No. 23-1365

In the
Supreme Court of the United States

UNITED STATES,
Petitioner,
v.

BRENT BREWBAKER,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether a price agreement between a dual-distributing manufacturer and its dealer regarding the price offered to a potential customer is *per se* illegal under Section 1 of the Sherman Act.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

OPINIONS BELOW

The opinion of the court of appeals is reported at 87 F.4th 563. An order of the district court is not published in the Federal Supplement but is available at 2022 WL 391310. Another order of the district court is not published in the Federal Supplement but is available at 2021 WL 1011046.

INTRODUCTION

Should the Court accept this case, it will be presented with the question of whether price agreements in dual-distribution relationships are *per se* unlawful. Dual distribution is the common practice of manufacturers (e.g., Nike) selling directly to consumers (e.g., Nike.com) and also selling their goods through dealers (e.g., Foot Locker). Often, in such arrangements, the manufacturer will agree not to undercut its dealers' prices. For example, Nike would agree not to price a certain pair of shoes on Nike.com lower than Foot Locker's prices for the same shoes. The question presented is whether those price agreements are *per se* unlawful. The Fourth Circuit correctly found that they are not.

After this Court held in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007), that vertical price agreements are not *per se* unlawful, every circuit to consider the question has held that *per se* illegality does not apply to price agreements in dual-distribution relationships. That is because such agreements often enhance interbrand competition, the protection of which is the primary purpose of the antitrust laws. *See State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997). The Fourth Circuit's decision below is consistent with this correct, unanimous circuit-level jurisprudence and, thus, review is unwarranted.

In presenting this case as an outlier, the Government attempts to rewrite the grand jury's allegations and ignores this Court's opinion in *Leegin*. But a clear-eyed review of the allegations and the economic realities of dual-distribution relationships show that review is not warranted. So too does the unworkability of the Government's proposed distinction between those dual-distribution agreements that would be *per se* unlawful and those that would be subject to the rule of reason. Indeed, the Fourth Circuit explained that it would be a "fool's errand" to try to administer the Government's proposal.

If the Court does accept this case, it should grant Mr. Brewbaker's conditional cross-petition, No. 24-124, in which he asks the Court to consider whether the Sherman Act is constitutional in the first place—a question the Fourth Circuit did not reach—as well as whether the Fourth Circuit erred by applying a presumption of correctness when determining whether a constitutional error was harmless.

STATEMENT OF THE CASE

1. "[T]he antitrust laws are designed primarily to protect *interbrand* competition." *Leegin*, 551 U.S. at 895 (cleaned up) (emphasis added).

2. In the relevant market for stormwater culverts in North Carolina, two brands competed for business: the Contech-Pomona partnership and Lane Enterprises. Contech is a manufacturer and seller of corrugated steel and aluminum pipes and plates. App. 2a. Since 1988, Pomona has been Contech's exclusive dealer for Contech product in North Carolina. *Id*. So close was the partnership that, starting in the 1990s, a Contech employee worked at Pomona's office. C.A.

J.A. 1915–16. The President of Pomona, whom the Government called as a witness, testified that he did not view Contech as a "competitor." C.A. J.A. 1914. The main competitor of the Contech-Pomona partnership was Lane. C.A. J.A. 125, 1854–55.

One type of project that Contech and Pomona partnered on was aluminum stormwater culverts under roads in North Carolina. C.A. J.A. 2158. Pomona, Contech, and Lane all typically bid for contracts with the North Carolina Department of Transportation to provide the material and installation for these stormwater culverts. C.A. J.A. 1930. Pomona's bid noted that, if it won the bid, it would source the aluminum from Contech, C.A. J.A. 1792, and the Department knew that Contech and Pomona had a business relationship, C.A. J.A. 1786.

If Contech won the bids, it would subcontract Pomona to manage the project. C.A J.A. 1929, 1932, 2143–44. Therefore, before bidding, Mr. Brewbaker would obtain or cause an employee to obtain Pomona's price for installing the culvert. C.A. J.A. 2143–44. This price was typically the same price as Pomona's bid price. *See* C.A. J.A. 2009.

