No. 21-852

In The
Supreme Court of the United States

CHRISTOPHER D. LISCHEWSKI,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* DUE PROCESS INSTITUTE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*.[1]

Amicus curiae Due Process Institute is a nonprofit, bipartisan, public interest organization that works to preserve and restore procedural fairness in the criminal legal system because due process is the guiding principle that underlies the Constitution's solemn promises to "establish justice" and to "secure the blessings of liberty." U.S. Const., pmbl. Due Process Institute has a strong interest in this case because the *per se* rule, as applied to criminal antitrust defendants, poses a grave threat to the fundamental principles guaranteed by the Fifth and Sixth Amendments.

Amicus curiae the Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

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[1] No party or counsel for any party authored any part of this brief; nor did anyone other than *amici curiae* and its counsel fund the preparation or submission of this brief. Undersigned counsel provided timely notice to counsel of record for all parties of the intent to file this brief and all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae Due Process Institute and the Cato Institute submit this brief to emphasize the great importance of the question presented by the petitioner. The recent and unprecedented wave of criminal prosecutions initiated by the Department of Justice under the Sherman Act only underscore that importance.

Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade. "Unreasonableness" is the key element that distinguishes legal business agreements, whether formal or informal, from those violative of the nation's antitrust laws.

In certain civil antitrust cases, unreasonableness may be established through conclusive presumptions under the *per se* rule. The Fifth and Sixth Amendments, however, guarantee that criminal defendants may not be convicted unless the government proves each element of the charged crime beyond a reasonable doubt. Conclusive presumptions, which remove that fundamental safeguard, are inconsistent with bedrock principles of fairness in criminal law. Yet the government claims the right to rely on a conclusive presumption of unreasonableness in criminal prosecutions it initiates under the Sherman Act.

Such reliance on a conclusive presumption of unreasonableness in an antitrust prosecution cannot be reconciled with the protections guaranteed by the Fifth and Sixth Amendments. Criminal defendants,

such as petitioner, are barred in *per se* cases from introducing evidence that the challenged conduct is in fact reasonable or otherwise defensible. The government need not prove, and juries need not find, the critical element of unreasonableness. The *per se* rule deprives criminal defendants of core due process protections and the presumption of innocence.

In 2016, the Antitrust Division of the Department of Justice issued a "Guidance" announcing its intention to begin prosecutions based on two forms of agreements between competitors never before the subject of federal indictments.[2] "No poaching" agreements involve joint refusals to solicit or hire another company's employees, while "wage-fixing" agreements pertain to employee salaries or other terms of compensation.[3] Prosecutions of both forms of alleged conduct under the *per se* rule began in late 2020 and early 2021.

The wisdom of charging such agreements as criminal offenses is not an issue to be addressed at this time by this Court. But the Department of Justice's aggressive expansion of criminal antitrust prosecutions, with its consequent deprivation of defendants' due process rights to be convicted only upon proof beyond a reasonable doubt of every element of the charged offense, is assuredly worthy of this Court's immediate review.

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[2] Antitrust Guidance for Human Resource Professionals, available at https://www.justice.gov/atr/file/903511/download

[3] *Id.* at 3.

The Court should accept this opportunity to hold that the *per se* rule, which is not a congressional command, cannot be used in criminal antitrust prosecutions. The risk of unfairness to criminal defendants is especially great given the text of the Sherman Act itself. The law offers no guidance as to which restraints of trade are unlawful. Courts have attempted to provide their own answers, leading to inconsistent results. And the legislative history of the Act offers no support for the use of the *per se* rule in criminal antitrust prosecutions.

Criminal convictions must "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Except, for now, in criminal antitrust cases. The constitutional rights of criminal defendants in antitrust cases should be restored. The Court should grant the petition for certiorari.

