No. 17-4148

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellant,
v.
KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
Honorable David Sam
District Court No. 2:16-cr-00403-DS

BRIEF FOR KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX

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Oral Argument Is Requested

CORPORATE DISCLOSURE STATEMENT

Kemp & Associates, Inc. has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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STATEMENT OF RELATED CASES

There are no prior or related cases to this appeal.

JURISDICTIONAL STATEMENT

The government is attempting to appeal two separate orders entered by the district court on August 28, 2017, but this Court only has jurisdiction over one of these appeals. Specifically, the government appeals from the district court's order dismissing the indictment as time-barred, and properly invokes this Court's jurisdiction under 18 U.S.C. § 3731 ("Section 3731"). The government is also attempting to appeal the district court's separate order setting the legal standard—the Sherman Act's "rule of reason"—that would apply at trial. That pretrial determination is not appealable under Section 3731.

In an attempt to circumvent Section 3731, the government asks that this Court take the extraordinary step of granting a writ of mandamus, but this Court should reject that request, as no circumstances justify it.

STATEMENT OF THE ISSUES

1. Whether the district court correctly determined that the indictment was untimely.

2. Whether the district court correctly determined that the rule of reason applies.

SUMMARY OF THE ARGUMENT

This appeal is an effort by the government to salvage its misguided criminal prosecution of a small, family-owned "heir location" business for conduct that indisputably ended a decade ago, and under an untenable legal theory, the district court's rejection of which is not even properly before this Court.

Neither party disputes that the alleged "restraint of trade" at issue in this antitrust case ended in 2008, well outside the statute of limitations period. As a result, the district court dismissed the indictment as time-barred. Now, on appeal, the government seeks to stretch the limitations period to cover this case based on the fact that certain estate payments were processed within the limitations period. But those payments did nothing to further the alleged conspiracy and thus do not bring the case within the statute of limitations—a point that has been repeatedly confirmed by appellate courts, including the Second Circuit in a recent antitrust case. Furthermore, as the district court found, to adopt the government's position that such payments were overt acts in furtherance of the conspiracy would result in an arbitrary and indefinite limitations period, frustrating the principle of repose.

The government is also attempting to stretch the law governing appellate jurisdiction to allow it to appeal from a separate decision of the district court

holding that the rule of reason would apply at trial—a legal standard that would permit the defendants to offer evidence of legitimate business justifications for the charged conduct. This pretrial decision in favor of the rule of reason—which is the default standard under antitrust law—is not appealable at this stage.

The decision was correct in any event. The *per se* rule of liability the government advocated governs only those cases for which there is extensive precedent. But both in the district court and before this Court, the government has failed to identify a single case—much less an established line of cases—showing that an agreement like the one at issue, in an industry like heir location, is so clearly unlawful as to give rise to *per se* Sherman Act liability. Nor has the government provided any persuasive reason to set aside the district court's correct conclusions regarding the legitimate business justifications for the agreement.

STATEMENT OF THE CASE

I. The Indictment

The indictment ("Indictment') was filed on August 17, 2016, charging defendants Kemp & Associates, Inc. ("Kemp") and Daniel J. Mannix ("Mannix")

in a single count with conspiracy to violate the Sherman Act, 15 U.S.C. § 1. A16-21.[1]

According to the Indictment, Kemp was a company that performed heir location services, A16, and Mannix its Director of Operations, A17. The Indictment alleges that firms like Kemp "identify heirs to estates of intestate decedents and, in exchange for a contingency fee, develop evidence and prove heirs' claims to an inheritance in probate court." A17. The Indictment further alleges that potential heirs may receive contingency offers from one or more such providers but that estates can take five or more years to reach distribution based on "[t]he complexity of the estate, the determinability and number of heirs to the estates, and the law that governs the estate." A17.

The Indictment charges that Kemp and Mannix entered a "conspiracy with Richard A. Blake, Jr."—the owner of another heir location company—"to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services." A18-19. In particular, the Indictment alleges that the agreement came into effect "when both co-conspirator companies contacted the same unsigned heir to an estate," so that "the co-conspirator company that first contacted that heir

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[1] Citations to the Appendix take the form A#.

would be allocated certain remaining heirs to that estate who had yet to sign a contract with an Heir Location Services provider." A19. Also, "the co-conspirator company to which heirs were allocated would pay to the other co-conspirator company a portion of the contingency fees ultimately collected from those allocated heirs." A19.

II. The Defendants' Motions

On March 31, 2017, Kemp and Mannix filed pretrial motions (the "Motions") seeking (1) a pretrial order regarding the legal standard that would apply at trial and (2) dismissal under the statute of limitations. A147-203.[2]

In particular, the defendants sought a pretrial order that the case would be subject to the rule of reason standard under the Sherman Act instead of the *per se* rule. In cases where the rule of reason applies, the fact-finder considers whether the alleged restraint of trade had a significant anticompetitive effect in the relevant market, and whether these "anticompetitive consequences . . . outweigh[ed] . . . legitimate business justifications." A166 (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994)). In cases governed by the *per se* rule, the

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[2] The defendants also argued that the case should be dismissed as unconstitutionally vague. A187-92. The district court did not rule on this motion.

fact-finder must consider the alleged restraint of trade unreasonable, without regard for whether legitimate business justifications outweighed any anticompetitive effects. A166-67.

The defendants argued that the alleged restraint in this case was not the kind that had been deemed, after extensive review by the courts, to be a *per se* violation of the Sherman Act. Rather, the alleged restraint—an agreement between two heir location firms—had an unusual structure, had never been addressed in the case law, operated in a highly unusual industry, and featured substantial legitimate business justifications and procompetitive effects.

By way of background, the defendants explained that heir location firms are in the business of finding intestate estates (which would often otherwise escheat to the state); locating the rightful heirs through genealogical research; and then helping those heirs recover their shares of the estate in exchange for a percentage of the recovery. A157. The process of finding intestate estates is labor-intensive. A158. Estate searchers often drive from courthouse to courthouse, sometimes hundreds of miles a week, searching reams of paper records to locate potentially viable estates. A158.

After locating a potentially suitable estate, the estate searcher must calculate its approximate value in order to determine whether the substantial additional effort required to research the heirs is likely to pay off. A158. This calculation requires attention to many factors, including the accessibility of genealogical records, the jurisdiction's idiosyncratic rules of intestate inheritance, the difficulty of finding heirs with common names, and the likelihood of foreign heirs who would be expensive to track down. A158.

If management approves further work, an estate researcher begins the time-consuming genealogical research. A159. Researchers commonly encounter genealogical dead ends or discover that heirs are located overseas, requiring them to enlist a foreign correspondent. A159. Where the researcher is able to solve the genealogy, Kemp can approach the heirs and offer to assist them in claiming their inheritance. A160. If an heir agreed to employ Kemp, she signed a contract assigning Kemp the right to act on her behalf in exchange for a percentage of the recovery. A160. Competition among heir location firms chiefly occurs in the speed and efficiency with which the firms find and "solve" the estate and contact heirs—a "race to the doorstep." A161.

The final phase is administration of the estate. Kemp engaged counsel and carried out additional work. A160. Successfully administering the estate is dependent on the thoroughness of the genealogical research, and, as the Indictment notes, the various steps and outside factors can make the process take more than five years in certain cases. *See* A17.

Return on investment is relatively low. Relevant Kemp data for the years 2000 to 2014 indicates that only approximately 30% of opened cases resulted in signed heirs, and of those a significant number were never administered for the reasons discussed above or resulted in a lower recovery than anticipated. A160. In short, the product provided by Kemp—the information required to bring the estate to administration—gets built from the ground up for each individual estate. A159. That information is bespoke: it is only relevant for a single estate. A159-60. It is also highly fragile, and subject to losing all commercial value by being revealed. A182-83. Where an estate does not come to fruition, all resources devoted to it are lost. A160.