In calculating its bid, Contech would add an amount to its bid price to account for administrative costs it would incur if it won the bid. *See* C.A. J.A. 1891, 1996. Contech's bids were, therefore, always higher than Pomona's bids. C.A. J.A. 1826–27. The reasons that Contech submitted bids were (1) to ensure that if Pomona's bid were disqualified, the Contech-Pomona partnership would still have a chance to defeat its competitor's (Lane Enterprises') bid; and (2) so Contech was on the Department's list for getting emergency contracts.[1] C.A. J.A. 1826, 2084. Importantly, the Department did *not* require a minimum number of bids, C.A. J.A. 1784, and nothing about Contech's bids affected Pomona's bids or the price that the Department paid for the work, C.A. J.A. 1794–95, 2086. Moreover, a DOJ Antitrust Section memo *approved* bidders submitting intentionally losing bids to remain on emergency bid lists. C.A. J.A. 1275 ("[B]idder can lawfully submit an intentionally high bid that it does not think will be successful for its own independent business reasons, such as being too busy to handle the work but wanting to stay on the bidders' list.").

3. On October 20, 2020, the Government obtained a six-count indictment charging Contech and Mr. Brewbaker with a Sherman Act violation (15 U.S.C. § 1), as well as five fraud counts.

The § 1 charge alleged that Contech was a "manufacturer" of aluminum pipes used for structure projects. C.A. J.A. 45. It further alleged that, starting "before 2009" until June 2018, Pomona was Contech's distributor or "dealer" and that, "[a]s part of that relationship," Contech "regularly sold aluminum" to Pomona to "use[] . . . to complete work on behalf of [the Department of Transportation], including for aluminum structure projects." C.A. J.A. 46. It alleged that, from at least 2009 through June 2018, Contech and Pomona had an agreement under which Contech would submit to the Department an "intentionally higher bid" than Pomona's bid for aluminum structure contracts. C.A. J.A. 48. And it alleged that, in so doing, Mr. Brewbaker, Contech, and Pomona

[1] Both these goals increase interbrand competition between the Contech-Pomona partnership and Lane.

engaged in a conspiracy to "knowingly . . . suppress and eliminate competition by rigging bids to [the Department] for aluminum structure projects," which was alleged to be "a *per se* unlawful, and thus unreasonable, restraint of interstate . . . commerce in violation of [§ 1]." C.A. J.A. 50. Notably, the Indictment did not allege that Contech and Pomona were "competitors." C.A. J.A. 44–62.

The indictment also charged Mr. Brewbaker with fraud for including with the bid submissions a statement that the bids were "submitted competitively and without collusion." C.A. J.A. 685.

4. In response to the indictment, Contech and Mr. Brewbaker moved to have the district court apply the rule of reason, rather than the *per se* rule. C.A. J.A. 63–99, 615–24, 1341. Because the indictment alleged that the conduct was a *per se* violation of the Sherman Act, the district court construed the motion as a motion to dismiss.

In support of the motion, Contech and Mr. Brewbaker provided an affidavit of Professor Kenneth G. Elzinga. C.A. J.A. 102–47. Professor Elzinga is the Robert C. Taylor Professor of Economics at the University of Virginia and a former Antitrust Division economic advisor to the Assistant Attorney General. C.A. J.A. 105. This Court has relied on Professor Elzinga's economic analysis in at least three antitrust cases, most recently in *Leegin*, 551 U.S. 877, in which this Court accepted Professor Elzinga's analysis to overturn precedent and hold that the rule of reason applies to vertical price fixing. C.A. J.A. 88, 105.

Professor Elzinga's forty-four-page affidavit applied economic principles to the allegations in the indictment and concluded that the indictment alleged a type of restraint that is not always or almost always anticompetitive, but is, instead, often procompetitive. C.A. J.A. 102–88. He explained that the alleged conduct was the "model of [a] dual distribution [arrangement], whereby a manufacturer and its distributor both [sell] the manufacturer's products" directly to customers. C.A. J.A. 108. And he explained that "[p]rice coordination in [such] a dual distribution [arrangement] is recognized to be procompetitive" and "is common[.]" *Id*.

Professor Elzinga also noted that, from an economic standpoint, offering a price in a bid contest is the same as two companies offering prices to customers online and in a store. In other words, Contech and Pomona both submitting bids for predetermined amounts (as alleged) was the economic equivalent of Nike and Foot Locker agreeing on prices for Nike shoes each would offer to potential customers.

