No. 21-852

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

REPLY BRIEF FOR PETITIONER

DENNIS P. RIORDAN
Counsel of Record
TED SAMPSELL-JONES
RIORDAN & HORGAN
1611 Telegraph Ave.
Suite 806
Oakland, CA 94612
(415) 431-3472
dennis@riordan-horgan.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF FOR PETITIONER

ARGUMENT

1. a. The government's position is clear: "unreasonableness is not an element of a criminal violation of the Sherman Act based on a violation of the per se rule." Opp. 13. Therefore, according to the government, there is no need for jury determination of reasonableness, and no *Apprendi* problem.

The government's position rests on a premise that in per se cases, reasonableness is a fundamentally *legal* determination, to be made by judges. It is therefore acceptable to remove the determination from juries. According to the government, such a practice simply "reflects the basic principle that juries resolve only questions of fact." Opp. 10–11 (citing, *inter alia*, *United States v. Trenton Potteries Co.*, 273 U.S. 392, 400 (1927)).

But in its modern cases interpreting the Fifth and Sixth Amendments, this Court has firmly rejected the supposedly "basic" principle that "juries resolve only questions of fact." As Justice Scalia wrote in *Gaudin*, "the jury's constitutional responsibility is *not* merely to determine the facts, but to apply the law to those facts *and draw the ultimate conclusion of guilt or innocence*." *United States v. Gaudin*, 515 U.S. 506, 514 (1995) (emphasis added).

The government's position is that antitrust prosecutions are somehow exempt from that bedrock principle of modern constitutional law. Especially given the

growing importance of criminal antitrust prosecutions, review is imperative to determine whether the government's attack on *Gaudin* is correct.

b. After all, in antitrust law, it is undeniably true that the "ultimate conclusion of guilt or innocence" turns on reasonableness. The Sherman Act prohibits "only unreasonable restraints of trade." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *see Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911) (stating that the Act only forbids "undue restraint in trade"). As this Court said over a century ago, the "true test of legality" is whether a restraint of trade is reasonable and procompetitive, in which case it is legal, or unreasonable and anti-competitive, in which case it is not. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

Reasonableness is the dividing line between legal and illegal conduct. In most areas of law, reasonableness is a paradigmatic jury question. Yet the government contends that reasonableness is not an "element" of the offense because it is not a "factual" question—and thus that it may be properly removed from the jury's consideration. The government does not cite *Gaudin*, much less reconcile that holding with its position here that juries "resolve only questions of fact." Nor could it. Under *Gaudin*, a jury's role in a criminal case is not merely to determine narrow questions of fact, but to make the ultimate determination of guilt.

2. a. In order to show that reasonableness is a purely legal matter outside the jury's purview, the government relies heavily on *stare decisis*. Opp. 8–12. The government's reading of this Court's jurisprudence is both outdated and selective, akin to reading only the first few pages in a book.

The government's *stare decisis* argument rests on two pillars: this Court's holdings in *Trenton Potteries* and *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150 (1940).[1] In those cases, this Court held that there is no defense of reasonableness in price-fixing prosecutions. The government claims that those holdings settle this matter. In the intervening decades, however, those holdings have been seriously undermined in two ways.

First, as a matter of antitrust law, this Court has abandoned the bright-line binary distinction between per se cases and rule-of-reason cases. It has recognized that antitrust cases exist along a spectrum. *California Dental Ass'n v. FTC*, 526 U.S. 756, 779–80 (1999). Relatedly, it has held that even within traditionally per se categories such as price-fixing, conduct may be justified by the "special characteristics" of a market that render the conduct pro-competitive. *NCAA v. Board of Regents of Univ. of Okla*., 468 U.S. 85, 100–01 & n.21 (1984). This Court's more recent, more nuanced

[1] Notably, both cases were decided when criminal antitrust violations were mere misdemeanors. Antitrust violations only became felonies in 1974. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, sec. 3, §§ 1–3, 88 Stat. 1706, 1708 (1974). Penalties have been enhanced further since.

antitrust jurisprudence is inconsistent with the sweeping categorical claims of the earlier antitrust era.

Second, and more importantly, *Trenton Potteries* and *Socony-Vacuum* were decided before this Court developed its modern constitutional criminal procedure jurisprudence. *Trenton Potteries*, for example, held judges rather than juries could determine that certain categories of conduct were unreasonable as a matter of law. This Court thus concluded that "the trial judge correctly withdrew from the jury the consideration of the reasonableness of the particular restraints charged." 273 U.S. at 396.

The question presented here is whether that approach is still valid in light of *Gaudin* and *Apprendi* doctrine.

b. Again, the analogy from the fraud statutes is particularly apt. The question of materiality there followed the same sequence as the question of reasonableness here. In *Sinclair v. United States*, 279 U.S. 263, 298–99 (1929), this Court held that materiality is a question of law properly determined by judge rather than jury. *Sinclair* was decided in the same era as *Trenton Potteries* and *Socony-Vacuum*. Like those cases, it pre-dated *Apprendi* doctrine by decades. Based largely on *Sinclair*, lower courts were nearly uniform in determining that a defendant charged with fraud was not entitled to a jury determination of materiality. *See United States v. Gaudin*, 28 F.3d 943, 955–56 (9th Cir. 1994) (en banc) (Kozinski, J., dissenting).