The defendants explained in their Motions that Kemp and another heir location firm, Blake and Blake, reached an agreement on guidelines ("Guidelines") that governed situations where both companies contacted the same heirs. The

Guidelines were written down and attached as an exhibit to defendants' Motions. A214-15. The Guidelines are the agreement challenged by the Indictment. *See, e.g.*, A280-83.[3]

The Guidelines provide that when one company contacted an unsigned heir that was also contacted by the other company, the two companies split the case from that point forward, with both "keep[ing] all heirs that they have signed whether in hand or in the mail." A214. The Indictment and the written agreement thus make clear that heirs signed prior to the companies contacting the same heir were not subject to the profit-sharing provisions of the agreement. A281. Similarly, the agreement applied *only* to estates located by both firms. A281. That was a narrowly limited group; the proportion of estates worked by Kemp subject to the agreement was between 2.5% and 3.5%. A268.

Further, the companies agreed to split the fee received on the portion of the estate under the Guidelines 55% to 45% with "[t]he company that does the signing and documenting [i.e., the administration of estate] . . . [and] has more expenses

[3] Although absent from the record, the government notes that Richard A. Blake, Jr., owner and president of Blake and Blake, pleaded guilty in another district. Br. 5 n.2. The government neglects to point out that Blake's plea was pursuant to a cooperation agreement. *United States v. Blake*, 16 cr. 25 (N.D. Ill.), Dkt. 24, ¶¶ 12-13.

and does more work get[ting] paid more." A214. Thus, the firm handling administrative and other work going forward (typically the company that arrived first to the unsigned heir) took the larger share. A45-46, 282.

The Guidelines ended, however, almost a decade ago. On July 30, 2008, Mannix wrote to Kemp colleagues, in an email attached to the Motions: "The 'formal' agreement that we have had with [Blake and Blake] for the last decade is over." A219. There is no dispute that no further estates became subject to the Guidelines agreement after that date. A164.

Against this backdrop, the defendants sought a pretrial order that the case "be subject to the rule of reason for purposes of assessing the legality of the conduct" alleged. A153, 166-68. The defendants elaborated that such a ruling would mean that "if the case were to proceed to trial, the defendants should be allowed to present evidence and have instructions to the jury consistent with review of the case under a rule of reason analysis"—that is, regarding the legitimate business justifications for the Guidelines, among other things—and that deciding the question was "necessary and appropriate to allow the parties to adequately prepare their cases." A167.

In addition, the defendants moved to dismiss the case on the ground that any

conspiracy to allocate customers necessarily ended in July 2008, when Mannix terminated the Guidelines, more than three years outside the limitations period. A193-94.

III. The Government's Opposition

On April 28, 2017, the government filed an opposition brief arguing that defendants should be barred from introducing evidence regarding the legitimate business justifications for the Guidelines because it had labeled the Guidelines a "customer allocation agreement" in the Indictment, and customer allocation agreements are *per se* unlawful in any industry. *See* A239, 243.

Second, the government argued that the case was timely because even though the Guidelines ended in 2008, the distribution of estate payments continued after that. *See* A249-53.

IV. Oral Argument

The district court heard oral argument on June 21, 2017. A32-86. At the conclusion, the district court stated that unlike cases in which the *per se* rule is appropriate, "this is a rather unique and unusual case" and does not "fit like I would like to see cases fit under the Sherman Antitrust Act." A80. The district court thus announced that it would apply the rule of reason standard at trial. A81. Asked how it intended to proceed, the government responded that it "would like to

assess its options." A83. The district court held the other motions in abeyance, and requested a proposed order from the defendants, which the defendants subsequently submitted on June 30, 2017. A84-85.

On July 14, 2017, the government submitted a motion for reconsideration of the oral ruling, objected to the defendants' proposed order, and requested that the district court decide the statute of limitations issue. A87-100.

V. The District Court's Two Decisions

On August 28, 2017, the district court entered two separate orders. In its "Order on Defense Motion Regarding Application of Rule of Reason," the district court held, consistent with its ruling at oral argument, that the rule of reason standard applied to this case. A133-36 (the "Rule of Reason Decision"). The district court explained that the rule of reason is the default rule, so "[*p*]*er se* liability applies *only* where the practice fits a *per se* category by prior precedent, or on its face appears to be one that would always restrict competition and decrease output." A133-34 (emphasis added).

In order to determine whether the practice here fit a "*per se* category," the district court declined to "rely on labels applied by the government"—that is, declined to rely on the mere fact that the government labeled the Guidelines a

customer allocation agreement in the Indictment—and instead stated that it would look to "the substance of the allegations" and whether the practice alleged fit an established category of restraint that was *per se* unlawful under prior precedent. A134.

The district court explained, however, that the government failed to identify, and the court could not locate on its own, any "case addressing the particular kind of restraint at issue here, or otherwise closely resembling this one," noting the agreement's unusual structure in an "obscure industry . . . with an unusual manner of operation." A135. The district court found that in this obscure industry, "the Guidelines on their face would not necessarily restrict competition or decrease output, but instead contained efficiency-enhancing potential," and explained why, based on the structure of the agreement and the operation of the industry. A135. In reaching these conclusions, the district court expressly relied on the Guidelines, but noted that it "can and would reach the same result based solely on the conduct as it is described in the Indictment." A134-35 n.2.

In a separate "Memorandum Decision and Order," the district court denied the government's reconsideration motion and dismissed the Indictment as time-barred. A137-43 (the "Limitations Decision"). First, the district court denied

reconsideration of its oral rule of reason decision because "the government offer[ed] no facts or law which would suggest to the court that its earlier decision was erroneous." A138.

Second, the district court concluded that the case was barred by the statute of limitations because after July 2008, "no additional estates became subject to the Guidelines and there was no further allegedly wrongful allocation of customers." A139. The district found instructive the Indictment's definition of the conspiracy as "to suppress and eliminate competition by agreeing to allocate customers." A140 (quotations omitted). That "had been abandoned in July 2008." A140. The district court rejected the government's argument that the distribution of proceeds continued into the limitations period, finding that this argument "confuses the results of a conspiracy with actual conduct in furtherance of it." A141. The district court distinguished cases relied on by the government where "the central purpose of the conspiracy was to obtain wrongful proceeds of money." A141.

On September 26, 2017, the government filed a notice of appeal as to both orders. A143-46.

STANDARD OF REVIEW

Reviewing a motion to dismiss on statute of limitations grounds, the Court

assumes "the indictment's allegations are true" and reviews *de novo* the district court's decision to dismiss. *United States v. Qayyum*, 451 F.3d 1214, 1218 (10th Cir. 2006). This standard does not apply, however, to review of the district court's pretrial ruling establishing the legal standard to be applied at trial. There, the Court "accept[s] the factual findings unless they are clearly erroneous, and review[s] questions of law *de novo*." *United States v. Gonzales*, 399 F.3d 1225, 1228 (10th Cir. 2005). "Where a mixed question of law and fact involves primarily a factual inquiry, the clearly erroneous standard is appropriate. If, however, the mixed question primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate." *Littlejohn v. Royal*, 875 F.3d 548, 558 n.3 (10th Cir. 2017) (quotations and brackets omitted); *see, e.g.*, *United States v. Marquez*, 833 F.3d 1217, 1223 (10th Cir. 2016) (sentencing enhancement was mixed question reviewed for clear error); *see also In re Wholesale Grocery Prods. Antitrust Litig.,* 752 F.3d 728, 734-35 (8th Cir. 2014) (rule of reason or *per se* is a legal question, "[b]ut underpinning [it] are numerous factual questions").

ARGUMENT

I. The District Court Properly Dismissed the Indictment as Untimely

A. Statutes of Limitations Serve Vital Interests of Repose

In dismissing the Indictment, the district court noted the fundamental importance of limitations periods to "provide protections to a defendant's right to a fair trial as over time it becomes difficult or impossible for defendants and prosecutors to present a complete and fair trial . . . ." A138. Relying on well-established Supreme Court doctrine, the district court explained that such statutes are a "primary guarantee against . . . overly stale criminal charges" and "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice." A139 (quoting *United States v. Marion*, 404 U.S. 307, 322 (1971)).[4]

Recent Supreme Court decisions have placed a renewed emphasis on the fundamental role of limitations principles in delineating the boundaries between the liberty of our nation's citizens and the law enforcement powers of the

[4] The concern with staleness is salient here. In the course of discovery in 2017, defendants learned that two disgruntled former Kemp employees (and potential witnesses) first approached the Antitrust Division in 2008 or 2009. Typically, a memorandum of that interview would have been prepared, but when the defendants requested any record of that meeting, nothing could be found. A74.

government; these decisions have rejected end runs that would extend law enforcement prerogatives for lengthy or indefinite periods of time. *See, e.g.*, *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017) (applying five-year statute of limitations to SEC disgorgement actions; limitations periods are "'vital to the welfare of society'" as they "'se[t] a fixed date when exposure to the specified Government enforcement efforts en[d]'") (quoting *Gabelli v. SEC*, 568 U.S. 442, 448-49 (2013) (five-year limitations period for SEC actions begins at time of fraud, not on discovery)). Because of their importance, "criminal limitations statutes are 'to be liberally interpreted in favor of repose.'" *United States v. Habig*, 390 U.S. 222, 227 (1968) (quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932)).