The Government did not submit any economic information to counter Professor Elzinga's conclusions or otherwise to support the validity of its *per se* charge. C.A. J.A. 589–614, 949–61. Instead, the Government maintained that entities are necessarily horizontal competitors if they appear to compete for a sale to a specific customer.

The district court refused to consider any portion of Professor Elzinga's affidavit, and it declined to consider the partnership relationship between Contech and Pomona alleged in the indictment. Instead, the district court determined that Contech and Pomona were necessarily horizontal competitors because they both submitted bids, and it upheld the indictment on that basis.

Contech then pleaded guilty and paid a seven million dollar fine. Mr. Brewbaker proceeded to trial. He was convicted of all counts and appealed.

5. The Fourth Circuit reversed the antitrust conviction on the ground that the indictment failed to state a *per se* Sherman Act violation because the price agreement occurred within a dual-distribution relationship. In doing so, it heeded this Court's requirement that

> the classes of restraints subject to *per se* condemnation should be narrowly construed. Rather than look only at the label attached to the restraint, such as "price fixing" or "market allocation," courts must consider the restraint in context—including how the parties are related—before applying the *per se* rule.

App. 13a (citing *Leegin*, 551 U.S. at 888). The Fourth Circuit also applied this Court's requirement that

> when a case involves a category of restraint not yet classified under either the rule of reason or the *per se* rule, "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."

Id. (citing *Cont'l T.V. v. GTE Sylvania*, 433 U.S. 36, 58 (1977)).

The Fourth Circuit noted that the indictment alleged that the parties to the allegedly anticompetitive agreement were engaged in a manufacturer-dealer relationship in which they worked together to compete against "others" for the aluminum-structure projects, but also alleged that they both submitted bids to the Department for aluminum projects. Accordingly, "the restraint alleged in the indictment doesn't fit neatly into either the horizontal or vertical definition—it fits into both." App. 16a.

Recognizing that this Court has not yet determined whether the *per se* rule applies to such "hybrid" (i.e., horizontal and vertical) restraints, the Fourth Circuit found substantial guidance in this Court's opinions. It began with the instruction that courts must employ a "presumption in favor of a rule-of-reason standard." App. 17a (quoting *Bus. Electrs. Corp. v. Sharp Electrs. Corp.*, 485 U.S. 717, 730 (1988)). It noted that "problems in differentiating vertical restrictions from horizontal restrictions" do not alone "justify a *per se* rule." *Id*. (quoting *GTE Sylvania*, 433 U.S. at 58 n.28). And it correctly acknowledged that "[d]isplacing the presumptive rule-of-reason analysis is possible only when demonstrable economic evidence shows that the type of restraint at hand 'always or almost always' has 'manifestly anticompetitive effects' and 'lack[s] . . . any redeeming virtue.'" *Id*. (quoting *Leegin*, 551 U.S. at 886–87).

Applying these directives, the Fourth Circuit joined every other circuit to consider the issue and declined to extend the *per se* rule to the hybrid restraint alleged in the indictment. First, the Fourth Circuit defined the type of restraint at issue, explaining that the restraint alleged "is known in antitrust law and economics as a 'dual distribution' arrangement.'" App. 26a. It noted that "we're all familiar with" such arrangements. *Id.*

> To illustrate, let's say you want some new Nikes. There's more than one way you could

> buy them. You can order them online at Nike.com. Or you can drive to Foot Locker and buy them. If you go with the first option, you are buying directly from the manufacturer. If you go with the second, you are buying from the manufacturer's dealer. So Nike is both supplying Foot Locker with shoes to sell (a vertical relationship) and is competing with Foot Locker when selling the shoes directly to consumers (a horizontal relationship).
>
> The indictment here alleged nothing different.

Id.

It then identified the ultimate question at issue:

> The government doesn't dispute that, post-*Leegin*, if a manufacturer like Contech wasn't also selling directly to a customer (here, [the Department]), any price restraint it imposed on its distributors would be adjudged under the rule of reason.
>
> The inquiry is thus whether the fact that a manufacturer is also selling directly to consumers eliminates the potential interbrand procompetitive effects that supported the Supreme Court's holding in *Leegin*.

