No. 23-1365

In the Supreme Court of the United States

BRENT BREWBAKER,
Cross-Petitioner,

v.

UNITED STATES,
Cross-Respondent.

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

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Section 1 of the Sherman Act criminalizes "[e]very contract . . . in restraint of trade." 15 U.S.C. § 1. This prohibition cannot be applied literally because it proscribes all contracts, thus leaving courts to define the offense.

> Does the criminal provision of Section 1 of the Sherman Act violate Article 1 of, and the Fifth and Sixth Amendments to, the United States Constitution?

2. Did the court of appeals correctly apply the constitutional harmless-error test when it "presumed" that the jury was *not* affected by a constitutionally erroneous jury instruction?

PARTIES TO THE PROCEEDING

Cross-Petitioner Brent Brewbaker was the appellant below. Cross-Respondent United States of America was the appellee below. Contech Engineered Solutions LLC was a defendant in the district court but did not participate in the proceedings in the court of appeals.

RELATED PROCEEDINGS

United States District Court (E.D.N.C.):

United States v. Brewbaker, No. 20-cr-481 (Sept. 8, 2022)

United States Court of Appeals (4th Cir.):

United States v. Brewbaker, No. 22-4544 (Feb. 15, 2024)

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Brent Brewbaker, through counsel, respectfully conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. Mr. Brewbaker requests that, if the Court grants the Government's petition, the Court consider two preserved, broadly important questions of law.

The first question is whether the criminal offense promulgated by Section 1 of Sherman Act is constitutional in the first place. Because this purported offense violates at least four fundamental constitutional principles—those of non-delegation, objectivity, jury as factfinder, and the prohibition on judge-made crimes—the offense is unconstitutional.

The second question raises the critical issue of whether appellate courts can presume that constitutional errors are non-prejudicial. It has been many decades since the Court has provided guidance on how to apply the harmless-error test, and this case—along with an increasing list of other examples—shows that such guidance is needed, particularly because the harmless-error doctrine is, at once, "almost certainly the most frequently invoked doctrine in all criminal appeals" and one of the most consistently misapplied. Daniel Epps, *Harmless Errors and Substantial Rights*, 131 Harv. L. Rev. 2117, 2119 (2018).

To be clear, the Court should deny the Government's petition. The court of appeals correctly decided the question raised in the Government's petition; there is no circuit split on that issue; the Government's factual summary is materially

inaccurate; and the Government's merits argument both ignores this Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), and asks this Court to engage in what the court below correctly described as a "fool's errand," Pet.App.19a.

However, the Government's petition highlights the need for the Court to address the foundational question of whether the Sherman Act criminal provision is constitutional in the first place. And the decision below illustrates the need for this Court to provide additional guidance to lower courts on how to apply the harmless-error test. Accordingly, if the Court grants the Government's petition, it should also consider the two questions presented herein.

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. An additional order of the district court is not published in the Federal Supplement but is available at 2021 WL 1011046.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 2023. A petition for rehearing was denied on February 15, 2024. On June 28, 2024, the Government filed its Petition for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> 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.

Article I, Section 1 of the United States Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The Fifth Amendment to the United States Constitution provides: "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 United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

I. Question 1: Is the criminal provision of Section 1 of the Sherman Act constitutional?

STATEMENT

1. The first provision in our constitution is non-delegation: "All legislative Powers herein granted shall be vested in a Congress . . . ." U.S. Const. art. I, § 1. This provision—in conjunction with the protections of the Fifth and Sixth Amendments—prohibits Congress from "set[ting] a net large enough to catch all possible offenders, and leav[ing] it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Kolender v. Lawson*, 461 U.S. 352, 358 n.7 (1983) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)).

The criminal provision of Section 1 of the Sherman Act violates this first principle. The statute provides, "[e]very contract . . . in restraint of trade" is illegal, and the making thereof is a crime. 15 U.S.C. § 1. Section 1, if applied literally, "would be destructive of all right to contract" because its plain terms outlaw every contract. *Standard Oil Co. v. United States*, 221 U.S. 1, 63 (1911); *see Leegin*, 551 U.S. at 885 (noting that the literal language "proscribe[s] all contracts"). A literal reading of the statute would also render "enforcement of the statute . . . impossible because of its uncertainty." *Standard Oil*, 221 U.S. at 63.

