No. 19-288

IN THE

Supreme Court of the United States

JAVIER SANCHEZ, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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INTRODUCTION

Amicus curiae, the National Association of Criminal Defense Lawyers (NACDL), respectfully submits this brief to emphasize the great importance of the question presented by the petitioners.[1] NACDL's members represent real defendants—not economic abstractions—in cases that should be about whether those defendants' real-world conduct actually restrained trade unreasonably. But the *per se* rule, as applied in criminal antitrust cases, precludes inquiry into that crucial question when the conduct at issue is allegedly of a ***type*** that judges, after going back and forth over the years, currently consider to present a sufficiently high risk of anticompetitive effects to justify a conclusive presumption of unreasonableness. As this Court held earlier this year, however, "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.'" *United States v. Davis*, 139 S. Ct. 2319, 2326 (2019).

The legislative history of the Sherman Act also makes clear that, because it is a criminal statute, it "must not only be construed strictly in favor of the alleged violator, but the acts constituting the crime must be proven beyond reasonable doubt." 1 The Legislative History of the Federal Antitrust Laws and Related Statutes 97 (Earl W. Kintner ed. 1978)

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[1] No party or counsel for any party authored any part of this brief; nor did anyone other than *amicus curiae* NACDL and its counsel fund the preparation or submission of this brief. NACDL gave counsel of record for all parties timely notice of its intent, and received all parties' consent, to file this brief.

[hereinafter Legis. Hist.] (statement of Sen. James Z. George (D-Miss.)). Nevertheless, courts have long felt free to construe the Sherman Act liberally—including by creating the *per se* rule and imposing it even in criminal cases—in reliance on Senator John Sherman's characterization of his eponymous Act as "a charter of liberty" that should be liberally construed. *Id.* at 126. But Senator Sherman was explicitly referring to a version of his bill that did ***not*** include criminal penalties, but instead was a purely "***remedial statute with civil remedies***." *Ibid.* (emphasis added). And even when discussing that form of his bill, Senator Sherman stated that the tendency "to restrain trade . . . ***can not be assumed as against any combination unless upon a fair hearing it should appear to a court of competent jurisdiction that the agreement composing such combination is necessarily injurious to the public and destructive to fair trade***." *Id.* at 122 (emphasis added).

The time has come to restore the constitutional rights of criminal defendants in antitrust cases—rights the Sherman Act's framers always intended for such defendants to retain, the restoration of which is further mandated by this Court's recent jurisprudence under the Fifth and Sixth Amendments. "Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." *United States v. Haymond*, 139 S. Ct. 2369, 2373 (2019). The Court should grant the petition for certiorari.

INTEREST OF *AMICUS CURIAE*

Amicus curiae NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of the law. NACDL files numerous *amicus* briefs each year in this and other federal and state courts to provide assistance on issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

SUMMARY OF THE ARGUMENT

The legislative history of the Sherman Act strongly supports the petition in this case. That history shows that the framers of the Sherman Act intended for juries to decide whether any particular contract or combination was in restraint of trade.

Furthermore, the need for this Court to answer the question presented is particularly pressing because the government is bringing increasing numbers of criminal antitrust prosecutions, and persistent calls for still more aggressive enforcement indicate that those numbers will rise even further.

ARGUMENT

I. THE HISTORY OF THE SHERMAN ACT SUPPORTS THE PETITIONERS' ARGUMENT

As this Court remarked in *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978), the Sherman Act "has not been interpreted as if it were primarily a criminal statute; it has been construed to have a 'generality and adaptability comparable to that found to be desirable in constitutional provisions.'" *Id.* at 439 (quoting *Appalachian Coals v. United States*, 288 U.S. 344, 359–60 (1933)). Yet this "charter of freedom," *Appalachian Coals*, 288 U.S. at 359, is also used to send people to prison for up to ten years. *See* 15 U.S.C. § 1. The legislative history explains the Sherman Act's "schizoid" nature, which courts have too often exacerbated. *Cf. Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (Scalia, J.) (noting the risk of the *per se* rule and the rule of reason creating a "schizoid statute").