ARGUMENT

I. The *Per Se* Rule Relieves The Government From Proving An Essential Element Of An Antitrust Offense.

The Fifth Amendment guarantees that no one may be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V. The Sixth Amendment ensures criminal defendants the right to a speedy and public trial by an impartial jury. U.S. Const. amend. VI. These "pillars of the Bill of Rights" ensure that the government must prove, and a jury must find, "every fact which the law makes essential

to [a] punishment" beyond a reasonable doubt. *United States v. Haymond*, 139 S.Ct. 2369, 2376 (2019) (internal quotation omitted). The guarantee that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty . . . stands as one of the Constitution's most vital protections." *Id.* at 2373.

Instructions that direct a jury to presume an element of a crime cannot be reconciled with those constitutional dictates. Such conclusive presumptions have repeatedly fallen when scrutinized by the Court. *See*, *e.g.*, *Morissette v. United States*, 342 U.S. 246 (1952); *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Carella v. California*, 491 U.S. 263 (1989).

Nonetheless, criminal prosecutions under the Sherman Act continue to skirt that precedent and the constitutional principles driving it. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. §1. Section 1 is (and always has been) interpreted as outlawing only unreasonable restraints of trade. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018). Unreasonableness is a necessary element for all Section 1 claims.

Although unreasonableness is an element of a Section 1 charge, the government routinely obtains convictions, as it did against petitioner, without proving it. Putting aside the constitutional infirmities of that result, nothing in Section 1 compels it. Rather, it is the product of the judicially crafted "*per se*" rule.

Unreasonableness may be established under Section 1 of the Sherman Act "in one of two ways." *Am. Express*, 138 S. Ct. at 2283. Most restraints are judged under the "rule of reason," which "requires courts to conduct a fact-specific assessment of market power and market structure . . . to assess the [restraint]'s actual effect on competition." *Id.* at 2284 (internal citations and quotations omitted). Courts undertake a searching analysis of the "facts peculiar to the business," the "condition before and after the restraint was imposed," and the "nature" and "history of the restraint" to determine whether the restraint is unreasonable—i.e., whether it "promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

A small number of restraints, however, are presumed to be unreasonable "*per se*." This rule operates as a "conclusive presumption that the restraint is unreasonable." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 344 (1982). The *per se* rule's origins date back to 1927, when the Court determined that because "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition," such agreements "may well be held to be in themselves unreasonable." *United States v. Trenton Potteries*, 273 U.S. 392, 397 (1927). Having made this categorical determination, the Court concluded that it could skip the otherwise necessary "minute inquiry whether a particular price is reasonable or unreasonable as fixed." *Id.* Since that time, the Court has determined that a narrow group of agreements may be

"presumed unreasonable without inquiry into the particular market context in which it is found." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 100 (1984).

While the Court has accepted many cases addressing the scope of the *per se* rule in the civil context, it has not applied the *per se* rule in the criminal context since *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945), a misdemeanor prosecution. Since then, the government has continued to use the *per se* rule to prosecute antitrust defendants for felony violations. Lower courts have continued to approve that use, relieving the government of its obligation to prove an essential element—in many cases, the essential element—of a Section 1 claim.

II. The *Per Se* Rule Cannot Coexist With The Constitutional Rights Afforded Criminal Defendants.

The *per se* rule erases protections guaranteed by the Fifth and Sixth Amendments. The Court repeatedly has recognized that conclusive presumptions are unconstitutional in the criminal context. The *per se* rule is precisely that.

A fundamental problem is that activities covered by the *per se* rule are not always unreasonable; the "match between the presumed and the actual is imperfect." *Maricopa Cty.*, 457 U.S. at 344. The Court has recognized that, in the civil context, many applications of the rule are a product less of economic realities than of a desire to foster "business certainty and

litigation efficiency." *Id.* In the name of certainty and efficiency, the Court has "tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable." *Id.*; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) (noting that *per se* rules "can . . . prohibit[] procompetitive conduct the antitrust laws should encourage").

That compromise may be permissible in the civil context. Such an approach might also be appropriate for Congress when defining the scope of federal antitrust crimes in clear statutory terms. But Section 1 "does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *Gypsum*, 438 U.S. at 438. There is no clear dividing line in the text of the Sherman Act between conduct that should be condemned as unreasonable "*per se*," and conduct that warrants a full "rule of reason" analysis.

