No. 23-1365

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BRENT BREWBAKER

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

REPLY BRIEF FOR THE PETITIONER

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Since the enactment of Section 1 of the Sherman Act, 15 U.S.C. 1, courts have understood that "an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition," is per se unlawful. *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898) (Taft, J.), aff'd as modified, 175 U.S. 211 (1899). Yet in this case, the court of appeals held that an agreement between competing bidders to rig bids fell outside the scope of that longstanding per se rule because the bidders' relationship also had a vertical component. Contrary to respondent's suggestion, that decision conflicts with the statute, with this Court's precedents, and with the decisions of other courts of appeals. The Court should grant the petition for a writ of certiorari and reverse.

A. The Decision Below Is Wrong

1. In the decision below, the court of appeals stated that the "only restraints that the Supreme Court has held to be *per se* unreasonable are purely horizontal, or, in other words, are agreements between entities who are *only* related as competitors." Pet. App. 16a n.9. The court determined that, because Contech Engineered Solutions and Pomona Pipe Products were "related *both* vertically and horizontally," the agreement between them fell outside the scope of the established per se rule against horizontal agreements to rig bids. *Id.* at 20a.

Respondent makes no effort to reconcile the court of appeals' analysis with this Court's decisions in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam). See Pet. 13-14. He does not dispute that, in those cases, the Court held that agreements among competitors were per se unlawful even though those competitors also had vertical relationships. See *ibid.* That alone justifies reversal of the decision below, which rests on the mistaken premise that this Court's decisions imposing per se liability under Section 1 have all involved "agreements between entities who are *only* related as competitors." Pet. App. 16a n.9.

Respondent also makes no serious effort to address Section 1's common-law background. See Pet. 10-11, 14. He never disputes that the type of agreement alleged in the indictment would have been per se unlawful at common law. He instead contends, in his cross-petition for a writ of certiorari, that the common law is "irrelevant." 24-124 Pet. 6 n.2 (citation omitted). That view conflicts with this Court's precedents, which have long read the statutory term "restraint of trade" in light of common-law understandings of that term. See, *e.g.*, *NCAA* v. *Al-*

ston, 594 U.S. 69, 81 (2021); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59-60 (1911).

Instead of focusing on this Court's precedents and the common law, respondent argues (Br. in Opp. 15) that "economic literature" establishes that the types of agreements at issue here "are often procompetitive." But respondent misunderstands the role of economic analysis in Section 1 cases. A court's task in a Section 1 case, as in any other statutory case, is to apply the text that Congress enacted, not to engage in freewheeling economic analysis. In this case, the enacted text uses the term "restraint of trade," 15 U.S.C. 1—a term that "took [its] origin in the common law" and was "familiar in the law of this country" at the time of the Sherman Act's adoption. *Standard Oil*, 221 U.S. at 51. Under that term's established common-law meaning, the type of agreement at issue here is per se unlawful.

Respondent's economic analysis might be relevant if a plaintiff sought to invoke the Sherman Act's "dynamic potential" by asking a court to recognize a new per se rule. *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 732 (1988); see *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 349 n.19 (1982). But in this case, the government sought enforcement of the settled per se rule against horizontal bid-rigging agreements, which courts had recognized even before Congress enacted the Sherman Act.

Respondent's economic analysis is beside the point for an additional reason. The "natural tendency and inherent character" of a horizontal agreement to rig bids is "to lessen competition." *McMullen* v. *Hoffman*, 174 U.S. 639, 647, 649, 651 (1899); see Pet. 11-12. "The anticompetitive potential inherent in all [such] agreements justifies their facial invalidation even if procom-

petitive justifications are offered for some." *Maricopa County Medical Society*, 457 U.S. at 351. Respondent therefore cannot avoid per se liability by asserting (Br. in Opp. 5-6) procompetitive justifications for some horizontal bid-rigging agreements.

As the petition for a writ of certiorari explains (at 15-18), a court should apply the ancillary-restraints doctrine when a defendant argues that a particular horizontal restraint enhances competition, and therefore complies with Section 1, because it promotes a procompetitive vertical collaboration. Under that approach, a court first decides whether the challenged restraint is ancillary to a legitimate collaboration and then (if the court answers that question in the affirmative) determines whether the overall arrangement is procompetitive under the rule of reason. Although respondent contests (Br. in Opp. 14, 19-20) the government's characterization of the ancillary-restraints doctrine as creating an affirmative defense, courts have treated that doctrine as an affirmative defense for more than a century. See, *e.g.*, *Addyston Pipe*, 85 F. at 282-283.

In any event, nothing in this case turns on which party bears the burden of proof when an ancillary-restraints issue arises. Rather, the salient point is that the ancillary-restraints doctrine, which focuses on the *relationship* between a challenged horizontal restraint and the parties' overall course of dealing, provides the proper framework for addressing a defendant's claim that a particular instance of horizontal collusion furthered a procompetitive vertical collaboration. See Pet. 17-18. The court of appeals, by contrast, treated the mere *existence* of a vertical relationship between Contech and Pomona as sufficient to justify dismissal of a per se charge, despite respondent's failure to demon-

strate at trial that the challenged horizontal restraint (the two companies' collusive bidding) was reasonably necessary to achieve a procompetitive vertical collaboration between the companies.