A. The Schizoid Sherman Act of 1890

When Senator Sherman, the eminent Ohio Republican of the 50th Congress, first proposed the Act that bears his name, he did not suggest a criminal statute. Instead, he proposed that trusts and other anticompetitive arrangements be subject to private actions for double damages, and to civil actions by U.S. district attorneys for forfeiture of corporate franchises. *See* 1 Legis. Hist. at 63–64. But the Senate Finance Committee added a provision that violators "shall be guilty of a high misdemeanor" and subject to fines of up to $10,000 or imprisonment for up

to five years. *Id.* at 64–65. That provision was taken from a bill introduced by Senator John H. Reagan (D-Tex.), which, unlike Senator Sherman's bill, attempted to define "trusts." *See id.* at 61–63, 66.

Senator Sherman's bill, as amended, was attacked by Mississippi Senator James Z. George on the basis that it would apply to "purely moral and defensive" arrangements. *Id.* at 78. Senator George warned that "the farmers and laborers of this country who are sending up their voices to the Congress of the United States, asking, pleading, imploring us to take action to put down trusts," might "find that they themselves in their most innocent and necessary arrangements, made solely for defensive purposes against the operations of these trusts, will be brought within the punitory provisions of this bill." *Ibid.* But he expected courts and juries to prevent such tragedies:

> Being a penal statute, and nothing else, it will be construed strictly in favor of alleged violators. Nothing will be brought within it which is outside of its plain words. Enlargement by construction will not be allowed. The party charged with violating it can stand, and will stand, on the strict letter of the statute. The courts will not go an inch beyond this in trying and punishing alleged offenders. . . . The statute is a penal one and must not only be construed strictly in favor of the alleged violator, but the acts constituting the crime must be proven beyond reasonable doubt.

Id. at 94, 97. Strictly construed, however, the statute would be "a worthless remedy against the evils arising from these combinations." *Id.* at 99.

In response to those arguments, criminal penalties were again removed from the bill. Actions to enforce the statute would be "of a civil nature at common law or in equity." *Id.* at 112. As Senator Sherman explained, the bill "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." *Id.* at 114. As amended, the bill would be "a remedial statute," and therefore "would be construed liberally, with a view to promote its object." *Id.* at 115. Courts "will distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade." *Ibid.* A criminal statute, by contrast, must be "construed strictly," yet "it is impossible to describe, in precise language, the nature and limits of the offense in terms specific enough for an indictment." *Ibid.* Senator Sherman was thus "clearly of the opinion that at present at least it is not wise to include" criminal penalties. *Ibid.*; *see also id.* at 163–66 (same).

Even with the bill limited, at that point, to purely civil enforcement, Senator Sherman stated that the tendency of trusts "to restrain trade . . . ***can not be assumed as against any combination unless upon a fair hearing it should appear to a court of competent jurisdiction that the agreement composing such combination is necessarily injurious to the public and destructive to fair trade***." *Id.* at 122 (emphasis added). He admitted

that "it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case." *Ibid.* Courts would be free to do so given that criminal penalties had been removed from the bill, negating Senator George's objections, which treated the bill "as a criminal statute from beginning to end, and not as a remedial statute with civil remedies." *Id.* at 126. Framed instead as a "remedial statute," which, unlike a criminal statute, courts could construe liberally, the antitrust law would be "a bill of rights, a charter of liberty." *Ibid.*

Similarly, Senator David Turpie (D-Ind.) admitted that "there may be some difficulty in defining this offense"; indeed, to "describe it is impossible." *Id.* at 154. But he hoped that when the law "goes into practical operation it will receive a construction and a definition . . . aided by courts ***and juries***," and "by advocates upon both sides in stating different views of construction." *Ibid.* (emphasis added).

The bill was amended again, however, to incorporate Senator Reagan's proposed criminal provisions, tied to his attempt to define "trusts." *See id.* at 183–218. Senator William M. Stewart (R-Nev.) objected that "everybody might be put in the penitentiary who attempted to carry on any kind of business, provided the bill becomes a law and can be enforced." *Id.* at 226. Senator Reagan's version of the bill, "in order to warn people so that they may not fall into the penitentiary inadvertently, define[d] what a trust is." *Id.* at 227. But that definition would, according to Senator Stewart, "make pretty nearly everybody criminal." *Ibid.* Likewise, Senator

Orville H. Platt (R-Conn.) objected: "While its supporters say that it is a bill aimed at wrongful transactions, at wrongful combinations of capital, it is in its very terms a bill which is aimed at every business and every business transaction in the United States," and any benefit "would be a hundred, a thousand times outweighed by the disastrous effects which it would have upon the legitimate business interests of this country." *Id.* at 271.