B. The Guidelines Ended Eight Years before the Indictment

The Indictment charges a conspiracy "the substantial terms of which were to allocate customers of Heir Location Services." A18. The "Description of the Offense" further defines the scope of the alleged conspiracy as one "to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services." *Id.* In short, the conduct underlying the alleged Sherman Act violation is the supposedly wrongful splitting of certain estates between Kemp and Blake and Blake—i.e., the Guidelines. But Mannix indisputably terminated the Guidelines on

July 30, 2008, more than eight years before the Indictment. A139, 219. After that date, not a single heir is claimed to have been allocated between the two companies under the Guidelines, and no new estate was allegedly made subject to those Guidelines.

Nevertheless, the government argues that the district court "mistakenly concluded that the alleged conspiracy ended after the last customers were allocated, rather than continuing as long as the conspirators collected and distributed payments from contracts with the allocated customers." Br. 14. Far from it, the district court—following a studied analysis of the allegations—determined that this case must be distinguished from those cited by the government where the "central purpose of the conspiracy was to obtain wrongful proceeds or money." A141.

Here the only alleged conduct that took place in the five years prior to the Indictment were "administrative consequences of a concluded allocation agreement." A140. This conduct—which Kemp was contractually obligated to complete—typically involved engaging counsel, preparing the factual material needed to support a probate claim, and ultimately delivering to heirs any money distributed to them from the estate. As the Indictment alleges and the district court

emphasized, specific estate administrations can be quite lengthy and vary greatly depending on numerous factors, including "[t]he complexity of the estate, the determinability and number of heirs to the estate, and the law that governs the estate." A17, 142.

The district court emphasized that none of these administrative tasks constitutes the market allocation alleged as the central purpose of the conspiracy charged in the indictment. A140. Thus the district court correctly dismissed the Indictment as untimely.

C. The District Court's Decision Is Well Supported by the Law

"[T]the crucial question in determining whether the statute of limitations has run is the *scope* of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and *whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy*." *Grunewald v. United States*, 353 U.S. 391, 397 (1957) (emphasis added). A Sherman Act conspiracy exists only for as long as its members continue to commit acts in furtherance of an agreement to suppress or restrain competition. *United States v. Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir. 1981); *see also United States v. Great Western Sugar Co.*, 39 F.2d 152, 154 (D. Neb. 1930) (dismissing Sherman Act

charge involving alleged predatory pricing in beet industry where contracts had been completed outside the limitations period, but some of the beets were delivered within it; the deliveries "were just things that transpired in the course of business after the [price] war had been waged").

There is no dispute that any alleged allocation of the market—in the form of splitting estates between Kemp and Blake and Blake—ended by July 30, 2008. The government does not contest this point, but rather asserts that the conspiracy extended "as long as the conspirators collected and distributed payments from the contracts with the allocated customers." Br. 14. The district court correctly concluded otherwise. Parsing the Indictment's description of the specific conspiracy charged in this case, the court determined that

> [o]nce the firms agreed to end the Guidelines, only routine, administrative consequences of a concluded allocation agreement remained, and nothing more was done with respect to that estate that served the purpose of "suppressing" or "eliminating" competition between the two.

A140. The district court recognized that "[a] conspiracy's statute of limitations should not be extended 'indefinitely beyond the period when the unique threats to society posed by a conspiracy are present.'" A141 (quoting *United States v. Doherty*, 867 F.2d 47, 62 (1st Cir. 1989)). The only "unique threat" identified in

the Indictment was the customer allocation that unquestionably ended *eight years before the indictment*. *See Fiswick v. United States*, 329 U.S. 211, 216 (1946) ("Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one.")

Ordinary, lawful administrative conduct analogous to what occurred here after July 2008 has consistently been found insufficient to extend the statute of limitations. *United States v. Doherty*, 867 F.2d 47 (1st Cir. 1989), relied on by the district court, A141, is particularly instructive. The case concerned various conspiracy charges stemming from the theft of advance copies of police civil service examinations, which were sold to the defendants, who took the exams and obtained promotions. *Id.* at 51. Although the thefts and sale of the exams took place more than five years prior to the indictment, certain defendants "received increased salary payments due to the promotions after the relevant date." *Id.* at 60-61. The First Circuit found the charges untimely, recognizing that, had it adopted the government's argument, the limitations period could go on without end, long after the actual conduct targeted by the indictment had concluded:

> [W]here receiving the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions, such as receiving salary payments, *and* there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking

> place, we do not see how one can reasonably say that the conspiracy continues. Rather, in these latter circumstances, one would ordinarily view the receipt of payments merely as the "result" of the conspiracy. That is what the Supreme Court suggested in *Fiswick v. United States* . . . .

Id. at 61.

The Second Circuit reached the same conclusion more recently in the antitrust case *United States v. Grimm*, 738 F.3d 498 (2d Cir. 2013). That case involved an alleged scheme to obtain below-market interest rates on certain contracts. While the contracts were all entered into outside the limitations period, the government argued that subsequent below-market interest payments made the charges timely. Echoing *Doherty*, the Court rejected the government's argument, relying on the principle that a "[criminal] conspiracy ends notwithstanding the [later] receipt of anticipated profits where the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions." *Grimm*, 738 F.3d at 502 (quotation marks, ellipses, and brackets omitted). The payments of interest were "ordinary commercial obligations," which did not extend the limitations period:

> overt acts have ended when the conspiracy has completed its influence on an otherwise legitimate course of common dealing that remains ongoing for a prolonged time, without measures of concealment, adjustment or any other corrupt intervention by any conspirator.

Id. at 503.

United States v. Hare, 618 F.2d 1085 (4th. Cir. 1980) concerned the indictment of a public official for wrongfully obtaining a loan with "favorable interest and payment provisions." *Id.* at 1086. Although the loan issued nine years prior to the indictment, the government relied on the defendant's repayments at an advantageous interest rate within the five years prior to indictment. The argument was soundly rejected because those repayments were "the result of the beneficial concessions" obtained outside the limitations period. 618 F.2d at 1086-87. The Fourth Circuit recognized that adopting the government's theory would mean that the limitations period depended exclusively on the term of the loan, which could have been twenty-five years. Such a result cut directly against the "Supreme Court's admonition in *Toussie v. United States* . . . that federal statutes of limitations should be applied strictly in order to further the congressional policy favoring repose." *Id.* (citations omitted).

Like *Doherty*, *Grimm* and *Hare*, here the only acts alleged to have taken place during the limitations period were ordinary, lawful payments made and administrative tasks undertaken as a *result* of a prior agreement. The district court correctly determined that the central purpose of the conspiracy ended with the

Guidelines' termination, well outside the limitations period.

D. The Cases Cited by the Government Are Inapposite

The government seeks support from *United States v. Evans & Associates Construction Co.*, 839 F.2d 656 (10th Cir. 1988), *United States v. Northern Improvement Co.*, 814 F.2d 540 (8th Cir. 1987) (cited by *Evans*), and *United States v. Dynalectric Co.*, 859 F.2d 1559 (11th Cir. 1988). However—unlike this case—each of those cases involved a bid-rigging scheme where a *central* objective of the conspiracy included the distribution of the proceeds of ill-gotten gains.[5] *See Evans*, 839 F.2d at 661 ("the Sherman Act violation was accomplished both by the submission of noncompetitive bids *and* by the request for and receipt of payments at anti-competitive levels") (emphasis in original) (internal citations omitted); *N. Improvement*, 814 F.2d at 542 ("the object and purpose of this illegal agreement was 'illicit gain,' the receipt of payments"); *Dynalectric*, 859 F.2d at 1564 ("the indictment clearly alleges that two 'substantial terms' of the 'continuing [conspiratorial] agreement'" were that one conspirator "would earn profits on the

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[5] These bid-rigging cases also exhibit no efficient integration between competitors, as the district court found happened here in the administration phase, A135. Unlike in those cases, payment-related conduct as a result of the Guidelines was part of a legitimate, pro-competitive purpose.

rigged [] contract and that it would disburse fifty percent of those profits to [another conspirator].”).