In the absence of a clear congressional command, a judicial rule that tips the scale in favor of predictability and efficiency conflicts with "the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime." *Morissette*, 342 U.S. at 275. Indeed, it is a "fundamental value determination of our society . . . that it is far worse to convict an innocent man than to let a guilty man go free." *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (internal quotations omitted). As such, the constitutionally protected right to a jury trial "has always outweighed the interest in concluding trials swiftly." *United States v. Booker*, 543 U.S. 220, 244 (2005).

Application of the *per se* rule in criminal prosecutions is particularly problematic given the rule's ever-shifting scope. This Court has recognized that "the boundaries of the doctrine of *per se* illegality should not be immovable." *Leegin*, 551 U.S. at 900.

For these and other reasons, the Court repeatedly has narrowed the circumstances in which the rule applies. Precisely because the economic foundations of the rule have proven shaky in many applications, the Court over the past 40 years has limited, narrowed, or overturned many of its decisions applying the rule. *See*, *e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) and rejecting *per se* rule for vertical non-price restrictions); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) and holding vertical maximum price fixing is not subject to *per se* rule); *Leegin*, 551 U.S. 877 (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) and holding vertical price restraints subject to rule of reason).

Those inconsistent results in the civil context highlight the problems associated with using the *per se* rule in criminal prosecutions. If the touchstone of criminal liability is "reasonableness," then that question must be left to the jury. Instead, the *per se* rule permits the government to obtain criminal convictions without proving the core element of reasonableness, as it did in petitioner's case.

The *per se* rule by its nature necessarily captures conduct that Congress may not have intended the statute to cover. Such a result may be tolerable in some civil contexts but it cannot be reconciled with the fundamental rights guaranteed to criminal defendants. Those rights prohibit the government from obtaining criminal convictions, punishable by prison time and massive fines, through presumptive conclusions that necessarily establish the core element of a Section 1 claim.

The problem radiates out beyond situations in which criminal defendants proceed to trial. The *per se* rule undoubtedly leads many criminal antitrust defendants to settle rather than go through a trial in which the most critical issue has already been presumed in the government's favor.

When "the theoretical underpinnings" of decisions construing the Sherman Act have been "called into serious question," this Court has not hesitated to reconsider them. *Khan*, 522 U.S. at 21. Such is the case here. This Court should grant *certiorari* and hold that the judicially crafted *per se* rule cannot be used in criminal antitrust prosecutions.

III. The History Of The Sherman Act Supports Petitioner's Argument.

The legislative history of the Sherman Act supports excising the *per se* rule from criminal antitrust prosecutions. 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." The Legislative History of the Federal Antitrust Laws and Related Statutes 97 (Earl W. Kintner ed. 1978) [hereinafter Legis. Hist.] (statement of Sen. James Z. George (D-Miss.)). The *per se* rule provides an end-run around those intentions.

A. The Sherman Act of 1890

When Senator Sherman, the 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. 1 Legis. Hist. at 63–64. The Senate Finance Committee then 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.

The Senate ultimately passed the bill that 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. *Id.* at 276, 294. The House also passed the Sherman Act and President Benjamin Harrison signed it into law in July 1890. *Id.* at 30, 359–63.

Nothing in the statutory text of the Sherman Act of 1890 lends itself to what is now known as the *per se* rule. Nor does the legislative history support

such a rule. On the contrary, the legislative history makes clear that, having gone back and forth between civil or criminal penalties, and ultimately including the latter but only as a misdemeanor, 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 (Senator George).

B. The Misdemeanor Years

For eighty-four years, the Sherman Act remained a misdemeanor statute. 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).

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. Gregory J. Werden, *Individual Accountability Under the Sherman Act: The Early Years, Antitrust*, Spring 2017, 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).