The bill was then referred to the Senate Judiciary Committee. *Id.* at 274. Despite fears that the bill would never emerge from that "grand mausoleum of Senatorial literature," *id.* at 205 (Sen. Zebulen B. Vance (D-N.C.)), the Committee reported back only six days later, having put the bill into the form that ultimately passed into law. *See id.* at 275–94. In particular, the Committee removed Senator Reagan's attempt to define "trusts"; adopted the familiar prohibition against contracts and combinations "in restraint of trade"; and made violations misdemeanors punishable by fines of up to $5,000 or imprisonment of up to one year. *See id.* at 276. The Senate passed the bill that same day. *See id.* at 294.

The House Judiciary Committee, in a report authored by Representative David B. Culberson (D-Tex.), recommended that the House pass the Senate's bill even though it was "not precisely what any member of the committee would have proposed upon his own motion." *Id.* at 295–96. As Culberson observed, "just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of trade or commerce mentioned in the bill will not be known until the courts have construed

and interpreted this provision." *Id.* at 300. He admitted that he did not know, "nor can any man know, just what contracts will be embraced by this section of the bill until the courts determine." *Ibid.*

Given that admission by "as able and clear-headed a lawyer as we have upon this floor," Representative William L. Wilson (D-W. Va.) asked: "Was ever criminal law made in this fashion before? And who are to be the first victims that must be fined and sent to the penitentiary, in order that the courts may interpret and declare what are the crimes which we punish, but do not define?" *Id.* at 307. Yet Wilson did not oppose the bill, even though he did "not believe that anybody can tell us what it means. This is merely experimental legislation. It is a blind legislation, to answer a popular demand that something shall be done about trusts," if only by passing "a bill of which nobody can tell the meaning, but which may introduce chaos into the business of this country, for the professed purpose of suppressing trusts." *Id.* at 312. Nevertheless, he said, "we are all going to support the bill; we are all solid against trusts." *Ibid.*

Similarly, Representative Joseph G. Cannon (R-Ill.) answered those who "say that they do not know how the courts will construe the act" by asserting that is for Congress "to enact the law and for courts to construe and enforce it." *Id.* at 315–16. As Representative Richard P. Bland (D-Mo.) said: "This act is but the beginning, an experiment. The decisions of the courts under it, it is to be hoped, will point the way to a more perfect law." *Id.* at 317.

On June 20, 1890, the House passed the Sherman Act, which President Benjamin Harrison signed into law on July 2, 1890. *See id.* at 30, 359–63.

Nothing in the statutory text, of 1890 or today, suggests what has come to be known as the *per se* rule: a conclusive presumption that certain contracts or combinations—determined by judges, rather than legislators or juries—must be deemed illegal restraints of trade that cannot be justified, even by a defendant in a criminal case. Nor does the legislative history support such a rule. On the contrary, the legislative history makes clear that, having vacillated between civil or criminal penalties but ending up with the latter, the Sherman Act "must not only be construed strictly in favor of the alleged violator, but the acts constituting the crime must be proven beyond reasonable doubt." *Id.* at 97 (Sen. George).

B. The Misdemeanor Years

For eighty-four years, the Sherman Act remained a misdemeanor statute, under which imprisonment was "a rarely used sanction," imposed in "fewer than 4 per cent of the Department's criminal cases" from 1890 to 1969, "and then mostly in cases involving either acts of violence or union misconduct." Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. L. & Econ. 365, 389 (1970). German saboteurs were imprisoned under the Sherman Act during World War I for impeding munitions shipments; and mobsters were imprisoned under the Sherman Act in the 1930s; but "mere price fixing rarely produced a custodial sentence." Gregory J. Werden, *Individual Accountability Under the*

Sherman Act: The Early Years, Antitrust, Spring 2017, at 100, 103.