Indeed, the district court recognized in its decision that, although the Indictment “mentions the payment of proceeds,” that language—which is not contained in the “Description of the Offense”—is not pleaded as a *central purpose* of the conspiracy. A141. That ruling makes sense, as the “societal danger” targeted by the Indictment was the “suppress[ion] and eliminat[ion] [of] competition by agreeing to allocate customers of Heir Location Services.” A18. This alleged “societal danger” was eliminated on July 30, 2008.[6]

The government’s reliance on *United States v. Morgan*, 748 F.3d 1024 (10th

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[6] The government’s brief compares the language of the Indictment with those in *Evans* and *Northern Improvement*. Br. 21-22 & nn. 4-7. That analysis actually cuts against its argument. Here the Indictment’s “Description of the Offense” states that “*the* substantial terms of [the conspiracy] were to allocate customers,” A18 (emphasis supplied), while the “Offense Charged” section of the indictments in Evans and Northern Improvement read that “*a* substantial term” of those indictments was the submission of non-competitive bids, *see Evans* Indictment, https://www.justice.gov/atr/page/file/1018136/download, at ¶ 14; *N. Improvement* Indictment, https://www.justice.gov/atr/page/file/1018141/download, at ¶ 18 (emphasis added). The phrasing is consistent with the reality that in *Evans* and *Northern Improvement* there were *other* substantial terms (i.e., central purposes) of the conspiracy, namely the subsequent receipt of payments. *See also Dynalectric*, 859 F.2d at 1564 (indictment alleges that “two substantial terms” were earning profits and distributing them).

Cir. 2014), is similarly misplaced. In *Morgan*, this Court concluded that statements about the "unfair distribution of the proceeds" "furthered [the conspirators'] purpose to kidnap for money" and were thus admissible. There, the evidence showed that "*the central purpose* of [the] kidnapping and robbing [] was to obtain money and divide it among the co-conspirators." 748 F.3d at 1036 (emphasis added). Furthermore, the indictment in *Morgan* specifically identified robbery as a "primary object of the conspiracy" and specifically alleged that "discussions and meetings … [about] how the money should be divided up" were "Overt Acts in Furtherance of the Conspiracy." *United States v. Morgan*, 11 cr. 00303 (REB) (D. Col.), Ind. pp. 4, 7, ECF Dkt. No. 1.

The government's citation of *United States v. Walker,* 653 F.2d 1343 (1st Cir. 1981) is also inapposite, as that indictment alleged a broad conspiracy to defraud the government. Thus the conspiracy continued beyond an original false statement made to secure a timber cutting contract and included the subsequent cutting of timber and claims for payment. *Id.* at 1347.

More generally, in none of these cases did a defendant affirmatively terminate the alleged conspiratorial agreement. The payment-related conduct in those cases could more properly be said to relate to a continuing conspiracy,

whereas here it was truly residual to a terminated one.

Finally, the government argues that affirming the district court's decision will create an arbitrariness as to the length of the limitations period. Br. 22-23. That is backwards. The court below did not, as the government suggests, "impos[e] artificial limits on the time for, or the number of, payments received that qualify as overt acts." Br. 22. Rather, the district court identified a straightforward threshold, analyzing the Indictment and the conspiracy alleged to determine whether the payments that the government relies on could at all be viewed as in furtherance of the central purpose of the conspiracy. They cannot. The government itself acknowledges that, while the limitations period is fixed, "[w]hat varies is how long the conspiracy continues, which always depends on the conspirators' *agreement and actions*." Br. 23 (emphasis added). Here, as the district court recognized: (1) the alleged "agreement" was for market allocation, which ended in July of 2008; and (2) "action" by the individual defendant directly terminated the agreement.

Indeed, adopting the government's argument would cause exactly the type of arbitrariness that limitations periods were intended to address and that the Supreme Court resoundingly rejected in *Kokesh* and *Gabelli*. Even the Indictment concedes that the length of an estate's administration can vary widely depending on many

different factors; while some estates may be probated completely in a few years, others take far longer. *See* A17. For example, an estate may wind up in protracted litigation among potential heirs. In other instances, where an estate may be believed to be fully distributed, it can be reopened years later when additional assets are located. In such an instance, under the government's theory, a limitations period thought to have expired following the supposedly final distribution from an estate could suddenly be reopened by the distribution of those later found assets.[7] Such randomness is plainly unsatisfactory, and inconsistent with the interest in repose that statutes of limitations require and were designed for in the first place.

For all of these reasons, the district court was correct to dismiss the Indictment as barred by the statute of limitations, and this Court should affirm that ruling.

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[7] The government asserts that the payment periods in several cases it cites are "comparable to or greater than here." Br. 23, n.8 (referencing bid rigging cases where the periods range from three to seven years). In fact, the time from bid to final payment in *Evans* was approximately a year and a half. But more fundamentally, the administration of an estate can extend indefinitely, and a limitations period based on the length of probate would be subject to arbitrariness that does not exist where there is a rigged bid for a contract and a definite period of payment under such contract.

II. The District Court's Decision that the Rule of Reason Standard Would Apply at Trial Is Not Appealable and Was Correct

A. The Decision Is Not Appealable and Not Appropriate for Mandamus

The district court's (correct) decision that the rule of reason would be the applicable legal standard at trial—like the decisions made every day by district judges in criminal cases on evidentiary issues and jury instructions—is not subject to appellate review at this stage.

1. Section 3731 Provides No Basis for the Government's Appeal

As this Court explained in an important decision addressing the permissible scope of criminal appeals by the government, two "unique limitations" constrain such appeals: "the government may only initiate criminal appeals based on specific statutory authority; and there is a presumption against government criminal appeals." *United States v. McVeigh*, 106 F.3d 325, 329 (10th Cir. 1997) (per curiam) (quotations omitted); *see United States v. Farnsworth*, 456 F.3d 394, 399 (3d Cir. 2006); *United States v. Watson*, 386 F.3d 304, 307 (1st Cir. 2004); *United States v. Margiotta*, 662 F.2d 131, 137 n.14 (2d Cir. 1981). The only statute providing authority for government criminal appeals is Section 3731. *See McVeigh*, 106 F.3d at 331.

Section 3731 describes three specific types of orders from which the government can appeal: (1) "a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof"; (2) "a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding"; and (3) a decision or order granting a defendant's release or affecting the terms thereof. The district court's Rule of Reason Decision fits none of these categories. The Decision did not dismiss the sole count in the Indictment, or any portion of it; did not exclude government evidence; and did not affect any terms of release.

The government tries to work around Section 3731's plain text in two ways. Each effort fails.

First, the government argues that the Decision "effectively" dismissed the case because the government would *prefer* not to proceed to trial if the rule of reason governs. Br. 48-50, 55. It is true that when a district court's order actually has the direct effect of dismissing all or part of an indictment, the government can appeal that order under Section 3731. *See United States v. Bergman*, 746 F.3d 1128, 1131 (10th Cir. 2014) (refusal to schedule trial); *United States v. Williams*,

449 F.3d 635, 643-44 (5th Cir. 2005) (refusal to retry greater aggravated offenses). But the government may only appeal an order on this basis in those rare instances where dismissal is the "necessary result" of the order, *Carroll v. United States*, 354 U.S. 394, 404-05 (1957), and not where the order was merely a "but-for cause" of the dismissal, *see Watson*, 386 F.3d at 311-12.