In *Gaudin*, this Court granted certiorari to review the question. The defendant argued that, in light of modern constitutional cases such as *In re Winship*, 397 U.S. 358, 364 (1970), materiality must be submitted to a jury.

There, as here, the government argued *stare decisis*. Its lead argument was simple: "This Court's decisions and historical practice establish that the issue of materiality . . . is a question of law for the court, rather than an issue of fact for the jury." Br. for United States 8–9, *United States v. Gaudin*, No. 94-514 (Feb. 21, 1995). Relying on *Sinclair* and other cases, it argued that the issue was settled. It argued that modern constitutional criminal procedure jurisprudence did not require a different result. According to the government, nothing in "the modern articulation of the jury's role in a criminal case in decisions such as *In re Winship*, 397 U.S. 358 (1970)" required abandoning the rule of *Sinclair*, because "[t]he question of materiality requires determinations of law, and those legal issues fall outside of the jury's classic province." *Id*. at 26.

This Court squarely rejected the government's argument. *See Gaudin*, 515 U.S. at 511–13. It held that older cases that had allowed materiality to be determined by judges did not comport with the constitutional right to a jury trial. "[T]he jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id*. at 514.

c. The government repeats the same mistakes here, nearly verbatim. Relying on *Trenton Potteries*, the government argues that removing reasonableness from juries is acceptable because the practice "reflects the basic principle that juries resolve only questions of fact." Opp. 10.

That is *exactly* the proposition rejected by this Court in *Gaudin*. The jury's constitutional responsibility is "*not* merely to determine the facts," 515 U.S. at 514 (emphasis added), such as whether a defendant agreed to set prices with competitors. Rather, the jury's constitutional responsibility is "to apply the law to those facts and draw the ultimate conclusion of guilt or innocence," *id*.—namely, whether the defendant's conduct was unreasonable and unduly restrained trade.

d. As in *Gaudin*, the question presented here cannot be resolved with a simplistic appeal to *stare decisis*. As in *Gaudin*, the underlying problem is that this Court's early twentieth century case law conflicts with its more recent case law. On one hand, there is the old doctrine of *Trenton Potteries*, holding that anticompetitive effect is a question of law to be determined by judges. On the other hand, there are the modern cases, from *Winship* to *Gaudin* to *Apprendi*, holding that every conclusion necessary for punishment must be submitted to a jury and proven beyond a reasonable doubt.

The conflict between these two bodies of case law cannot be dismissed simply by citing the former and

ignoring the latter. As the former head of the ABA Antitrust Section has argued, "after the offense under the Act became a felony, unequivocal Supreme Court holdings invalidated the substitution of judicial presumptions for jury fact-finding of any element of a criminal offense." Henry, *Per Se Antitrust Presumptions in Criminal Cases*, 2021 Colum. Bus. L. Rev. 114, 171. The old doctrine cannot coexist with modern constitutional principles.

3. a. To justify its evasion of jury review in per se cases, the government wanders down the strange path forged by lower courts. It endorses lower courts' suggestion that the Sherman Act can be read "as if" it said something else. *See United States v. Giordano*, 261 F.3d 1134, 1144 (11th Cir. 2001); *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979) (cited at Opp. 13, 18). That is, to put it mildly, an unusual approach to statutory interpretation that has not been approved by this Court. The very oddity of the government's position demonstrates why certiorari is warranted.

Consider what the government's position, if accepted, would mean. For starters, it would mean that there are at least two substantively different antitrust offenses, with different elements. There are rule-of-reason offenses, which have an element of unreasonableness, and there are per se offenses, which do not. One need not be a dyed-in-the-wool textualist to notice that this position does not find support in the text of 15 U.S.C. § 1. That statute describes one offense, not two. Ordinarily, courts cannot solve problems of

statutory interpretation by positing that a statute should be read "as if" it said something else. Nor has this Court ever stated that there are two distinct Sherman Act offenses. In fact, it has clearly stated the opposite: "[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).

The implications of the government's "as if" approach go beyond merely positing two offenses. Consider any potential antitrust violation, such as a tying arrangement. *See Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 34–37 (2006) (discussing illegal tying). Assuming there are two substantively different categories of antitrust offenses, how does one determine *which kind* tying is? This determination cannot be made by looking at the statute, since the statute does not mention tying, much less dictate whether tying is a Type One antitrust offense or a Type Two antitrust offense. The government and antitrust plaintiffs posit: It is as if the statute states "tying is a per se illegal." But Congress has likely never considered the question, much less rendered a judgment in text.

And what is the legal definition of "tying" anyway? The term is not self-defining, and it is not defined in statute. *Someone* has to write a definition—someone has to define the elements of the offense of tying. It turns out that is not so easy. This Court initially stated that tying might be per se illegal "at least when

certain prerequisites are met." *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498–99 (1969). But what are those prerequisites, and who determines what they are? The matter is complicated further by this Court's "changing view of tying arrangements," *Illinois Tool Works*, 547 U.S. at 35, and its current view that only some tying arrangements are illegal, and only some small subset are fit for per se treatment.