Between 1938 and 1943, the Antitrust Division of the Department of Justice prosecuted more antitrust cases than before, including criminal cases, under the leadership of Thurman Arnold. *See id.* at 102. Arnold believed that "criminal prosecution is the only effective instrument under existing statutes" for deterrence. Thurman W. Arnold, *Antitrust Law Enforcement, Past and Future*, 7 J. L. & Contemp. Probs. 5, 16 (1940). "The civil suit has a useful place as a supplement to the criminal proceeding—not as a substitute." *Ibid.* But the result was not as draconian as it might have been because Arnold also believed that "the violation of antitrust laws by great industrial leaders does not usually fall in that class of offenses which involve moral turpitude. It is more like passing through a traffic light at high speed without the intention of harming anyone." *Id.* at 11. Accordingly, the "number of individuals sanctioned in the 1940s is breathtaking, but the severity of the sanctions is comparatively low. During the 1930s, 25.8 percent of the individual sentences not set aside on appeal were custodial, but that number dropped to 0.5 percent in the 1940s." Werden, *supra*, at 102.

In 1940, the same year Arnold made explicit his traffic-ticket theory of criminal antitrust enforcement, this Court applied the *per se* rule in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Arnold—a close friend of Justice Douglas, who wrote the opinion—argued the case personally. *See id.* at 154; Daniel A. Crane, *The Story of* United States v. Socony-Vacuum: *Hot Oil and Antitrust in*

the Two New Deals 19 (Cardozo Legal Studies Paper No. 173, 2006), https://ssrn.com/abstract=945455.

The Court in *Socony-Vacuum* stated that if defendants were allowed to challenge whether their alleged price fixing restrained trade unreasonably, the Sherman Act "would not be the charter of freedom which its framers intended." 310 U.S. at 221. The Court apparently did not realize, and certainly did not acknowledge, that when Senator Sherman characterized his Act as "a bill of rights, a charter of liberty," he was expressly referring to a version of it that was solely a "remedial statute with civil remedies," ***not*** criminal penalties. 1 Legis. Hist. at 126.

The *Socony-Vacuum* Court went on to base its application of the *per se* rule on its contention that:

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice.

310 U.S. at 221–22. But those assertions are contradicted by legislative and judicial history.

Congress ***did*** leave "the precise line between lawful and unlawful combinations . . . in each particular case" to be decided by "courts ***and juries***." 1 Legis. Hist. at 122, 154 (emphasis added). Moreover, the *per se* rule is the product of the type of judicial decision-making that *Socony-Vacuum* disclaimed: "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable," even though "the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 343–44 (1982) (citing *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 65 (1911), and *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397–98 (1927), as stepping-stones to *Socony-Vacuum*); *but cf. Haymond*, 139 S. Ct. at 2384 ("Yet like much else in our Constitution, the jury system isn't designed to promote efficiency but to protect liberty.").

It is also worth noting that the only references to "ruinous competition" in the legislative history belie any intention to deprive criminal defendants of the right to present such evidence and argument to the jury. *See*, *e.g.*, 1 Legis. Hist. at 168 (Sen. Stewart: if farmers were to "unite and say, 'We will hold back our corn; we will not sell it at these ruinous prices,'" it "is not the intention of anybody here to make that"

unlawful); *id.* at 340 (Sen. Morse: "So far as this bill does what its friends claim for it, . . . I believe in so much of this bill, but [not] if it proposes to deny to manufacturers and merchants . . . the right to say they shall not enter into ruinous competition.").

As for "good intentions," *Socony-Vacuum*, 310 U.S. at 222, this Court later held that "a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices." *Gypsum*, 438 U.S. at 435 (citing *Morissette v. United States*, 342 U.S. 246, 274–75 (1952)). That decision, unlike *Socony-Vacuum*, is amply supported by the legislative history, which shows that the framers were well aware that "individuals can only be punished for criminal intentions," and that "intention is the test of a crime." 1 Legis. Hist. at 115, 126 (Sen. Sherman).

In any event, consistent with Thurman Arnold's traffic-ticket enforcement theory, none of the defendants in *Socony-Vacuum* were sentenced to prison. The individual defendants were fined $1,000; the corporate defendants were fined $5,000. *See* The Federal Antitrust Laws with Summary of Cases Instituted by the United States, 1890-1951, No. 419 (1952); Crane, *supra*, at 17. If the defendants in *Socony-Vacuum* had been sentenced to ten years in prison, as defendants now can be, perhaps this Court's opinion would have been different—it certainly should have been. *See*, *e.g.*, *Gypsum*, 438 U.S. at 435.