The Rule of Reason Decision did nothing to prevent the government from moving forward with its case.[8] *See United States v. Lavallee*, 61 F. App'x 631, 632 (10th Cir. 2003) (per curiam) (no appellate jurisdiction over denial of continuance that meant critical government witness could not testify; "it was not the district court who precluded the witness from testifying," but "*outside circumstances*" (emphasis added)). Indeed, the government expressly represents that its policy of not criminally prosecuting rule of reason cases is simply an exercise of its "prosecutorial discretion." Br. 49. The government's exclusive reliance on *Bergman* and *Williams*, Br. 48, two cases where the district courts refused to try certain charges, is therefore misplaced. Rather, the Decision, as a

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[8] The government does not contend, and the district court did not conclude, that there is a constitutional bar to a rule of reason criminal prosecution. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 439, 443 (1978); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396 (1927).

practical matter, simply means that the defendants would be able to offer legitimate business justifications for the Guidelines and that the jury would be asked to weigh those justifications against any anticompetitive effects. The fact that the government would prefer to conduct a trial where this defense evidence is barred does not operate as an effective dismissal. And the government's argument that it should be permitted to appeal an adverse pretrial ruling simply by stating that it will otherwise drop the case would, if adopted, write Section 3731 out of the statute books; in any event, such argument is foreclosed by the Supreme Court's decision in *Carroll*. 354 U.S. at 404-05 (suppression order that government stipulated would cause it to dismiss not appealable);[9] *see also Farnsworth*, 456 F.3d at 397 (ruling that attempted tax evasion required proof of assessment, which government admitted did not exist, not effective dismissal).

Second, the government's attempts to characterize the *per se* rule as a "discrete basis of liability" under the Sherman Act are wrong. Br. 49-51. The government cites cases holding that where a theory of liability could have been charged independently, its exclusion can be appealed under Section 3731. *See*

[9] *Carroll* predates a change to Section 3731 expressly allowing government appeals from adverse suppression decisions.

Williams, 449 F.3d at 643-44; *United States v. Bloom*, 149 F.3d 649, 652-54 (7th Cir. 1998); *United States v. Oakar*, 111 F.3d 146, 150 (D.C. Cir. 1997); *United States v. Levasseur*, 846 F.2d 786, 790 (1st Cir. 1988); *see also United States v. Schneider*, 594 F.3d 1219, 1225-26 (10th Cir. 2010).

The gravamen of a Sherman Act violation is an agreement that imposes an unreasonable restraint of trade. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315 (3d Cir. 2010). That single indivisible alleged violation is what the Indictment here charges. A18 ("the combination and conspiracy . . . was in unreasonable restraint of trade and commerce in violation of Section 1 of the Sherman Act"). And the government does not contend that it could have drafted the Indictment to include two separate counts challenging the Guidelines: one as *per se* unreasonable, and one as failing the rule of reason.

Indeed, the Indictment never uses the words "*per se*" because the *per se* rule is not a separate theory of liability but a "judicial construct[]," *see United States v. Brown Univ.*, 5 F.3d 658, 670 (3d Cir. 1993), that relieves a plaintiff of its burden of proof as to reasonableness, *see Ins. Brokerage*, 618 F.3d at 316. Because the *per se* rule and the rule of reason are merely different ways of analyzing the Sherman Act's reasonableness requirement, *Atl. Richfield Co. v. USA Petroleum Co.*, 495

U.S. 328, 342 (1990),[10] they cannot, consistent with principles of multiplicity and double jeopardy, be charged separately, *see United States v. Morehead*, 959 F.2d 1489, 1505-06 (10th Cir. 1992). And an order increasing the "burden of proof beyond that which [the government] prefers to carry" does not eliminate any discrete bases of liability by "preclud[ing] consideration of any discrete acts or factual predicate which would give rise to criminal liability." *Margiotta*, 662 F.2d at 139-40.

That the government, like many civil plaintiffs, *see* Br. 50, does not wish to try to meet the more exacting rule of reason burden does not render the district court's decision subject to appeal.

2. The Government's Mandamus Request Should Be Denied

In apparent recognition that this appeal is barred by Section 3731, the government asks the Court to resort to the extraordinary remedy of issuing a writ of mandamus. As this Court has noted, "a writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire &*

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[10] *See also U.S. Gypsum*, 438 U.S. at 476 ("[R]ule-of-reason analysis is not distinct from '*per se*' analysis. . . . [A]greements that are illegal *per se* are merely a species within the broad category of agreements that unreasonably restraint trade . . . .") (Stevens, J., concurring in part and dissenting in part).

Rubber Co., 568 F.3d 1180, 1186 (10th Cir. 2009) (quotations omitted). The writ should issue "only when the district court has acted wholly without jurisdiction or so clearly abused its discretion as to constitute usurpation of power." *Id.* (quotations omitted). Five factors guide the Court:

> (1) whether the party has alternative means to secure relief; (2) whether the party will be damaged in a way not correctable on appeal; (3) whether the district court's order constitutes an abuse of discretion; (4) whether the order represents an often repeated error and manifests persistent disregard of federal rules; and (5) whether the order raises new and important problems or issues of law of the first impression.

Id. at 1187 (quotations omitted). None weighs in the government's favor.

As to the first two factors, the government contends that it has no alternative means to secure relief and will be damaged in a way not correctable on appeal because the district court's order will permit "evidence and argument on defenses the law forbids," and the district court will "instruct the jury on a rule that does not apply." Br. 54. But these arguments should be given little weight, as they will always be present when the government disagrees with a pretrial ruling in a criminal case about the admissibility of evidence, the propriety of arguments, and the correct instructions to the jury—decisions that are not subject to mandamus review other than in the most limited circumstances. *See, e.g.*, *Will v. United*

States, 389 U.S. 90, 98 (1967) ("[T]his Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal."); *Farnsworth*, 456 F.3d at 400-03; *Lavallee*, 61 F. App'x at 632; *United States v. Carrigan*, 804 F.2d 599 (10th Cir. 1986); *Margiotta*, 662 F.2d at 134 n.8.

These first two factors should also be considered in light of the well-established limits on government criminal appeals. As this Court has observed, "the lack of appellate jurisdiction here is not a mere procedural contingency fortuitously precluding review; on the contrary, the government's right to appeal in this context has been carefully circumscribed by Congress to safeguard important interests." *McVeigh*, 106 F.3d at 333 (quotations omitted). Thus, "mandamus may not be used to circumvent the policies effectuated by the restrictive provisions of § 3731 . . . ." *Id.*; *accord Will*, 389 U.S. at 97.

Next, and more importantly, with respect to whether the district court abused its discretion, "[i]t is not appropriate to issue a writ when the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Cooper Tire*, 568 F.3d at 1187 (quotations omitted). There can be no dispute that the rule of reason question was properly within the district court's

jurisdiction. After all, the government requested a pretrial ruling on exactly the same question. A58, 239. And, far from a "gross abuse of discretion," *Cooper Tire*, 568 F.3d at 1191-92, the district court's decision was entirely correct and amply supported by precedent, as we explain at length below. This was far from an abuse of discretion.[11]

Finally, the district court's ruling presents none of the special circumstances necessary for mandamus. It is not "representative of a persistent disregard among the district courts in [this] circuit for the federal rules or reflect[ing] an error often repeated by them." *See Cooper Tire*, 568 F.3d at 1196. It does not present the type of novel constitutional question that prompted this Court to grant mandamus in an unpublished decision in *In re United States*, 578 F.3d 1195 (10th Cir. 2009). Nor is it a question that evades review. The briefing to date in this case cites several dozen recent decisions from the Supreme Court and Courts of Appeal addressing this issue. The government's extraordinary dissatisfaction with the ruling does not

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[11] Further, the drastic remedy of mandamus is not warranted in cases like this one, involving "substantive issues" that are "complex and difficult" and where "the answer is not easily discerned." *See United States v. Moussaoui*, 333 F.3d 509, 517 (4th Cir. 2003); *see also Cooper Tire*, 568 F.3d at 1193 (lack of clear dividing line between relevant and irrelevant information; "we cannot say with a sufficient degree of certainty that this line was crossed").

create the extraordinary circumstances the writ demands.

B. The District Court's Rule of Reason Decision Was Correct

Even if this Court finds that it has jurisdiction to consider the district court's Rule of Reason Decision, that decision should be affirmed.