"In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute . . . ." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) (emphasis added). Thus, "[f]rom the beginning the Court has treated the Sherman Act as a common-law statute." *Leegin*, 551 U.S. at 899. But Congress cannot delegate legislative power to the court—and certainly not the power to

define crimes—for, "the notion of a common-law crime is utterly anathema today . . . ." *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of certiorari); *see Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) (same).

> It is one thing to recognize that some degree of uncertainty exists whenever judges and juries are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis.

United States v. Kozminski, 487 U.S. 931, 951 (1988).

Because the offense set forth in Section 1 of the Sherman Act does the latter, it violates the non-delegation principle of Article I and the related vagueness doctrine of the Due Process Clause.

2. The purported Section 1 offense violates a second foundational principle of our criminal justice system—that is, crimes must be defined by "objective standard[s]." *Johnson v. United States*, 576 U.S. 591, 598 (2015). Under this principle, a crime cannot be defined merely by whether a court and jury find the conduct "unreasonable." For example, in *United States v. L. Cohen Grocery*, this Court struck down as unconstitutionally vague an offense that purported to criminalize the charging of any "unreasonable" price for a necessary good. 255 U.S. 81, 93 (1921). The Court noted that "to attempt to enforce [such an offense] would be the exact equivalent of an effort to carry out a statute which . . . merely penalized and punished all acts detrimental to the public interest

when unjust and unreasonable in the estimation of the court and jury." *Id.* at 89.

Section 1 of the Sherman Act is the functional equivalent of the statute at issue in *L. Cohen Grocery*. Both statutes criminalize otherwise legitimate conduct (*i.e.*, setting a price and making a contract) when the price or contract is "unreasonable in the estimation of the court and jury," *L. Cohen Grocery*, 255 U.S. at 89.[1] Thus, the Section 1 offense is unconstitutionally vague for violating the objectivity requirement as well.[2]

3. The Section 1 offense also violates the constitutional requirement that the jury be the sole factfinder in criminal cases. *See Erlinger v. United*

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[1] The Court in *L. Cohen Grocery* noted that the statute's vagueness was further supported by "the persistent efforts . . . [of] administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution." 255 U.S. at 91. This observation also applies to the Sherman Act. *See* Pet.3-4 (referencing the Government's practice to "generally" only prosecute cases that fall under one of the court-made *per se* rules, as opposed to all potential Sherman Act violations).

[2] The Government suggests that the offense is defined by the common law meaning of "restraint of trade" at the time of the Sherman Act's passage. *See* Pet.10-11. But this Court has rejected that view, noting, "the state of the common law 400 or even 100 years ago is irrelevant." *Leegin*, 551 U.S. at 888 (quoting *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977)). "[T]he Sherman Act's use of 'restraint of trade' 'invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890.'" *Id.* (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988)).

States, 144 S. Ct. 1840, 1850 (2024).[3] To ensure that juries make the ultimate fact-finding and that the facts being found "are premised on laws adopted by the people's elected representatives" and not "pretended offenses," *id*., this Court has repeatedly deemed unconstitutional any jury instruction that takes an element away from jurors by directing them to rely on a "conclusive presumption." *Francis v. Franklin*, 471 U.S. 307, 317 (1985); *see also*, *e.g.*, *Carella v. California*, 491 U.S. 263, 265-66 (1989) (per curiam); *Sandstrom v. Montana*, 442 U.S. 510, 521-22 (1979); *Morissette v. United States*, 342 U.S. 246, 274-75 (1952). "A [conclusive] presumption instructs the jury that it must infer the presumed fact if the [Government] proves certain predicate facts. . . . Such presumptions violate the Due Process Clause if they relieve the [Government] of the burden of persuasion on an element of an offense." *Francis*, 471 U.S. at 314.