C. Felony Inflation

Violations of the Sherman Act were made felonies in reaction to panic about inflation and outrage over influence peddling in the Nixon administration.

In 1971, the Justice Department settled its antitrust case against the International Telephone & Telegraph Corporation (ITT). *See*, *e.g.*, James M. Naughton, *Alleged Memo Ties I.T.T. Trust Action To G.O.P. Funding*, N.Y. Times, Mar. 1, 1972, at 1, https://nyti.ms/1kSC3ti. The next year, news broke of a memorandum linking that settlement to a large contribution from the Sheraton Corporation, an ITT subsidiary, for the 1972 Republican National Convention. *See id.* at 1, 24. Attorney General John N. Mitchell and Deputy Attorney General Richard G. Kleindienst were implicated. *See id.* at 24.

In response, Senators John V. Tunney (D-Cal.) and Edward J. Gurney (R-Fla.) introduced a bill to set standards for consent decrees and increase criminal penalties for antitrust violations. *See* 9 Legis. Hist. at 6552–64; James P. Mercurio, *Antitrust Crimes: Time for Legislative Definition*, 51 Notre Dame L. Rev. 437, 439–40 (1976). The original bill, as passed by the Senate and referred to the House on July 23, 1973, only increased fines for antitrust violations; it did not make them felonies. *See* 9 Legis. Hist. at 6620–23.

On October 8, 1974, President Gerald Ford gave an address on the economy to a joint session of Congress. *See id.* at 6565. "We must whip inflation right now," he said, tying that effort to "more effective en-

forcement of laws against price fixing and bid rigging," and asking Congress to increase the amount of fines. *Ibid.* The Department of Justice followed up with a request that antitrust violations be made felonies punishable by five-year prison sentences. *See id.* at 6653. Thurman Arnold's traffic-ticket theory was gone. Although antitrust violations "have in the past been characterized as similar in nature to traffic violations," the Justice Department sought "to impress upon the public and businessmen the fact that commercial crimes of this nature have a serious adverse effect on the economy," and "are injuring the public in terms of monetary damages more seriously than auto thefts, armed robbery, and embezzlement which are considered felonies." *Ibid.*

The House obliged—although, at that time, it limited prison sentences to three years, rather than the five the Justice Department requested. The record of debate in the House is replete with straw-grasping suggestions that, as President Ford hoped, punishing antitrust violations with long prison sentences would somehow "slow down inflation," a paramount concern in that "time of double-digit inflation." 9 Legis. Hist. at 6657 (Rep. H. John Heinz (R-Pa.)). The representatives also hoped the bill would "help put an end to the Watergate atmosphere and insure that our antitrust laws are not for sale." *Id.* at 6659 (Rep. Elizabeth Holtzman (D-N.Y.)).

The representatives emphasized that "[o]ne cannot unknowingly commit a criminal antitrust violation. This increase is designed to deter those who might conspire to fix prices or to monopolize a given market." *Id.* at 6655 (Rep. Edward Hutchinson (R-

Mich.)). "Despite the economic and social costs of such violations, prison sentences are rare. By making these offenses felonies, Congress would be serving notice that we consider hard-core violations of the Sherman Act to be serious crimes." *Id.* at 6656 (Rep. John F. Seiberling (D-Ohio)). But the amendments did not tie felony penalties to "hard-core" violations. The representatives simply assumed that "criminal prosecutions of the antitrust laws are not brought except in cases where the law is very clear and where the violation is potentially very serious, and the defendants' actions are very clear. . . . So we are not dealing with fuzzy areas but very clear black-and-white areas of the antitrust laws." *Id.* at 6659–60. Based on that assumption, which is not supported by the actual text of the statute, Representative Seiberling, for one, was happy to have courts start "sentencing corporate executives to jail, because if there is one thing most corporate executives, who are usually respected members of their community[,] do not like, it is having a criminal label attached to them for the rest of their lives and having the reputation of having served time in jail." *Id.* at 6660.