Id. at 27a.

"It does not," the Fourth Circuit held, because dual-distribution agreements often increase interbrand competition. For one thing, "[m]ore sellers means it's easier to find a product," which increases interbrand competition. Such dual-distribution arrangements also allow manufacturers and dealers to focus on selling products in ways they are best suited to achieve. For example, Nike could focus on online sales while Foot Locker focuses on training staff to maximize in-person sales. And, "if distributors fail to make their sales (or, as relevant here, fail to place a bid), the manufacturer's sales serve as a stopgap to ensure the manufacturer" can still compete against other manufacturers for the sale. *Id.* at 27a–28a.[2]

The Fourth Circuit also recognized the often-procompetitive effects of a dual-distributing manufacturer not undercutting its dealers.

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[2] Notably, here, the genesis of Contech submitting bids for Department projects was to ensure that, if Pomona's bid were rejected for any reason (as sometimes happened), the Contech-Pomona partnership could still compete against its competitor, Lane. *See* C.A. J.A. 1826, 2084. In that way, Contech's bids were procompetitive, "serv[ing] as a stopgap" that *reduced* the prices paid by the Department and thus taxpayers as compared to the price that the Department would have paid but for Contech's allegedly anticompetitive bids. Similarly, in this case, the Department would only award emergency contracts (for example, after hurricanes washed out roads) to companies that historically submitted bids. Under DOJ Antitrust guidance, Contech could have submitted non-competitive bids to be on the emergency list. C.A. J.A. 1275. But because Contech submitted a bid designed to compete against its interbrand competitor, Lane, but not to undercut Contech's own partner, Pomona, the Government failed to alleged a *per se* antitrust crime.

"[A] manufacturer selling alongside a distributor may cause . . . 'channel conflicts.'" App. 28a.

> For example, if a manufacturer cuts its own prices, the independent distributor may lose the incentive to provide valuable additional services or to market—and thus sell—the product itself. More than that, a distributor may become so upset with the manufacturer for undercutting it that it decides to stop distributing the manufacturer's product completely. *See* [C.A] J.A. 115–16 ("To undercut one's distributor . . . would be the business equivalent of shooting oneself in the foot."). And this would be especially detrimental in a market where the number of potential distributors is limited. In both scenarios, consumers and competition lose out. When fewer distributors sell one manufacturer's goods, other manufacturers' goods face less interbrand competition.

App. 28a–29a (internal citations omitted).

"[M]anufacturers have to find a way to mitigate these conflicts." *Id*. And they often do so "by ensuring their direct-sale prices are equal to or higher than their distributors' prices by fixing the distributors' resale prices [and/]or the manufacturer's own." *Id*. (first citing C.A. J.A. 119) ; then citing Reuben Arnold, Neill Norman & Daniel Schmierer, *Resale Price Maintenance and Dual Distribution*, Distrib. and Franchising Comm.: ABA Section of Antitrust L. 12 (2016). Of course,

> outside of a dual-distributor setup, this type of vertical price fixing would not be subject to the per se rule after *Leegin*. Yet the same potential

> boons to interbrand competition don't disappear just because a manufacturer also acts as a distributor." J.A. 119–20; *cf. Leegin*, 551 U.S. at 890–91, 127 S. Ct. 2705. The price restraints still incentivize distributors to continue to vigorously sell the manufacturer's product and to offer additional services, therefore increasing interbrand competition. Arnold, Norman & Schmierer, *supra*, at 12 (explaining that a dual-distribution manufacturer that sets its direct sale price equal to its distributors "may strengthen the competitiveness of [its] brand and thereby enhance inter-brand competition").

App. 29a (citing *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 421 (5th Cir. 2010), *cert. denied*, 562 U.S. 1217 (2011)).

This "logic applies to the restraint alleged in this indictment." App. 30a.

> The alleged bid rigging (a type of price fixing) could allow Contech to maintain its relationship with Pomona by making sure it never undercut, and thus upset, its distributor. J.A. 115. So—just like in *GTE Sylvania*, *Leegin*, and *Khan*—while the bid rigging had the effect of eliminating intrabrand competition between Contech and Pomona, it also could benefit interbrand competition. By increasing Pomona's sales of Contech's aluminum, the restraint could lead to greater competition between Contech and other aluminum manufacturers. J.A. 115–16.