The Sherman Act *per se* rules violate this prohibition on conclusive presumptions because they relieve the Government of the burden of proving the element of "unreasonable restraint." "In consequence of the vagueness of its language," *Apex Hosiery*, 310 U.S. at 489, and "[f]or the sake of business certainty and litigation efficiency," courts have adopted *per se*

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[3] "By requiring a unanimous jury to find every fact essential to an offender's punishment, [the Fifth and Sixth] amendments . . . seek to constrain the Judicial Branch, ensuring that the punishments courts issue are not the result of a judicial 'inquisition' but are premised on laws adopted by the people's elected representatives and facts found by members of the community. Both of these checks on governmental power, the framers appreciated, were 'anchor[s]' essential to prevent a slide back toward regimes like the vice-admiralty courts they so despised." *Erlinger*, 144 S. Ct. at 1850 (citations omitted).

rules that constitute "*conclusive presumption[s]* that [certain] restraint[s] [are] unreasonable." *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 344 (1982) (emphasis added); *see also Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990) (same); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 475 (1978) (Stevens, J., concurring in part) ("Conclusive presumptions play a central role in the enforcement, both civil and criminal, of the Sherman Act.").

These *per se* rules take the element of unreasonableness away from the jury. They instruct a jury to "conclusively presume" that any restraint triggering the rule is unreasonable, *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 344 (cleaned up). Because unreasonableness of the restraint is an element of a Section 1 violation, these "conclusive presumptions," *id.* (cleaned up), "relieve the Government of the burden of persuasion on an element of an offense" and thus "violate the Due Process Clause," *Francis*, 471 U.S. at 314 (cleaned up). Therefore, the Section 1 offense is unconstitutional for this reason as well.

4. In response to the foregoing challenge to the *per se* rules as unconstitutional conclusive presumptions, the Government argues that the *per se* rules are not presumptions but instead define separate Sherman Act offenses.[4] The problem with

[4] For example, the Court recently requested a response from the Government on whether the Sherman Act's *per se* rules are constitutional in criminal cases. *See Sanchez v. United States*, No. 19-288 (Sept. 24, 2019), available at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-288.html. In response, the Government argued,

the Government's argument is that courts create the *per se* rules, and courts cannot create crimes. Therefore, even if this Court accepts the Government's position (which is contrary to this Court's rulings, *see Maricopa Cnty. Med. Soc'y*, 457 U.S. at 344; *see also Atl. Richfield Co.*, 495 U.S. at 342), the rules would instead be unconstitutional judge-made crimes.

This Court has repeatedly stated that "*courts*" "adopt" a *per se* rule after "*courts* have had considerable experience with the type of restraint at issue" such that "*courts* can predict" that it would invariably be invalidated by the rule of reason—and courts adopt such rules primarily for "litigation efficiency." *Leegin*, 551 U.S. at 886–87 (emphasis added); *see also, e.g.*, *id.* at 887 ("[*W*]*e* have expressed reluctance to adopt *per se* rules[.]" (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)) (emphasis added)); *id.* at 888 ("[T]he Sherman Act's use of 'restraint of trade' 'invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890." (quoting *Bus. Elecs.*, 485 U.S. at 732)); *id.* at 888 ("[T]he state of the common law 400 or even 100 years ago is irrelevant" (quoting *Cont'l T. V.*, 433 U.S. at 53 n.21)); *id.* at 899-900 ("The case-by-

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> The per se rule is not an evidentiary presumption. It does not affect what is required to prove a crime; rather, it is an interpretation of the Sherman Act—i.e., of which restraints of trade fall within the purview of Section 1. It is as if the Sherman Act read: "An agreement among competitors to rig bids is illegal."

Brief of Respondent at 12, *Sanchez v. United* States, No. 19-288 (Nov. 25, 2019) (quoting in parenthetical *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979)) (cleaned up).

case adjudication contemplated by the rule of reason has implemented this common-law approach. Likewise, the boundaries of the doctrine of *per se* illegality should not be immovable."); *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 344 (same). *Contra Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) ("[E]very [(valid)] statute's meaning is fixed at the time of enactment." (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018))).

