine is held together by inertia rather than logic. Long ago, lower courts began allowing the government to prosecute citizens using per se treatment, thus relieving prosecutors of the burden of showing an unreasonable restraint of trade or intent.

None of this comports with the Constitution. Crimes must be defined by Congress, and before a defendant can be convicted, all essential facts must be found by a jury beyond a reasonable doubt. The ever-evolving judicial process of defining per se categories and then imposing per se liability might be acceptable and necessary in *civil* antitrust enforcement, but when

applied to the criminal law, it is illegal. The solution is simple: In all criminal antitrust cases, a jury must find an unreasonable restraint of trade. That is the only solution that the Constitution allows.

Lower courts continue to avoid that result, relying on legal fictions and rhetorical evasions to justify an outmoded approach to criminal antitrust prosecutions. Since that approach was first created in the middle of the last century, this Court's case law has evolved. In antitrust law, this Court has rejected the rigid dichotomy between per se and rule-of-reason cases. In criminal procedure, it has rigorously enforced *Apprendi* doctrine across numerous contexts and rejected all manner of evasions. In constitutional law, it has reiterated the bedrock notion that only Congress may pass laws, especially criminal laws.

The truth is widely known to antitrust scholars and practitioners: This Court would never endorse the legal fictions used by lower courts to justify per se treatment in criminal cases. Those fictions survive only because they have evaded review by this Court. The time for that review is past due.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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