In Sherman Act cases, the rule of reason presumptively applies. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). *Per se* liability is appropriate only where the challenged practice (1) fits a *per se* category established by prior precedent, or (2) on its face appears to be one that would always restrict competition and decrease output. *See Cayman Exploration Corp. v. Utd. Gas Pipe Line Co.*, 873 F.2d 1357, 1360 (10th Cir. 1989); *see also Dagher*, 547 U.S. at 5. "The *per se* rule's conclusive presumption that the restraint is unreasonable should not be applied to a challenged practice until 'experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" *Cayman Exploration*, 873 F.2d at 1360 (quoting *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982)). "[C]ondemnation *per se* is an unusual step, one that depends on confidence that a whole category of restraints is so likely to be anticompetitive that there is no point in searching for a potentially beneficial instance." *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir.

1985); *see In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014).

The district court assessed the two standards set out by *Cayman Exploration* and concluded that (1) the Guidelines are not sufficiently comparable to a *per se* category—customer allocation—established by prior precedent, A134-35; and (2) rather than always tending to restrict competition and decrease output, the Guidelines on their face created the potential for increased efficiency, A135. Both findings were correct; both require applying the rule of reason.

1. The Guidelines Do Not Fit a *Per Se* Category

As the district court explained, A134, the confidence needed to find that a particular restraint falls within an established *per se* category cannot be based merely on the labels used by one party, *see Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8 (1979) ("[E]asy labels do not always supply ready answers."); *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1083 (11th Cir. 2016) (mere characterization "as a market allocation agreement does not mean that the *per se* rule applies"). Instead, courts must look to see whether the restraint is, in fact, sufficiently comparable in substance to a category of restraint that prior precedent establishes as *per se* unlawful. *See Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 844 (9th Cir. 1986); *see also Se. Milk*, 739 F.3d at 273. Even when a party

alleges that a restraint fits a *per se* category (as the government has alleged here), courts refuse to apply *per se* treatment if the substance of the restraint does not justify such treatment. *See, e.g.*, *Cayman Exploration*, 873 F.2d at 1360; *Procaps*, 834 F.3d at 1083-84; *Wholesale Grocery*, 752 F.3d at 734-35; *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1012-13 (7th Cir. 2012).

The district court properly looked beyond the government's allegations that the Guidelines were a customer-allocation agreement to examine the substance of the Guidelines against the established case law and in light of the industry. A134-35.

The government, meanwhile, endorsed a curious—and untenable—approach to deciding whether a restraint fits a *per se* category. It repeatedly argued that no analysis of this crucial question is permissible if the Indictment includes an allegation that on its face fits a recognized *per se* restraint. *See* A58, 243. That remains the government's position. *See* Br. 45. Under this view, as long as the government proved that the Guidelines existed (never in dispute here[12]), no

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[12] The government's suggestion that the defense could seek to prove that a different agreement existed, *see* Br. 45, is nonsensical. This is not a situation, as in *United States v. Green*, 592 F.3d 1057, 1068-69 (9th Cir. 2010) and other cases, where there is a dispute as to what the parties agreed. The terms of the agreement

substantive assessment of the restraint by a court would ever be appropriate, and the defense would be precluded from defending the merits of the Guidelines. *See* A58, 243. Put another way, once the government secures an indictment with language tracking a *per se* category,[13] the defense's hands—and the Court's—are tied. *See* Br. 27; A58, 97, 126-27, 132. That is not the law.

a. The Guidelines as a Restraint Do Not Fit the Case Law

Because the *per se* rule is premised on predictability and precedent, a court must determine whether the case law establishes the challenged restraint as *per se* unreasonable. *See Broadcast Music*, 441 U.S. at 10 ("We have never examined a practice like this one before . . . ."); *Procaps*, 845 F.3d at 1084; *Metro Indus.*, 82 F.3d at 844 (plaintiff "does not point to, and we have not found, a single instance in which an arrangement similar to [this] has undergone judicial scrutiny in the Sherman Act context"). The government's attempts to fit the Guidelines into a category of restraints to which the *per se* rule applies have failed for a simple reason: there is no case law on point. A135 ("The government has not identified,

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are set out in a writing endorsed by the parties. A214-15.

[13] Of course, the government never claimed to have explained to the grand jury the distinction between *per se* and rule of reason analysis.

and the Court is not aware of, any case addressing the particular kind of restraint at issue here, or otherwise closely resembling this one.").

To be sure, customer allocation is, in certain forms, *per se* unreasonable. *See, e.g.*, *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 472 (10th Cir. 1990). The district court recognized this. A134. But the district court also recognized that the Guidelines stand apart from, and cannot persuasively be analogized to, customer-allocation cases. A134 (distinguishing "[t]he main forms of customer allocation recognized by prior precedent"). The classic customer-allocation agreement occurs where competitors agree to cede away some defined, pre-existing segment of each other's customers, so that "each [competitor] becomes a monopolist in its own half without concern about competition from the other." Areeda & Hovenkamp, *Antitrust Law*, ¶ 2000b, at 6 (3d ed. 2011). Thus, cases finding customer allocations *per se* unreasonable unfailingly involve the creation of pools of exclusive customers as to whom the assigned competitor can raise prices. *See, e.g.*, *Suntar Roofing,* 897 F.2d at 472 (agreement not to compete for each other's established customers); *United States v. Coop. Theatres of Ohio, Inc.* 845 F.2d 1367, 1371 (8th Cir. 1988) (same); *United States v. Goodman,* 850 F.2d 1473, 1475 (11th Cir. 1988) (same). But in heir location, there are no repeat

customers, each estate and set of heirs being unique. Thus, customer-allocation cases are simply not instructive as to the Guidelines.

Instead, the way for heir location firms to create monopoly allocations would be to agree on exclusive territories, and the government is flat wrong to suggest that doing so "would make little sense in this industry," Br. 35. A naked territorial allocation would have permitted the firms to avoid competition at any stage of the process. With no offsetting integration of resources, the firms could have reduced output, the touchstone of all customer allocations deemed *per se* illegal. Areeda & Hovenkamp, ¶ 2030a, at 218 ("Naked horizontal market division agreements enable the participants to reduce output in their assigned territorial, product, or customer area, thus raising the price above competitive levels."). Such an allocation would have been simple to write up.

Yet that is precisely what the parties to the Guidelines did *not* do. They instead negotiated a complicated agreement that governed a very limited subset of estates and used profit sharing to incentivize efficiency (pooling resources and avoiding duplication).[14] That structure and degree of coordinated continued effort

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[14] The district court correctly emphasized the targeted nature of the Guidelines, A135, as "a restraint in a limited aspect of a market may actually enhance

on individual estates stands in marked contrast to cases finding customer allocation *per se* unlawful, where the parties create and then operate independently within respective fiefdoms. For the same reasons, the cases on which the government primarily relies have no application here:

- In *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994), auto parts dealers used a call-forwarding scheme to geographically allocate customers. Nothing in *Hammes* suggests that the parties worked together on forwarded calls, a fact underscored by the lack of profit-sharing.

- *United States v. Flom* is a bid-rigging case, 558 F.2d 1179, 1183 (5th Cir. 1977) ("Conspiracies between firms to submit collusive, non-competitive, rigged bids are *per se* violations"), and thus not instructive about customer allocation.[15] Even so, there is no suggestion in *Flom* that the selection of winning bidders was keyed to efficient cooperation (again highlighted by the lack of profit-sharing).

The government offers no case finding *per se* illegal an agreement that worked like the Guidelines—only governing the isolated situations where both firms had invested significant resources in the same estate, and one firm could take

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marketwide competition," *NCAA v. Bd. of Regents*, 468 U.S 85, 103 (1984); *see also Broadcast Music*, 441 U.S. at 23. That aspect of the Decision was not predicated, as the government contends, on the raw number of subject estates, Br. 35-36, but on how that number reflected the Guidelines' limited, tailored structure.

[15] Bid-rigging is its own well-recognized category of restraint. *See, e.g.*, *United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992). Whereas a customer soliciting bids is actively seeking the potential transaction, here an heir typically does not even know she is a potential customer for the product (information about a specific estate) until approached by the heir location firm.

the lead in the administration phase to avoid duplication, thereby increasing efficiency. Thus, the district court properly found no assurances from prior decisions that the Guidelines were analogous to customer-allocation agreements that are *per se* unlawful.

b. Heir Location Is a Highly Unusual Industry

The district court correctly found that heir location is a "relatively obscure industry . . . with an unusual manner of operation," and correctly relied on this finding as an additional reason supporting its finding that the Guidelines could not be treated as *per se* unlawful. A135. According to the Supreme Court, that an industry operates in an unusual way can be "critical" to analyzing a restraint's effects on competition. *See NCAA*, 468 U.S at 100-01. Indeed, where a restraint arises in "a novel way of doing business (or an old way in a new and previously unexamined context[)]," subjecting the conduct to *per se* treatment is a "bad idea." *Sulfuric Acid*, 703 F.3d at 1011.