The Government's argument that the *per se* rules are merely typical legal interpretations of the Sherman Act is also wrong. Courts adopt *per se* rules based on *factual* determinations—namely, that the type of restraint is "manifestly anticompetitive" and "lack[s] . . . any redeeming virtue," and that, "after courts have had considerable experience with the type of restraint at issue," the court can "predict with confidence that it would be [found by a factfinder to be unreasonable] in all or almost all instances." *Leegin*, 551 U.S. at 886–87 (internal quotation marks omitted) (first quoting *Cont. T. V.*, 433 U.S. at 50; then quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1985)). Moreover, the Court has explained that the meaning of the term "restraint of trade" at the time the Sherman Act was enacted is "irrelevant." *Leegin*, 551 U.S. at 888. Accordingly, the *per se* rules are judge-made rules.

Thus, if this Court credits the Government's argument that the *per se* rules are not unconstitutional conclusive presumptions but instead define separate Section 1 criminal offenses, those offenses are unconstitutional judge-made crimes.

5. In sum, the Sherman Act criminalized all contracts and unconstitutionally left it to courts to decide which contracts are criminal. The judiciary performed this delegated legislative role by adding to the statutory language the element of unreasonableness. As a result, the offense delineates between criminal and non-criminal contracts based on a subjective determination of whether the contract is "unreasonable," rendering the offense unconstitutionally vague. The judiciary then created the *per se* rules "for the sake of litigation efficiency and business certainty" to determine which contracts will be "conclusively presumed" to meet the unreasonableness element. *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 344 (cleaned up). Yet, these rules are either unconstitutional conclusive presumptions that violate the Fifth and Sixth Amendments or they are invalid judge-made crimes that violate Article I and the Fifth Amendment. Thus, at each step, the Section 1 offense violates foundational constitutional principles, and the Court should recognize the criminal provision of the Sherman Act for what it is: an emperor with no clothes. It is an unconstitutional criminal offense and should be recognized as such.

REASONS FOR GRANTING THE PETITION

The Court should deny the Government's petition. But if it chooses to grant the Government's petition, it should grant Mr. Brewbaker's petition as well for at least four reasons.

First, the unconstitutionality of the Section 1 criminal offense provides an alternative ground to vacate Mr. Brewbaker's Section 1 conviction, and it would "treat[] [Mr. Brewbaker], who has already served his sentence, more fairly to consider the

alternative ground and thereby more fully . . . dispose of the case," *United States v. Tinklenberg*, 563 U.S. 647, 661 (2011).

Second, the last time this Court considered the constitutionality of the criminal provision of the Sherman Act, violations were misdemeanors. *See Nash v. United States*, 229 U.S. 373 (1913); *see also* Pub. L. 93-528, 88 Stat. 1706 (1974). Such violations now carry up to ten years in prison. *See* 15 U.S.C. § 1. Thus, convictions of violations of Section 1 of the Sherman Act carry significant penalties that did not exist when the Court considered the constitutionality of this offense. Whether this statute can be constitutionally used to imprison citizens for up to a decade (for each violation) is important enough to warrant this Court's review.

Third, review is particularly appropriate here because the Government is seeking this Court's approval of an unconstitutional process for deciding so-called *per se* Section 1 cases. Under the Government's proposal to this Court, criminal defendants "would bear the burden" of proving their innocence, and the court—not the jury—would decide the dispositive factual questions. Pet.17. Specifically, the Government proposes that,

> when a defendant argues that a particular horizontal restraint enhances competition, . . . *a court* [(not a jury)] first decides [the factual question of] whether the challenged restraint is ancillary to a legitimate collaboration and then (if *the court* answers that [factual] question in the affirmative) [the court] determines whether the overall arrangement is procompetitive under the rule of reason.