When the bill returned to the Senate, however, Senator Roman L. Hruska (R-Neb.) objected that the amendments making violations of the Sherman Act felonies were "very unwise and very unfair." *Id.* at 6667. His comments merit quotation at length:

> If violations of the antitrust law are to be put in the class of felonies there must, in all justice, be some qualification providing that only deliberate and intentional violations are to be consid-

> ered criminal. As an illustration of the technical and unpredictable nature of the antitrust laws let me refer to *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), in which a newspaper publisher attempted to establish the maximum price at which distributors could sell his newspapers to customers. A distributor who was charging higher prices sued the publisher. The district court held that there was no antitrust violation and the court of appeals held that there was no antitrust violation. However, the Supreme Court, in a 7-to-2 decision, held that the fixing of maximum resale prices, in these circumstances, was *per se* an illegal restraint of trade under the Sherman Act. Justices Harlan and Stewart, dissenting, said that the decision "stands the Sherman Act on its head." In any event, of the 13 judges who passed on this case, 6 of them thought that there was no violation of the Sherman Act involved, and 7 held that there was. Under the House [amendments] the newspaper publisher in this case would be branded as a felon and could be prosecuted as such by the Department of Justice. Numerous similar cases could be cited but this is sufficient to make the point.

Id. at 6667–68 (footnotes omitted).[2]

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[2] Senator Hruska's point was confirmed when this Court over-

Despite Senator Hruska's well-founded objection, the Senate accepted the House's amendments. *Ibid.* President Ford signed the bill into law on December 23, 1974, lauding its increased criminal penalties as "tools to fight inflation." *Id.* at 6670. President Ford stated that the law "changes such antitrust violations of the Sherman Act as price fixing from misdemeanors to felonies; increases the maximum sentence from 1 year to 3 years; and raises maximum allowable fines from $50,000 to $1 million for corporations and from $50,000 to $100,000 for individuals." *Id.* As already discussed, however, the statutory text does not limit felony violations to price fixing. Nor, for that matter, does it say anything about the *per se* rule, or purport to limit a defendant's right to present a complete defense to the jury. *See* Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, § 2, 88 Stat. 1706, 1708, § 3 (1974).

In 2004, Congress further increased criminal penalties for antitrust violations. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, 665-69 (2004). Defendants convicted of violating the Sherman Act now "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." 15 U.S.C. § 1. The comparatively brief legislative history indicates that Congress intended to "increase criminal penalties for the most egregious antitrust violations," in order to "send the proper message" that "crimes such as price

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ruled *Albrecht* in *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997).

fixing and bid rigging" are "serious offense[s] that steal from American consumers just as effectively as does a street criminal with a gun." 149 Cong. Rec. S13520 (daily ed. Oct. 29, 2003) (statement of Sen. Herbert H. Kohl (D-Wis.)).

Once again, however, Congress did not amend the text of the statute to limit its increased criminal penalties to "the most egregious antitrust violations," *ibid.*, or attempt to define such violations. Instead, Congress continued to "hand off" its "responsibility for defining criminal behavior to unelected prosecutors." *Davis*, 139 S. Ct. at 2323. The Justice Department took the legislative baton from Congress long ago and has been running with it ever since.

The Justice Department interprets section 1 of the Sherman Act "as two statutes. One is a criminal statute dealing with hard-core violations—price fixing, market allocation, and similar conduct—complete with a set of strengthened felony sanctions added in 1974." Donald I. Baker, *To Indict or Not to Indict: Prosecutorial Discretion in Sherman Act Enforcement*, 63 Cornell L. Rev. 405 (1978). "The second statute—the other section 1—is a civil statute of extraordinary breadth and flexibility; it invites the judiciary to develop creative equitable remedies responsive to changing restraints in a changing economy." *Ibid.* Of course, there are not two first sections of the Sherman Act; only one.

In any case, even the Justice Department's antitextual two-statute theory has difficulty with what Donald Baker—formerly in charge of the Antitrust Division—called "soft core" *per se* rules, such as the

rule against tying. *Id.* at 407. The "two statutes overlap. Some conduct is close enough to the hard-core area that one prosecutor might responsibly prosecute it as criminal, while another would seek only a civil remedy," perhaps recognizing "the need to provide fair notice to those affected. How the Department of Justice proceeds in this middle area—the area of overlap between the civil and criminal statutes—is important to the public and challenging to the decisionmakers." *Id.* at 408. This, as Baker admitted, raises "serious questions" about the Sherman Act's "constitutionality as a criminal statute," despite the Justice Department's efforts "to give defendants due notice of what it regards as within the Act's criminal prohibitions." *Id.* at 409.