Id.

Because the alleged agreement was a type that provided "potential interbrand procompetitive effects," it was not a "category of restraint" that would "invariably lead to anticompetitive effects." *Id.* Such "economic uncertainty . . . shows the indictment did not allege a *per se* violation [because the court] cannot 'predict with confidence that' the dual-distribution [agreement] alleged in the indictment 'would be invalidated in all or almost all instances under the rule of reason.'" *Id.* (quoting *Leegin*, 551 U.S. at 886–87). Accordingly, the indictment—which alleged a price fixing agreement within a dual-distribution relationship—did not allege a *per se* Sherman Act violation, and the Fourth Circuit held that the indictment did not state an offense and dismissed that charge.

The Government petitioned for rehearing en banc, which the Fourth Circuit denied. App. 78a.

REASONS FOR DENYING THE PETITION

1. The Government asks the Court to disregard its own allegations about the manufacturer-dealer relationship and thus to consider in a vacuum the alleged agreement on bid prices. Pet. 13. It goes so far as to argue that the relationship of the parties "makes no difference." *Id.* But "agreements that otherwise look identical in form produce different economic effects based on how the parties relate to one another." App. 18a (citing *Leegin*, 551 U.S. at 888).

For example, in a civil case that the Government relies on heavily in its petition, *Deslandes v. McDonald's USA, LLC ("McDonald's")*, 81 F.4th 699, 703 (7th Cir. 2023), the Seventh Circuit noted that "a partnership to practice law . . . [is] a horizontal agreement [among competitors] . . . not to compete" with each other. Here, the Government claims that any agreement among horizontal competitors not to compete with each other is necessarily *per se* illegal and that courts cannot look at the relationship of the parties when deciding whether the *per se* rule applies to such agreements. Pet. 13. Thus, under the Government's argument all law firm partnerships (and all other professional partnerships) are *per se* illegal. The Government also argues that the ancillary restraint doctrine creates an affirmative defense, even in criminal cases, on which the defendant bears the burden—and that the existence of an ancillary restraint is irrelevant to the validity of a *per se* charge. Pet. 16–18. Therefore, under the Government's proposal, every multi-partner law firm could be charged with a *per se* criminal horizontal price fixing agreement (carrying up to 10 years in prison and $10 million fine for individuals and $100 million fine for companies); the charge could not be dismissed before trial; and the partners and firm would only escape criminal liability if they (the criminal defendants) carried their burden to prove to a jury that the agreement was not only "collateral to [a] legitimate collaboration" but also "'reasonably necessary' to achieve its procompetitive objectives." Pet. 17 (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898)). The discretion such an interpretation would give to prosecutors to charge and take to trial, among others, every multi-partner law firm and every professional partnership in the country, along with the novel burden shifting inherent in the Government's proposed scheme, are dangerous positions that show the Government's position must be wrong.[3]

Here, the indictment alleged that the agreement arose as "part of" a preexisting, bona fide manufacturer-dealer relationship. C.A. J.A. 46. And this Court's consistent precedent requires inquiry into the relationship of the parties before applying the *per se* rule. *See, e.g., Leegin*, 551 U.S. at 888. Indeed, courts could not distinguish between *per se* illegal horizontal price fixing and rule-of-reason-governed vertical price fixing without considering the parties' relationship. And because precedent requires courts to look at the relationship of the parties to an allegedly anticompetitive agreement when determining whether to apply the *per se* rule, the Fourth Circuit correctly rejected the Government's position below.