The Supreme Court has also cautioned against "extend[ing] *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458-59 (1966); *see Maricopa*, 457 U.S. at 344. Where

something about the relevant industry undermines confidence and predictability, a court should not apply the *per se* rule. *See Broadcast Music*, 441 U.S. at 10. The district court was on rock-solid legal ground in considering the nature of the industry in reaching its rule of reason decision, and the government is wrong to suggest otherwise.[16]

Heir location presents several highly unusual features: a custom product (information) of value only to a handful of potential customers; which must be developed without the potential customer's knowledge; which is not legally protectable; and the value of which can be destroyed in a moment by its disclosure. The government counters that many businesses, like real estate development (a comparison drawn from a recent news article, not case law), require upfront

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[16] *Maricopa*, one of two cases the government cites on this point, actually demonstrates the correctness of the district court's view. It notes that in earlier decisions the Supreme Court had considered unique aspects of certain industries (public service for state bar associations and ethical norms for engineers) as potential bases for affording different treatment to conduct that otherwise could be *per se* unreasonable. 457 U.S. at 348-49.

The other case cited by the government, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), was decided forty years before *NCAA*, *Maricopa*, and *Broadcast Music*, and addressed an argument about the reasonableness of oil industry prices as fixed, *see id.* at 221-22, not about how the restraint would operate against the structure of the industry.

outlays with the risk of no return. Br. 37. That overlooks that heirs typically do not even realize they are potential customers until contacted by the firms, unlike entities that solicit proposals and bids. It also overlooks that the heir location "product"—information showing that a person stands to inherit from a particular estate—is exceedingly fragile and that its value can be destroyed by its mere revelation; yet that information is not protectable by a legal regime like copyright, trademark or patent law. *See Broadcast Music*, 441 U.S. at 23.

The government relies on a series of cases arising in far more mainstream industries, nothing like heir location: auto parts (*Hammes*), construction (*Suntar Roofing* and *Flom*), product distribution (*Cooperative Theatres*), garbage disposal (*Consolidated Laundries*), industrial garments (*Cadillac Overall Supply*[17]) and health care (*Blue Cross & Blue Shield*[18]).

More fundamentally, whether the Guidelines would have a negative impact on competition is not an academic point: these singular aspects of the industry, coupled with the limited nature of the restraint, called into serious question

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[17] *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir. 1978).

[18] *Blue Cross & Blue Shield Utd. of Wis. v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995).

whether the Guidelines would have the same real-world effect as a true allocation agreement. Indeed, in the Motions the defendants presented the district court with two separate analyses showing that any effect on price from the Guidelines was *de minimis*, and an analysis showing that the Guidelines had pro-competitive effects because they increased the proportion of lower-value estates serviced.[19] A183-86. The district court was fully justified in its skepticism that the economic impact of the Guidelines would be the same as it might have been in a more traditional industry.

* * *

At bottom, the district court's central insight was correct: "[T]his is a rather unique and unusual case. . . . [T]his case does not, in my view, fit like I would like to see cases fit under the Sherman Antitrust Act." A80. That is, the district court properly refused to apply the *per se* rule in the absence of experience with the

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[19] The defendants put forward this information in their initial motion papers below, A154, 183-86; and on reply noted that whether to apply the rule of reason or the *per se* rule could constitute a mixed question of law and fact, suggesting that the Court consider an evidentiary hearing if it wished further development of the record, A263-64. At no point did the government specifically dispute these facts or proffer any to the contrary, even after the district court indicated that it would find that the rule of reason applied, A81-85, and despite filing two lengthy submissions seeking reconsideration of the district court's ruling. If the government had any contrary analysis to offer, it was required to provide it below.

competitive results of this particular restraint.

2. The Doctrine of Ancillary Restraints Requires Rule of Reason Analysis

The district court also held that the Guidelines' "potential for increased efficiency supports application of the rule of reason instead of the *per se* standard." A135. It correctly based this conclusion on its assessment that the Guidelines allowed the firms, having invested significant resources, to integrate their efforts in administering a single estate. A135.

a. Where a Restraint Has the Potential to Increase Efficiency or Output, the Rule of Reason Applies

A court's decision whether to deviate from the rule of reason requires a second, independent step: determining whether the doctrine of ancillary restraints is implicated. *Cayman Exploration*, 873 F.2d at 1360. Where it is, the rule of reason governs. *Polk Brothers*, a seminal case on the doctrine of ancillary restraints, explains the process:

> [T]he *per se* rule is designed for "naked" restraints rather than agreements that facilitate productive activity. . . . A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. If it arguably did, then the court must apply the Rule of Reason to make a more discriminating assessment. . . . A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output.

776 F.2d at 188-89; *see Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744

F.2d 588, 595 (7th Cir. 1984) (rule of reason applies where "arguable . . . that the [] restriction was 'ancillary' to a lawful main purpose") (Posner, J.).

This initial assessment focuses not on whether procompetitive benefits occurred in practice, but on whether such benefits could be anticipated at the time the agreement was formed. *Polk Bros.*, 776 F.2d at 188; *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 775 (8th Cir. 2004). Whether the restraint is ultimately found to be reasonable under a full analysis is a separate, sequential question not presented here. *See Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 n.7 (2d Cir. 2008) (Sotomayor, J., concurring).

The government confuses the issue in contending that the firms could instead have pooled resources "after the heirs are signed . . . without eliminating competition," Br. 43, that most resources were expended before that point, *id.*, and that the Guidelines were not "'an integral part' of productive cooperation," *id.* at 42. These points all go to the merits of reasonableness, and not to whether the rule of reason applies. And by recognizing that the firms pooled resources, the government effectively acknowledges that the Guidelines created the potential for greater productivity or output, regardless of whether that coordination could have occurred in a different, less restrictive way. That potential is plain from the terms

of the Guidelines; moves this case outside the *per se* rule; and mandates a rule of reason analysis (under which the government could still try to prove its theory that the Guidelines' competitive harms outweighed its competitive benefits).

b. The Guidelines Were Designed to Increase Efficiency and Output

The district court found that "[t]he Guidelines provided for the firms to integrate their efforts going forward, specifically in administering the probate process of the estate, which needed to be done only once." A135. This is fully corroborated by the terms of the Guidelines and exposes the government's misstatement that the district court failed to "identify any legitimate collaboration to which the charged allocation could have been ancillary," Br. 43.

On those estates where the firms attempted to sign the same unsigned heir, the first firm to make contact would keep that heir and any remaining unsigned heirs of that estate, and the second firm would receive a portion of the estate proceeds from the heirs covered by the agreement. A214. Profits were apportioned to compensate the first firm for doing the larger share of the work—that is, for finding any unsigned heirs and conducting the administration phase of the work. A214, 282. This is written directly into the document: "the company that does the signing and documenting," i.e., the one "that has more expenses and does more

work[,] gets paid more." A214. Further, previously signed heirs were not subject to the agreement, so that where one firm signed all heirs before the other firm arrived, that firm kept the entire estate. A214, 281. The agreement thus encouraged both firms (1) to locate and sign as many heirs as possible, as quickly as possible, before encountering the other, and (2) to coordinate efforts to bring shared estates through administration as efficiently as possible, A135. The former encouraged competition; the latter created efficiencies (as the district court correctly found).

Because administration occurred only once, having both firms administer their separate heirs separately entailed unnecessary duplication. The Guidelines allowed the firms to pool complementary genealogical research and have only one firm deal with administration of an estate. In the process, the firms not only shared profits, but the risk of loss as well, in the event that the administering firm was unable to complete the estate and no distributions were made. These are hallmarks of an efficient joint venture. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994) ("[T]he efficiencies created by joint ventures . . . [include] risk-sharing, economies of scale, access to complementary resources, and the elimination of duplication and waste.") (quotations omitted); Areeda & Hovenkamp, ¶ 1902a, at 233 ("Horizontal agreements often increase output and

thus are deemed procompetitive, when joint activity reduces the costs or risk facing individual firms . . . .").