It is not the Justice Department's prerogative, but Congress's duty to "write statutes that give ordinary people fair warning about what the law demands of them." *Davis*, 139 S. Ct. at 2323. Prosecutors and judges cannot be allowed to define *per se* crimes, and certainly must not be allowed to prevent defendants from disputing that their conduct was "in restraint of trade." 15 U.S.C. § 1. On the contrary, as even Congress's most ardent supporters of felony antitrust penalties made clear, "the prosecution must meet the burden of proof in criminal proceedings and prove its case beyond any reasonable doubt." 9 Legis. Hist. at 6659 (Rep. Seiberling). This Court should put an end to the mutation of what "began as a codification of the common law in 1890 . . . into a judge-made monstrosity that Senator Sherman and his fellow framers would not be able to recognize today." Andrew S. Oldham, *Sherman's March (in)to the Sea*, 74 Tenn. L. Rev. 319, 379 (2007).

II. THE PETITION PRESENTS A QUESTION OF GREAT AND INCREASING IMPORTANCE

NACDL's members can attest to the pressing need for this Court to answer the question presented here. Indeed, the Justice Department's Antitrust Division can, too, having deemed it necessary recently to attempt to defend its position that the *per se* rule applies in criminal cases, in light of the fact that the "past year saw a number of criminal defendants argue that the rule of reason applies" instead. U.S. Dep't of Justice, Antitrust Div., *Per Se Rule Applies*, https://www.justice.gov/atr/division-operations/division-update-spring-2019/per-se-rule-applies. Such disputes will intensify because prosecutors are "preparing for trial in six matters and had 91 pending grand jury investigations at the close of FY 2018." U.S. Dep't of Justice, Antitrust Div., *Cartels Beware: The Antitrust Division Prepares for Trial and Continues Criminal Investigations in Key Markets*, https://www.justice.gov/atr/division-operations/division-update-spring-2019/cartels-beware. That is the highest number of pending grand jury investigations in nearly a decade. *See* U.S. Dep't of Justice, Antitrust Div., Antitrust Division Workload Statistics FY 2009 – 2018, https://www.justice.gov/atr/file/788426/download.

The already increasing number of antitrust prosecutions will surely increase even more. "Not since 1912, when Teddy Roosevelt ran for President emphasizing the need to control corporate power, have antitrust issues had such political salience." Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714, 715 (2018). The press, in-

cluding typically pro-business publications such as the Wall Street Journal and the Economist, is striking a "regular drumbeat" in a parade for more aggressive antitrust enforcement. *Id.* at 717. Senator Elizabeth Warren may be leading that parade, having "been especially vocal about the decline of competition in America and the need for stronger policies to reign in corporate power." *Id.* at 720. But President Donald Trump is also calling for antitrust prosecutions, and, as discussed above, his administration has responded with more grand jury investigations and trials to come. *See*, *e.g.*, *id.* at 720–21.

The question presented in this case, therefore, is extremely important and calls for this Court's immediate attention. If it was ever appropriate to apply the *per se* rule in criminal antitrust cases—which it never was—those days, the days of traffic-ticket enforcement, are long gone. Defendants now face ten years in prison for violations that Congress has admittedly never defined. And when defendants' conduct allegedly falls, according to the Justice Department, into the ever-changing judicially-defined category of *per se* violations, defendants are precluded from defending themselves on the grounds that their actions were not, in fact, "in restraint of trade." 15 U.S.C. § 1.

It is time for this Court to interpret the Sherman Act according to its actual text, the intentions of its framers, and the commands of the Bill of Rights. "Being a penal statute, and nothing else," its text must be "construed strictly in favor of alleged violators." 1 Legis. Hist. at 94 (Sen. George). Courts must "not go an inch beyond this in trying and punishing

alleged offenders." *Ibid.* The *per se* rule, which judges and prosecutors have drawn far outside the lines of the statutory text, and which has been scratched out and redrawn again so many times that it is more of a blot than a bright line, is no basis for trying and punishing alleged offenders—much less imprisoning them for ten years.

CONCLUSION

For the reasons explained above, as well as those set forth in the petition for certiorari, the Court should grant the petition.

Respectfully submitted,

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