If a criminal defendant were charged with illegal tying and the government sought per se treatment, the jury would have to be instructed on the elements of the offense. The instructions might say: "It is as if the Sherman Act says 'certain kinds of tying are per se illegal, and the certain kinds have the following characteristics: (a) ___, (b) ___, (c) ___, and (d) ___. Other kinds of tying are only illegal if they unduly restrain trade.'" These definitions—these elements necessary for guilt and punishment—would be entirely unmoored from any act of Congress.

b. The government's position is inconsistent with the fundamental principle that only Congress can define crimes. This is not simply an area where courts have filled in the gaps by clarifying the meaning of ambiguous statutory terms. Rather, in antitrust law, the entire definitions of offense such as "illegal tying" have been created whole cloth, with no grounding whatsoever in the statutory text.

Nor is the problem simply one of judicial creation of common-law crimes—which would be bad enough.

The practical reality of antitrust enforcement is that prosecutors determine what conduct is deserving of per se treatment. *See* Henry, *supra*, 2021 Colum. Bus. L. Rev. at 143–49 (discussing the extensive influence of internal DOJ policies on the definition of criminal antitrust offenses). And the ABA Antitrust Section drafts the model jury instructions that are regularly used by lower courts in antitrust prosecutions including this one.

In short, per se offenses have been defined by courts, the Department of Justice, and the ABA—rather than by Congress. That unique system of lawmaking flows from the government's position that unreasonableness is not an element of *some* offenses, and therefore that someone (not Congress) must determine which conduct falls into which basket. This Court's review is warranted to examine that position.

c. The government argues that this Court should not concern itself with these nondelegation, separation-of-powers, and fair warning principles because they were not raised below. Opp. 16–17. That is nonsense. This Court has long recognized the distinction between "separate claims" and "separate arguments in support of a single claim." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Petitioner's claim has always been the same: That he cannot be found guilty without a jury finding of unreasonableness and criminal intent.

In the court of appeals below, petitioner candidly conceded that his claim was foreclosed by binding

Ninth Circuit precedent. He therefore raised his claim only briefly, for the sake of preservation. This Court is not bound by Ninth Circuit precedent—so, unlike the court of appeals panel, it can and should consider the claim fully. And "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991).

Nor are the arguments regarding nondelegation outside the scope of the question presented. The question presented is whether a criminal defendant has the right to a jury determination of reasonableness in criminal antitrust prosecutions. The government answers that question in the negative, based on its position that courts and the executive may take the lead in defining criminal antitrust law by determining what conduct is eligible for per se treatment.

That view should be rejected in part because it raises grave nondelegation, separation-of-powers, and fair warning concerns. This Court should not ignore those concerns in its consideration of the question presented.

4. a. Finally, while the government avoids endorsing some of the more bizarre implications of lower court rulings in this area, it nonetheless relies on the near uniformity of the circuits to argue that review is unwarranted. Opp. 18–19. It is true that the circuits are nearly uniform in removing reasonableness from

juries' consideration.[2] But the circuits were likewise nearly uniform in removing materiality from juries' consideration prior to *Gaudin*. For that matter, prior to this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), the lower courts were uniform in endorsing the judicially created offense of honest services fraud. Examples like this abound. Sometimes the circuits are uniformly wrong.

b. The government notes that a few years ago, this Court denied a petition presenting similar arguments. *See Sanchez v. United States*, 140 S. Ct. 909 (2020) (No. 19-288). That is also true. And the issue raised both there and here will continue to arise until this Court resolves it.

The problem is growing in importance. A century ago, criminal antitrust jurisprudence had relatively little importance. Antitrust violations were punishable only as misdemeanors, and prosecutions were rare. Today, by contrast, antitrust violations are punishable by many years in prison. At the same time, both legislators and regulators are calling for more aggressive antitrust enforcement. Some reformers have argued that antitrust law enforcement should expand beyond its traditional aim of consumer protection—that it should pursue broader policy goals, such as limiting the profits and political power of large firms. There is pressure on the Department of Justice "to loosen

[2] The government notably fails to mention *United States v. Kemp Assocs.*, 907 F.3d 1264, 1275 (10th Cir. 2018). There, the Tenth Circuit rejected the government's position that the Sherman Act contains two substantively different offenses.

prosecutorial self-restraint" and pursue criminal enforcement more aggressively. Henry, *supra*, 2021 Colum. Bus. L. Rev. at 118.

Against that backdrop of increasing punishment and aggressive enforcement, it is incumbent on this Court to address the question presented. This case presents an ideal vehicle, and there is no reason to wait any longer.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

DENNIS P. RIORDAN
Counsel of Record
TED SAMPSELL-JONES
RIORDAN & HORGAN
1611 Telegraph Ave.
Suite 806
Oakland, CA 94612
(415) 431-3475
dennis@riordan-horgan.com

Counsel for Petitioner

April 11, 2022