Id. at 16 (emphasis added). Further, under the Government's proposal,

> [the criminal defendant] would bear the burden of showing not only that a separate, legitimate collaboration between [the alleged competitors], but also (among other things) that the [*per se* unreasonable agreement] was "subordinate" and collateral to that legitimate collaboration and "reasonably necessary" to achieve its procompetitive objectives.

Id. at 17 (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 285, 291 (6th Cir. 1898) *(aff'd as modified*, 175 U.S. 211 (1899)) (emphasis added). That the Antitrust Section of the Department of Justice, through the Solicitor General, is arguing that a criminal defendant should "bear the burden" of proving their innocence and is arguing that the court should decide dispositive factual disputes in criminal antitrust trials illustrates a dire need for this Court to review the constitutionality of the Sherman Act's criminal provision.[5]

Finally, review is necessary because of the breadth of the statute's coverage and the resulting breadth of the statute's impermissible delegation to prosecutors,

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[5] *Cf. Erlinger*, 144 S. Ct. at 1850 (jury, not judge, must find every fact essential to conviction); *Fulton v. Warden, Md. Penitentiary*, 744 F.2d 1026, 1031 (4th Cir. 1984) ("There can be little doubt" that instructions that shift the burden to the criminal defendant as to an element of the offense are unconstitutional.) (discussing impermissible alibi instruction that shifted the burden to the defendant) (citing *In Re Winship*, 397 U.S. 358, 364 (1970); *Patterson v. New York*, 432 U.S. 197, 215 (1977); and *Sandstrom*, 442 U.S. at 524).

judges, and juries. The statute literally declares every contractual agreement "anywhere in the whole field of human activity to be [criminal]." *Standard Oil*, 221 U.S. at 60. As heretofore interpreted by courts, the only limitation on criminalizing all contracts is that, to be criminal, the contract must be deemed "unreasonable in the estimation of the court and jury," *L. Cohen Grocery*, 255 U.S. at 89. It may be true that the Government "*generally* reserves prosecution under Section 1 for per se violations[.]" Pet.3-4 (quoting U.S. Dep't of Justice, *Justice Manual* § 7-2.200 (updated Apr. 2022)) (emphasis added). But that entirely discretionary decision to "generally" only prosecute a subset of potentially prosecutable contractual agreements affords no protection to citizens. It does, however, suggest that the Government tacitly recognizes the unconstitutionality of a "rule of reason" antitrust prosecution—and, thus, the unconstitutionality of the Sherman Act offense itself.

Because application of settled principles shows that the statute's criminal provision does not comport with our constitutional guarantees, the Court should grant this petition and declare the criminal provision of Section 1 unconstitutional.

II. Question 2: Did the court of appeals correctly apply the constitutional harmless-error test when it "presumed" that the jury was *not* affected by a constitutionally erroneous jury instruction?

STATEMENT

1. The Government charged Mr. Brewbaker both with an antitrust violation and intimately related fraud counts. The antitrust charge was for allegedly engaging in anticompetitive conduct by colluding with his employer's exclusive distributor on bid prices. The fraud charges were for submitting, as part of those same bids, an allegedly false certification that Mr. Brewbaker's bid was "submitted competitively and without collusion." JA55.[6]

2. The district court denied Mr. Brewbaker's pretrial motion to dismiss the Sherman Act charge and thus both the Sherman Act and fraud charges proceeded to trial.

3. When instructing the jury on the Sherman Act charge, the district court told the jury that the alleged agreement supporting the Sherman Act charge was "always illegal" under the antitrust laws. JA2592. Then, during deliberations, the jury asked the district court to provide a definition of the term "collusion." JA2645. The district court declined and instead instructed the jury to "consider all the facts and circumstances in evidence in reaching your understanding of the crime charged, and consider all

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[6] References to the JA are to the joint appendix filed in the court of appeals.

of the Court's instructions as a whole as you continue your deliberations." JA2645.

4. The jury then convicted Mr. Brewbaker of both the Sherman Act and the intimately related fraud charges. At the sentencing hearing, the district court observed that the Government's trial theory on the fraud charges was that the fraud was designed to cover up the antitrust violation. JA2677-2678.