Contrary to respondent's suggestion (Br. in Opp. 14), the government's theory does not imply that "all law firm partnerships (and all other professional partnerships) are *per se* illegal." A properly formed partnership is a "lawful, economically integrated joint venture," and the "core activit[ies]" of such a venture, such as the "pricing" of its services, are not per se unlawful. *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 3, 7 (2006); see *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979) ("When two partners set the price of their goods or services * * * they are not *per se* in violation of the Sherman Act."). This case, in contrast, does not involve a joint venture.

2. Respondent also repeatedly describes Contech's relationship with Pomona as a "dual-distribution" relationship. Br. in Opp. 1; see, *e.g.*, *id.* at i, 2, 6-13, 15-21. That characterization is a red herring.

Contech and Pomona did not have a dual-distribution relationship. A "dual distributor" is a manufacturer that both sells its products at wholesale to a distributor and sells them at retail to consumers. See *Fleet Wholesale Supply Co.* v. *Remington Arms Co.*, 846 F.2d 1095, 1096 (7th Cir. 1988). To use respondent's example (Br. in Opp. 1), if Nike sold shoes both through Foot Locker and directly through its own website, Nike would be a dual distributor. In this case, however, Contech did not sell the same product at both wholesale and retail. Contech instead sold one product (unfinished aluminum pieces) to Pomona, but bid to sell a different product

(installed aluminum structures) to the North Carolina Department of Transportation. See Pet. App. 2a.

In any event, the application of the Sherman Act does not turn on whether Contech is properly described as a dual distributor. Contrary to respondent's contention (Br. in Opp. 17), courts of appeals have not exempted dual distributors from ordinary antitrust principles. Courts have instead applied the per se rule to agreements between dual distributors and their competitors about the way in which they will compete, just as they have applied the per se rule to other horizontal agreements. See, *e.g.*, *Jacobs* v. *Tempur-Pedic International, Inc.*, 626 F.3d 1327, 1341 (11th Cir. 2010) (recognizing that "a horizontal arrangement [c]ould exist between [a dual distributor], qua distributor, and [other] distributors"). If Nike were sued for agreeing with Foot Locker as to the prices that Nike would charge for its website sales (see Br. in Opp. 16), Nike could invoke the ancillary-restraints doctrine and attempt to show that the agreement enhanced competition overall. But the mere existence of a vertical wholesaler-retailer relationship between the two companies would not automatically render the per se rule inapplicable to a challenged horizontal restraint.

Nor does the portion of the decision below that is at issue here depend on whether Contech is correctly characterized as a dual distributor. In holding that the agreement alleged in the indictment fell outside the scope of the longstanding per se rule against bid rigging, the court of appeals relied not on Contech's purported status as a dual distributor, but on the fact that "Contech and Pomona had a hybrid relationship with both vertical and horizontal components." Pet. App. 21a. The court characterized the agreement in this case

as "a dual-distribution arrangement" only in the course of deciding whether to recognize a *new* per se rule against such arrangements. *Id.* at 27a; see *id.* at 25a-31a. But the government has not sought the recognition of any new per se rule; it has instead argued only that the agreement alleged in the indictment falls within the scope of the per se rule against bid rigging that then-Judge Taft recognized in *Addyston Pipe* more than a century ago.

3. Contrary to respondent's argument (Br. in Opp. 2), the government's current contentions do not conflict with the allegations in the indictment. Respondent asserts that "the Indictment did not allege that Contech and Pomona were 'competitors.' " *Id.* at 5 (citation omitted). In fact, the indictment alleged that Contech and Pomona had submitted competing "bids for aluminum structure projects" and that respondent had participated in a "conspiracy to suppress and eliminate competition by rigging bids." Pet. App. 82a, 85a. Respondent asserts (Br. in Opp. 2) that Contech and Pomona had formed a "partnership," but the indictment never alleges any such partnership.

More importantly, respondent's factual objections have no bearing on the question presented. This case presents a pure question of law: whether the existence of a vertical relationship between competing bidders precludes the application of the established per se rule against horizontal bid rigging. This Court can answer that question without resolving the factual issues that respondent raises.

4. Finally, respondent is wrong to suggest (Br. in Opp. 4) that the Department of Justice has "approved" the type of collusion in which respondent engaged. The primer that respondent cites states that a bidder may

"submit an intentionally high bid * * * for its own independent business reasons"—not that bidders may collude with each other. C.A. J.A. 1275; see, *e.g.*, *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 553-554 (2007) (explaining that Section 1 prohibits only concerted action, not independent action). The primer elsewhere states that "bid rigging schemes are per se violations of the Sherman Act"; that bid rigging includes "[c]omplementary bidding," which "occurs when some competitors agree to submit bids that * * * are too high to be accepted"; and that complementary bidding "defraud[s] purchasers by creating the appearance of competition to conceal secretly inflated prices." C.A. J.A. 1272-1273. The indictment here alleged that respondent had colluded with Pomona, not that respondent had independently decided to submit losing bids. See Pet. App. 85a-87a.