Arnold also believed, however, that "the violation of antitrust laws . . . does not usually fall in that

class of offenses which involve moral turpitude." *Id.* at 11. He went so far as to characterize such a violation "as more like passing through a traffic light at high speed without the intention of harming anyone." *Id.* at 11. Accordingly, while the "number of individuals sanctioned in the 1940s is breathtaking, . . . the severity of the sanctions is comparatively low." *Werden*, *supra*, at 102. "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." *Id.*

In 1940, this Court applied the *per se* rule in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), a criminal antitrust prosecution. In that case, the Court justified its application of the *per se* rule as follows:

> 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.

The legislative and judicial history do not support that justification. Congress in fact left "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.

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*, 342 U.S. at 274–75). That decision, unlike *Socony-Vacuum*, is well 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, none of the defendants in *Socony-Vacuum* were sentenced to prison. Perhaps the Court's decision would have been different had a decade in prison been a possible punishment.

C. An Increased Criminal Penalty

In December 1974, touting increased criminal penalties as "tools to fight inflation," President Gerald Ford signed into law a bill that made antitrust viola-

tions of the Sherman Act, such a price fixing, punishable as felonies. 9 Legis. Hist. at 6670. The bill also increased the maximum sentence from one year to three years and raised the maximum fines from $50,000 to $1 million for corporations and from $50,000 to $100,000 for individuals. *Id.*

The increased criminal penalties for violations of the Sherman Act came in reaction to panic about inflation and outrage over influence peddling in the Nixon administration. *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).

Although antitrust violations had "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." 9 Legis. Hist. at 6653.

Although Sherman Act violations could now be prosecuted as felonies, the Act itself said nothing about the *per se* rule. Nor did it contain language suggesting a limitation on a defendant's right to present a complete defense to the jury. 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. 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 could 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 relatively brief legislative history suggests 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 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," *id.*, or attempt to define such violations. Instead, Congress continued to "hand off" its "responsibility for defining criminal behavior to unelected prosecutors." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). The Justice Department has embraced that responsibility ever since.

Although the Sherman Act contains only one § 1, the Justice Department interprets that section "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." *Id.*

The Justice Department's antitextual two-statutes-in-one-section interpretation 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." *Id.* at 408. "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." *Id.* "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.* 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.

That duty, however, belongs to Congress, not the Justice Department. *Davis*, 139 S. Ct. at 2323 (it is the role of Congress to "write statutes that give ordinary people fair warning about what the law demands of them."). Congress has deliberately chosen

not to codify *per se* crimes in this context, and prosecutors and judges cannot be allowed to do so on their own. Nor should they be allowed to prevent defendants from disputing that their conduct was "in restraint of trade." 15 U.S.C. § 1. What "began as a codification of the common law in 1890" has morphed "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).

IV. The Petition Presents A Question of Great And Increasing Importance.

Amici can attest to the pressing need for this Court to answer the question raised here. The Department of Justice is bringing an ever-increasing number of antitrust prosecutions. "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 media, including typically pro-business publications such as the Wall Street Journal and the Economist, in recent years have maintained a "regular drumbeat" in favor of more aggressive antitrust enforcement. *Id.* at 717. Senator Elizabeth Warren has "been especially vocal about the decline of competition in America and the need for stronger policies to reign in corporate power." *Id.* at 720.

Criminal antitrust prosecutions are increasing not only in volume but also in scope. As noted above, the Department of Justice is now prosecuting two

forms of agreements between competitors – "no poaching" and "wage-fixing" agreements – that previously were never subject to federal criminal enforcement.[4] While increased enforcement may be warranted by changed economic conditions, government policy, however commendable, can never justify the deprivation of fundamental constitutional rights.

The question presented in this case is important and growing more so each year. The ever-increasing number of antitrust prosecutions, combined with the severity of possible punishment, demonstrate that, regardless of how the *per se rule* was treated in the past, it cannot coexist with a criminal defendant's fundamental rights. Defendants now face ten years in prison for violations that Congress has never defined.

The Court should 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." *Id.* The *per se* rule permits precisely that. It threatens core principles of fairness in the criminal legal system by depriving criminal defendants of core constitutional protections and the legal presumption of innocence. It has no lawful basis in criminal antitrust prosecutions.

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[4] *See* notes 2, 3, *supra.*

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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