The Guidelines also generated potential for additional output. Because each firm has finite resources to locate an indeterminate number of potential estates to solve (i.e., products to create), resources freed from estate administration could be invested elsewhere. Indeed, as we explain above, the Guidelines actually caused the firms to increase their pursuit of smaller, riskier estates. A183-84. That is little surprise, as the Guidelines were specifically designed with that consideration in mind. Although typically the firms shared proceeds 55-45%, "[i]n the case of smaller estates, defined as under $75,000 with no heirs and under $150,000 with known heirs, the fee split will be 2/3 – 1/3 with the company doing the work receiving the larger share." A214; *see* A46-47.

In addition, the Guidelines reduced any incentive that one firm may have had to resort to tortious retaliation against the other by disclosing an estate to heirs, thus "blowing up" the product, that is, taking it off the market.[20] Where that

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[20] Thus, contrary to the government's claims, the defendants do not raise the "age-old cry of ruinous competition," *see* Br. 39, but the recognized doctrine that fending off tortious actions in the marketplace is a legitimate purpose under the Sherman Act. *See* A51-55 (discussing *Avaya, Inc. RP v. Telecom Labs, Inc.*, 838

happened, both firms would discontinue their work; no output would exist; and the heirs may not have been able to perfect a claim on their own.

The government claims that the Guidelines resulted in artificially high contingency fee rates. Br. 40-41. But by nature, agreements like joint ventures are permitted to impose restraints that in other contexts might merit condemnation. *See Dagher*, 547 U.S. at 6 (joint venture's "pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense"); *Sulfuric Acid*, 703 F.3d at 1013. *Polk Brothers* is directly on point. The home goods stores in that case built a joint facility but agreed that each would have the exclusive right to sell certain products. 776 F.2d at 187. That each therefore faced no price competition with respect to the exclusive products was not enough to compel *per se* condemnation in light of the efficiencies of the arrangement. *See id.* at 189-90. Just as here, removing contingency rate competition for a limited subset of heirs is no bar to rule of reason analysis given the overall efficiencies of the Guidelines.

The government's attempt to dispute these obvious efficiencies once again values the words that the government chose to place on the face of the Indictment over the substance of the Guidelines. That "the indictment does not charge an

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F.3d 354, 369-71, 393 (3d Cir. 2016)); A182-83.

allocation agreement ancillary to some productive joint venture," Br. 44; *see also* Br. 43, is a non sequitur. Of course it doesn't. What the Indictment does, however, is describe an agreement whose actual terms would, in practice, function as a productive joint venture to which any customer allocation was ancillary. Similarly, in *Sulfuric Acid*, the plaintiffs claimed that an agreement under which one U.S. and two Canadian acid producers pooled output for U.S. distribution was not a legitimate joint venture but intended merely to eliminate competition. *See* 703 F.3d at 1013. But the Seventh Circuit looked beyond the plaintiffs' characterization of the arrangement, focusing instead on the fact that the venture made available to the Canadian producers a "very extensive U.S. distribution network," thus "enabl[ing] substantial economies in transportation and marketing." *See id.* The district court here correctly recognized that, notwithstanding any negative effect on competition, the Guidelines enabled significant economies in the administration of estates. That alone required rule of reason analysis.

3. The Rule of Lenity Militates Against the *Per Se* Rule in Criminal Cases

The foregoing sets out two independent grounds for rule of reason analysis of the Guidelines. But even should the Court consider the question a close one, the rule of lenity applies in criminal cases to dictate that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quotations omitted). The Supreme Court has acknowledged that the *per se* question is infected by ambiguity: "[O]ur categories of analysis of anticompetitive effect are less fixed than [the] term[inology] . . . tend[s] to make them appear. We have recognized, for example, that there is often no bright line separating *per se* from Rule of Reason analysis . . . ." *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999) (quotations omitted); *see also Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293-94 (1985) (discussing uncertain treatment of group boycotts).

Further, the *per se* rule invalidates, to save judicial resources, some agreements that under a full analysis might have been upheld. *Maricopa*, 457 U.S. at 344; *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980) ("[T]he fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*."). Because judicial economy

rationales should register faintly in the criminal context, a court should decide any disputed inferences regarding a restraint's predicted effects on efficiency and output in favor of the defendant and, as required under the rule of reason, allow a full hearing of the restraint's merits.

Applying the rule of lenity, ambiguity with respect to whether the *per se* rule applies must be resolved in favor of applying the default rule of reason, just as the district court did here. *See* A80.

4. The District Court's Decision Was Procedurally Appropriate

The district court acted well within established procedure in making the Rule of Reason Decision. The government attacks the Decision on the ground that it "go[es] to the ultimate merits," and argues that district courts may not "decide in advance of trial questions that are relevant to guilt or innocence." Br. 45-46. The government further argues that the district court at least may not make such a decision "based on evidence outside the indictment." Br. 46. This argument, however, mischaracterizes the Decision, which merely determined the sorts of evidence and arguments that would be permitted at trial, and the law on which the jury would be instructed. The government itself admits as much in another section of its brief on appeal (when doing so is more compatible with its argument). Br. 54

(admitting in connection with mandamus petition that Rule of Reason Decision meant that certain "evidence and argument" would be allowed at trial, and would impact how the district court "instruct[ed] the jury").

There is nothing at all improper about a district court making a pretrial determination about the evidence and arguments that will be permitted, or about jury instructions. District courts routinely make such decisions in advance of trial, and regularly do so relying on information outside to four corners of an indictment. *See United States v. Meisel*, 875 F.3d 983, 990 (10th Cir. 2017) (district court considered defendant's proffered facts in determining admissibility of alternative perpetrator defense); *United States v. Graham*, 663 F. App'x 622, 623-24 (10th Cir. 2016) (district court correctly required defendant to proffer facts in ruling on admissibility of duress defense).

In any event, the only evidence the district court considered here beyond the Indictment was the Guidelines, which were "essentially undisputed," *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994); *United States v. Brown*, 925 F.2d 1301, 1303-04 (10th Cir. 1991). The government never contested that the Guidelines were the agreement alleged in the Indictment but only asked the district

court not to consider them.[21] A56-57, 97, 239. There was thus nothing improper about the district court's consideration of the Guidelines—nor, had the court considered them, the limited additional facts proffered by the defendants, as to which the government proffered nothing to the contrary—in reaching its Decision.[22]

CONCLUSION

This Court should affirm the district court's order dismissing the Indictment as barred by the statute of limitations. The Court should also dismiss for lack of jurisdiction the appeal of the order applying the rule of reason and should refuse to issue a writ of mandamus; or, in the alternative, affirm that order.

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[21] In its reply on reconsideration below, the government quibbled about whether the Guidelines agreement began before being documented, and when it ended. A128. The district court denied reconsideration, but in any event those facts are immaterial to the rule of reason question because they do not bear on how the agreement was structured.

[22] Even if this Court reaches the Rule of Reason Decision (despite the lack of jurisdiction under Section 3731), and even if this Court were to agree with the government's arguments, the Rule of Reason Decision should not be "reverse[d]," Br. 58, as the government requests, but at most should be vacated without prejudice to the district court reconsidering the question on a fuller record in advance of trial.

Respectfully submitted.

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STATEMENT REGARDING ORAL ARGUMENT

The defendants respectfully request oral argument because this case presents three distinct legal questions regarding the proper application of the statute of limitations in criminal cases, the boundaries of Section 3731 jurisdiction, and the circumstances under which a court in a Sherman Act criminal case can deviate from the rule of reason. Oral argument would materially assist the Court in resolving those questions.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,930 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 2013 with 14-point Times New Roman font.

February 2, 2018

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CERTIFICATE OF SERVICE

I, Jason D. Boren, hereby certify that on February 2, 2018, I electronically filed the foregoing Brief for Kemp & Associates, Inc. and Daniel J. Mannix with the Clerk of the Court of the United States Court of Appeals for the Tenth Circuit by using the CM/ECF System.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

February 2, 2018

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CERTIFICATE OF DIGITAL SUBMISSIONS AND PRIVACY REDACTIONS

I, Jason D. Boren, hereby certify that:

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I certify that the foregoing is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

February 2, 2018

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