2. The Government also argues for a definition of vertical price fixing that would render *per se* illegal all price agreements in dual-distribution arrangements. But economic literature—and the record here—establishes that such arrangements are often procompetitive. App. 25a. The Government argues that a price agreement is only vertical—and thus not

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[3] Because the Court "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly,'" *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)), the Government's positions also show that the Court should strike down the Sherman Act crime as unconstitutional. *See* Conditional Cross-Petition for Writ of Certiorari at 8-10, *Brewbaker v. United States*, No. 24-124 (Aug. 1, 2024).

prohibited by the *per se* rule—if it is *both* "among firms at different levels of distribution" *and* relates only to "matters on which they do not compete." Pet. 3. Under that position, Nike could not agree that it would not undercut Foot Locker's prices. Yet, including the Fourth Circuit below, each of the ten circuits to consider that position have rejected it, *see PSKS, Inc.,* 615 F.3d at 421 & n.8; App. 31a, because a manufacturer's agreement not to undercut its dealer's prices often enhances interbrand competition, and "the same potential boons to interbrand competition don't disappear just because a manufacturer also acts as a distributor." App. 29a.

In its petition for rehearing en banc, the Government conceded that some dual-distribution restraints should be analyzed under the rule of reason. *See* Petition of the United States for Panel Rehearing and Rehearing En Banc at 23, *United States v. Brewbaker*, No. 22-4544 (Jan. 16, 2024). But it argued that the rule of reason should apply only when the court determines that, when imposing the restraint, "the manufacturer was *acting as a supplier* (in a vertical capacity)," rather than acting "as a competitor distributor (in a horizontal capacity)." *Id.* at 24 (emphasis added). The Fourth Circuit rejected that position as requiring "arbitrary and likely impossible line-drawing" to "artificially split a business entity into pieces in order to conclude that only one part of the entity—for example, the part that acted as the other party's competitor—was the actual 'party' to the agreement." App. 18a. The court explained that attempting such an exercise would be a "fool's errand." App. 19a.

Now the Government takes a different tack. It argues that *all* price agreements in dual-distribution arrangements are *per se* unlawful and that avoiding criminal liability in such circumstances requires the criminal defendant to prove an affirmative defense, which the Government calls the "ancillary restraint doctrine." Pet. 16. Yet the Government can point to no economic analysis or circuit precedent to support its position that price agreements in dual-distribution relationships are always or almost always anticompetitive. Because the *per se* rule applies only when categories of agreements are irredeemably anticompetitive, *see Leegin*, 551 U.S. at 886–87, the Government's failure to present any economic support—much less to rebut the economic record here showing that such agreements are often procompetitive—is fatal to its position that the *per se* rule should apply to such agreements.

The Government's position also lacks support in the courts of appeals. Since this Court held that vertical price-fixing agreements are not *per se* unlawful, no circuit court has held that such agreements within a dual-distribution relationship are *per se* unlawful. In arguing otherwise, the Government cites *United States v. Koppers Co.*, 652 F.2d 290 (2d Cir. 1981), *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), and *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699 (7th Cir. 2023), but none of those decisions supports the Government's position or demonstrates the existence of a circuit split.

Koppers was decided before this Court held that "[v]ertical price restraints are to be judged according to the rule of reason," *Leegin*, 551 U.S. at 907. *Cf. Koppers*, 652 F.2d at 297 ("For a relationship to qualify for rule-of-reason treatment . . . , it is not enough that it be shown to be vertical; there must also be some 'redeeming virtue,' some possibility that the terms of the relationship hold out the prospect for being pro-competitive.").

Apple was a civil case involving a horizontal price fixing agreement between competing publishers (i.e., between manufacturers). Apple was a dealer for those publishers and thus vertically related to the manufacturers. But Apple "agree[d] to orchestrate [the] horizontal price-fixing conspiracy," and thus "committed itself to 'achiev[ing] [the] unlawful objective' . . . [of horizontal] collusion . . . among the Publisher Defendants to set ebook prices." 791 F.3d at 322 (quoting *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)). Because Apple conspired with the competing manufacturers in *their* horizontal price-fixing agreement, its vertical relationship with the competing manufacturers did not insulate Apple from conspiracy liability. *Id.* at 315 (A defendant conspires when they "commit[] to a common scheme designed to achieve an unlawful objective." (quoting *Monsanto*, 465 U.S. at 764)) (finding that Apple's liability is based on conspiracy liability).