5. On direct appeal, the court of appeals correctly held that the Sherman Act charge failed to state an offense. It so held because the two companies at issue—Contech and Pomona—had both an exclusive manufacturer-distributor relationship (a vertical relationship) as well as a co-bidder relationship (a horizontal relationship). Pet.App.10a. It noted that this type of arrangement, known in economics as a "dual distribution" arrangement, provides "potential interbrand procompetitive effects." Pet.App.27a. Therefore, the court could not "'predict with confidence that' the [arrangement] . . . 'would be invalidated in all or almost all instances under the rule of reason.'" Pet.App.30a. Accordingly, *per se* condemnation was not appropriate. Pet.App.31a.

6. Despite finding that the district court unconstitutionally allowed the defective *per se* Sherman Act charge to go to trial and consequently that it erroneously instructed the jury the alleged anticompetitive conduct was "always illegal," the court of appeals affirmed Mr. Brewbaker's fraud convictions based on harmless error.[7] Pet.App.31a. It

[7] The court of appeals did not specify the harmlessness standard it applied, but having found a constitutional error—*i.e.*, the Fifth Amendment error in allowing an indictment that failed to state

did so on the ground that the jury was instructed to "'consider each count separately'" and that "guilt on one count 'shouldn't control [its] verdict as to the other counts.'" Pet.App.32a. The court of appeals "s[aw] nothing that sufficiently undercut[] [its] assumption that the jury followed these instructions." *Id.* Ultimately, the court of appeals held that a party "can only overcome the presumption that a jury follows instructions in 'extraordinary situations,'" and "[t]his is no such situation." Pet.App.34a.

7. Thus, the court of appeals found a recognized constitutional error harmless because the case was not an 'extraordinary situations' in which a "presumption" has been "overcome." *Id.* This analysis turns the constitutional harmless-error test on its head—from one designed to afford relief to a prevailing party except in "rare situations," *Connecticut v. Johnson*, 460 U.S. 73, 87 (1983), to one designed to deny relief except in "extraordinary situations," Pet.App.34a.

REASONS FOR GRANTING THE PETITION

If the Court grants the Government's petition, it should grant Mr. Brewbaker's petition on this question as well because this case represents yet another example of an appellate court misapplying the harmless-error test, thus further highlighting a systemic problem of tremendous importance to our criminal justice system. Like the appellate court in *Anthony v. Louisiana*, 143 S. Ct. 29, 35–36 (2022), "The court [of appeals] failed to ask, let alone attempt to answer, the core question: What effect did [the

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an offense to proceed to trial—the court of appeals had to find harmlessness beyond a reasonable doubt.

recognized error] have on the jury's deliberations? That inquiry, the Court has explained time and again, is the core of assessing harmless error." *Id.* (Sotomayor, J., dissenting from denial of certiorari) (collecting cases). These repeated errors in what is "almost certainly the most frequently-invoked doctrine in all criminal appeals," Epps, *supra*, at 2119; *see also* William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. Legal Stud. 161, 161 (2001), establishes the need for this Court's review.

Review is particularly important here because the court of appeals not only failed to apply the correct test; it also impermissibly shifted the burden to the defendant to overcome a presumption that the error was *not* prejudicial. At its core, the harmless-error test "allocat[es] to the government the burden of proving harmlessness, [and] any difficulties in reconstructing an alternate error-free world are resolved in favor of the defendant." *United States v. Benard*, 680 F.3d 1206, 1216 (10th Cir. 2012) (Gorsuch, J., concurring in part). Moreover, "a reviewing court [must] exercise extreme caution before determining that [a constitutional error] at trial was harmless." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). "The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered . . . would violate the jury-trial guarantee." *Sullivan v. Louisiana*, 508 U.S. 275, 279–80 (1993) (emphasis removed).

> In other words, "the question is . . . whether guilt has been found by a jury according to the

> procedure and standards appropriate for criminal trials." "Findings made by a judge cannot cure deficiencies in the jury's findings as to the guilt or innocence of a defendant resulting from the courts failure to instruct it to find an element of the crime."