B. The Question Presented Warrants This Court's Review

1. As the petition for a writ of certiorari explains (at 18-20), the court of appeals' decision in this case conflicts with the Second Circuit's decisions in *United States* v. *Koppers Co.*, 652 F.2d 290, cert. denied, 454 U.S. 1083 (1981), and *United States* v. *Apple, Inc.*, 791 F.3d 290 (2015), cert. denied, 577 U.S. 1193 (2016), and with the Seventh Circuit's decision in *Deslandes* v. *McDonald's USA, LLC*, 81 F.4th 699 (2023), cert. denied, 144 S. Ct. 1057 (2024). Respondent's attempts to minimize that conflict are unpersuasive.

Respondent does not deny the conflict between the decision below and *Koppers*, but dismisses *Koppers* on the ground that it was "decided before this Court held that 'vertical price restraints are to be judged according to the rule of reason.'" Br. in Opp. 17 (quoting *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S.

877, 907 (2007)) (brackets omitted). The *Koppers* court, however, did not rely on the premise that vertical price restraints are per se unlawful. The court instead determined that a bid-rigging "agreement among competing retailers" was "a *per se* violation of the Sherman Act" even though the retailers' relationship had "vertical elements." *Koppers*, 652 F.2d at 297. That holding remains binding precedent in the Second Circuit today. See, *e.g.*, *United States* v. *Aiyer*, 33 F.4th 97, 115, 118-121, 122 n.23, 123-126 (2d Cir. 2022) (applying *Koppers* to a bid-rigging agreement between competing bidders who also had a vertical relationship).

Respondent next addresses (Br. in Opp. 18) the Second Circuit's decision in *Apple*, but his own description of that decision confirms that it conflicts with the ruling below. Respondent correctly observes (*ibid.*) that, in *Apple*, the Second Circuit concluded that a company's "vertical relationship with [other conspirators] did not insulate" it from per se liability. In this case, by contrast, the court of appeals held that Contech's vertical relationship with Pomona *did* insulate it from per se liability: The court declined to apply the per se rule against horizontal agreements to rig bids because Contech's relationship with Pomona had "vertical * * * components." Pet. App. 21a.

Finally, respondent asserts (Br. in Opp. 19) that "there was no vertical relationship * * * at issue" in *Deslandes*. That is incorrect. *Deslandes* involved agreements between McDonald's and its franchisees, and the relationship created by a franchise agreement is plainly a vertical relationship. See 81 F.4th at 702. In fact, McDonald's argued that the agreements were subject to the rule of reason because the relationship between McDonald's and its franchisees had "vertical aspects." McDon-

ald's Br. at 20, *Deslandes*, *supra* (No. 22-2333) (citation omitted). The Seventh Circuit rejected that argument, holding that the agreements had imposed a "horizontal restraint" by specifying the terms on which McDonald's and its franchisees would compete for labor. *Deslandes*, 81 F.4th at 703.

Respondent also emphasizes (Br. in Opp. 18) that *Apple* and *Deslandes* were "civil case[s]," while this is a criminal case. But when a statute "has both criminal and noncriminal applications," a court "must interpret the statute consistently, whether [it] encounter[s] [the statute] in a criminal or noncriminal context." *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). The interpretations adopted by the Second and Seventh Circuits in *Apple* and *Deslandes* therefore apply equally in criminal cases, just as the interpretation adopted by the Fourth Circuit here applies equally in civil cases.

2. Respondent does not dispute that the question presented is recurring and important. He does not deny that bid rigging is a common form of price fixing, that bid-rigging schemes are a particular focus of Department of Justice antitrust prosecutions, or that participants in bid-rigging schemes often enter into subcontracting arrangements or other vertical relationships. See Pet. 22.

Respondent contends (Br. in Opp. 20-21) that government entities can protect themselves from rigged bids through tools other than the imposition of per se antitrust liability, but the potential tools that he identifies are inadequate. For example, "requiring disclosure of all subcontracting arrangements," *id.* at 21, would not prevent a contractor and subcontractor from colluding. Similarly, "prohibiting subcontracting with co-bidders," *ibid.*, would not address collusion among competing bid-

ders whose vertical relationships involve agreements other than subcontracts. More fundamentally, government entities should not be required to modify their bidding practices in order to prevent a type of conduct—collusion among competing bidders—that is per se unlawful under long-settled Section 1 principles.

Respondent also suggests (Br. in Opp. 21) that the court of appeals' decision still allows the government to bring per se charges against competing bidders who enter into vertical relationships as a "ruse." But the court did not specify that its analysis contained a carveout for sham vertical relationships. Respondent's suggestion is in any event inadequate. In the absence of a valid ancillary-restraints defense, horizontal bid rigging is inherently anticompetitive, and thus per se unlawful, even when the competing bidders have a bona fide vertical relationship.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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