McDonald's is another civil case, this time involving "no-poach" agreements that prohibited owners of McDonald's franchises from employing or soliciting other McDonald's employees. Nothing about that arrangement resembles a dual-distribution agreement. Instead, in their positions as employers, the franchises were horizontal competitors for labor. Indeed, the Seventh Circuit noted as much; it rejected plaintiffs' position that the relevant market is "workers at McDonald's," explaining that it is "impossible to treat employees at a single chain as a market" because "[p]eople who work at McDonald's one week can work at Wendy's the next, and the reverse." 81 F.4th at 702–03. The Seventh Circuit did not discuss any vertical relationship or even use the term "vertical." Because there was no vertical relationship or dual-distribution relationship at issue in *McDonald's*, the opinion does not support the Government's claim that price agreements in dual distribution arrangements are *per se* illegal.

Because the Government has cited no case supporting its position that price agreements in dual-distribution arrangements should be *per se* illegal, there is no circuit split here. All ten circuits to consider the question have ruled that such agreements are not governed by the *per se* rule. *See PSKS, Inc.,* 615 F.3d at 421 & n.8; App. 31a. Thus, the Court should reject the Government's claimed circuit split argument.

3. *McDonald's* is instructive, however, on another problem with the Government's position. The Government argues that the *per se* rule should have applied to the agreement here, and that the vertical relationship should have been raised by Mr. Brewbaker as an affirmative defense. Pet. 16–17. That argument is wrong. In a criminal case, the government must prove all facts necessary to make the conduct criminal. *See, e.g., Erlinger v. United States*, 144 S. Ct. 1840, 1850 (2024). Generally, an affirmative defense is "a 'justification or excuse' . . . [for] conduct that satisfies the elements of an offense." *Ruan v. United States*, 597 U.S. 450, 472 (2022) (Alito, J., concurring) (quoting 1 W. LaFave, *Substantive Criminal Law* § 1.8(c) (3d ed. 2018)). But the *per se* rule criminalizes only "naked" horizontal agreements

among competitors, *McDonald's*, 81 F.4th at 702, and "[a]n agreement among competitors is not naked if it is ancillary to the success of a cooperative venture," *id.* at 703. The supposed affirmative defense thus defeats the "nakedness" element of the *per se* rule offense; it is, therefore, not an affirmative defense in a criminal antitrust case. *See id*.

Only the legislature can shift the burden of proof to the defendant to disprove the existence of a crime. *Cf. Patterson v. New York*, 432 U.S. 197, 204–06, 210 (1977). So the Government's effort to blame Mr. Brewbaker for not raising the manufacturer-dealer relationship charged in the indictment as an affirmative defense at trial fails. The existence of that relationship defeats the nakedness predicate to application of the *per se* rule here, and that relationship was pled in the indictment. Thus, the Fourth Circuit correctly held that the indictment failed to state a *per se* Sherman Act offense.

4. The Government next complains that the Fourth Circuit's holding will make *per se* criminal prosecutions more difficult. Pet. 23. But it should not be easy for the Government to charge a *per se* Sherman Act violation. "[T]he per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score." *Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 718 (6th Cir. 2019) (quoting *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362–63 (5th Cir. 1980)). In any event, the Government's claim that upholding the unanimous conclusion of the circuits that price agreements in dual distribution arrangements are not *per se* unlawful will "make[] it substantially more difficult

for the government to protect taxpayers from schemes to rig bids for government contracts," Pet. 23, overstates the problem for two reasons.

First, entities soliciting bids for government contracts can protect themselves by, for example, requiring disclosure of all subcontracting arrangements as part of the bid process, prohibiting subcontracting with co-bidders, or any number of other measures built into the contractual bid process.

Second, if interbrand competitors (such as two competing manufacturers) use subcontracting agreements to disguise an effort to secretly monopolize a market, the Government could simply allege that the subcontracting agreement was a ruse and not a bona fide vertical relationship.

In any event, administrative inconvenience is not a legitimate basis for criminalizing often-procompetitive conduct by using a *per se* rule designed only to outlaw conduct that is always or almost always irredeemably anticompetitive.

CONCLUSION

The circuits have unanimously rejected the Government's position, and economists have consistently determined that the category of agreements at issue—price agreements within dual-distribution relationships—are often procompetitive. Accordingly, the Fourth Circuit correctly joined the nine other circuits to consider the issue in holding that the charged agreement was not a *per se* Sherman Act violation. The Court should deny the Government's petition.

Respectfully submitted,

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