Carella, 491 U.S. at 269 (Scalia, J., concurring) (first quoting *Bollenbach v. United States*, 326 U.S. 607, 614 (1946); then quoting *Cabana v. Bullock*, 474 U.S. 376, 384–85 (1986), *abrogated by Pope v. Illinois*, 481 U.S. 497 (1987)).

"These principles necessarily circumscribe the availability of harmless-error analysis when[, as here,] a jury has been [erroneously] instructed to apply a conclusive presumption." *Id.* (Scalia, J., concurring). Specifically, when a trial judge erroneously instructs the jury to apply a conclusive presumption—in this case, that the agreement at issue is "always illegal"—"the problem [can]not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury. As with a directed verdict, 'the error in such a case is that the wrong entity judged the defendant guilty.'" *Id.* (quoting *Rose v. Clark*, 478 U.S. 570, 578 (1986)) (emphasis removed).

Here, the court of appeals failed to provide any record analysis and instead "assumed" that the error was harmless, and it placed the burden on the appellant to show that this was an "extraordinary situation" warranting a finding of prejudice. Pet.App.34a. Notably, the court of appeals did not

address whether the district court's erroneous "always illegal" instruction *could have* affected the verdict; the court of appeals merely reached its own factual conclusion that the agreement at issue rendered the bid price non-competitive and collusive. Pet.App.33a ("As a matter of parlance, it'd be hard to say a bid was submitted 'competitively' when Contech's bid was intentionally higher, or 'without collusion' when it was previously agreed-upon.").

The problem with this reasoning is that the jury did not decide the elemental question of whether Mr. Brewbaker falsely certified that his bid was "submitted competitively and without collusion," JA55, because the district court instructed the jury that the agreement between Contech and Pomona was "always illegal" under the antitrust law. JA2592. Because conduct that is "always illegal" under the antitrust laws is necessarily anticompetitive and collusive, this instruction directed the jury to find that Mr. Brewbaker's certification was false, thus directing a verdict on the false representation element of each fraud charge.

As Justice Blackmun wrote for the plurality in *Connecticut v. Johnson*:

> An erroneous presumption on a disputed element of a crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. . . . To allow a reviewing court to perform the jury's function of evaluating the evidence . . . , when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to

> the method by which decisions of guilt are to be made.

Connecticut v. Johnson, 460 U.S. 73, 85-86 (1983). By assuming that the verdict was not affected by the district court's constitutionally erroneous instruction, the court of appeals gave "[no] weight to the method by which decisions of guilt are to be made." *Id.*

Here, a reasonable juror certainly "could have"—and, indeed, every juror who followed the "always illegal" instruction would have—been impacted in their determination of whether the quote at issue was "competitive and [not] collusive" by the district court's erroneous instruction that the allegedly anticompetitive agreement was "always illegal" under the antitrust laws. The Government never argued that the jury could not have been affected, and the court of appeals did not find that the error could not have affected the fraud verdicts. Instead, the court of appeals relied on a presumption of non-prejudice. The court of appeals thus misapplied the harmless-error test. That it did so by shifting the burden to the defendant to prove prejudice shows that this Court's intervention is necessary to reiterate that the Government always bears the burden of proving harmlessness in the face of recognized constitutional errors.

CONCLUSION

The Government's petition should be rejected. But if the Court agrees to address this case, it should review the other important questions raised by this prosecution—namely, (1) whether the antitrust charge is constitutional despite violating four foundational constitutional principles: the non-delegation provision, the objectivity requirement of

the vagueness doctrine, the jury-as-factfinder requirement, and the separation of powers prohibition on judges creating crimes; and (2) whether an error so fundamental as unconstitutionally allowing a defective charge of *per se* illegal conduct to be presented to the jury could be harmless beyond a reasonable doubt as to intimately related charges and, in particular, whether a court of appeals can presume a constitutional error to be harmless.

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