No. 14-654

In the Supreme Court of the United States

RONALD SALAHUDDIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible plain error by failing to instruct petitioner's jury that a conviction for conspiracy to obstruct commerce by extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951(a), requires proof of an overt act in furtherance of the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 765 F.3d 329.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2014. The petition for a writ of certiorari was filed on December 2, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to obstruct interstate commerce by means of extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951(a). Pet. App. 7a-8a. The district court sentenced petitioner to one year and one day of imprisonment, to be

followed by two years of supervised release. *Id.* at 8a. The court of appeals affirmed. *Id.* at 1a-38a.

1. Petitioner was the Deputy Mayor for Public Safety in Newark, New Jersey. Pet. App. 3a. He also was a "silent partner" in a demolition business owned by Sonnie Cooper. *Ibid.* In 2006, petitioner met Joseph Parlavecchio, a Newark political operative, to discuss a scheme by which petitioner would use his political influence to steer city demolition contracts to a Newark businessman named Nicholas Mazzocchi in exchange for Mazzocchi's promise to subcontract part of that work to Cooper's demolition business. *Id.* at 4a-5a. Petitioner and Cooper met Mazzocchi several times and "solidified their understanding of the plan." *Id.* at 5a.

In accordance with the scheme, petitioner successfully urged Newark's Demolition Director to award city contracts to Mazzocchi. Pet. App. 5a. On two occasions in 2007, Mazzocchi was awarded demolition contracts. *Id.* at 6a. Both times, Mazzocchi subcontracted part of the work to Cooper's demolition business. *Ibid.* After receiving $5029 from one of those jobs, Cooper gave $5000 to petitioner. *Ibid.*

Petitioner, Cooper, and Mazzocchi subsequently discussed extending their scheme to demolition work on a new arena for the New Jersey Devils hockey team. Pet. App. 6a. Petitioner suggested that he could steer that demolition work to Mazzocchi if Mazzochi would then "subcontract a significant portion of that work to Cooper." *Ibid.* To carry out the scheme, petitioner attempted "to keep the Devils arena work private, rather than having a public bid process." *Ibid.*

Throughout the period during which the conspiracy existed, petitioner "sought and extracted political and charitable contributions from Mazzocchi to help [petitioner] influence the demolition contracting process." Pet. App. 6a. Petitioner advised Mazzocchi to "conceal the source of some of his contributions by having the check come from a secretary or a family member." *Id.* at 7a.

Unbeknownst to petitioner, Mazzocchi had agreed in April 2006 to work with the Federal Bureau of Investigation in order to avoid prosecution for bribery and tax evasion. Pet. App. 4a. Mazzocchi recorded numerous meetings and telephone conversations with petitioner and Cooper, which formed the basis for petitioner's prosecution. *Ibid.*

2. In 2010, petitioner and Cooper were charged with conspiracy to obstruct interstate commerce by extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951(a). Pet. App. 7a. In pertinent part, the Hobbs Act establishes criminal penalties for "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The indictment alleged numerous specific corrupt actions that petitioner had engaged in "[t]o further the conspiracy." Indictment ¶ 17. Petitioner and Cooper also were charged with attempting to violate the Hobbs Act, and with three counts of bribery in violation of 18 U.S.C. 666(a)(B) and 18 U.S.C. 2. Pet. App. 7a.

The case proceeded to trial, where the government "introduced recorded conversations involving [petitioner] and Cooper made by Mazzocchi, documentary

evidence of business records and records of charitable donations, and witness testimony from Mazzocchi and several Newark officials." Pet. App. 7a-8a. At the close of the government's case, petitioner made a general motion for acquittal. 9/26/11 Tr. 13. Petitioner stated that the government had not shown that he had "conspired to extort anything from anyone," but he did not offer any specific objection to the government's evidentiary showing. *Ibid.* The district court reserved judgment on the motion. *Id.* at 14. At the close of all the evidence, petitioner observed that he had reserved his right to move for a judgment of acquittal, but he again did not offer any specific argument supporting his entitlement to that relief. 10/4/11 Tr. 151.

Before delivering the jury instructions, the district court asked the parties whether they had any objection to those instructions. 10/6/11 Tr. 3. Petitioner's counsel stated that he had no objection. *Ibid.* After confirming that "the charge as is written is acceptable to all parties," *ibid.*, the district court instructed the jury. The jury instruction on the Hobbs Act conspiracy count did not identify the performance of an overt act as an element of the offense. *Id.* at 16-18.

The jury found petitioner and Cooper guilty on the conspiracy count, but acquitted them on the remaining charges. Pet. App. 8a, 10a.

3. Petitioner subsequently filed a post-verdict motion for judgment of acquittal or for a new trial. The district court denied that motion. Pet. App. 39a-110a.

As relevant here, petitioner argued that his conspiracy conviction could not stand because the government had not demonstrated that he had "obtain[ed] contributions, future payments and contracts

for Cooper, which constitutes the sine qua non overt act substantiating a charge for conspiracy." Pet. App. 83a-84a (quoting Mot. for J. of Acquittal 11). The district court rejected that challenge. The court explained that petitioner's "concept of an overt act" differed from "what is required under the law" because "[a] conspiracy conviction does not require that the substantive crime, the object of the conspiracy, be completed." *Id.* at 86a. The district court noted the existence of case law "hold[ing] that no overt act is required for a Hobbs Act conspiracy," but the court found no need to "decide this issue" because petitioner had "committed numerous overt acts, such as [his] continued meetings and discussions with Mazzocchi regarding" the scheme. *Id.* at 85a-86a.

The district court subsequently sentenced petitioner to one year and one day of imprisonment, to be followed by two years of supervised release. Pet. App. 8a.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-38a. In his appellate brief, petitioner argued that the district court had erred by failing to instruct the jury that Hobbs Act conspiracy requires proof of an overt act. *Id.* at 9a-10a. Because petitioner "did not object to the jury instruction" or otherwise "raise [that] argument[] * * * before the District Court," the court of appeals reviewed it for plain error. *Id.* at 9a.

The court of appeals concluded that no error had occurred because "the statute imposes no overt act requirement for a Hobbs Act conspiracy." Pet. App. 17a. The court explained that "a line of Supreme Court decisions apply[] the principle that when a conspiracy statute is silent as to whether an overt act is

required, there is no such requirement." *Id.* at 12a. Rather, "[a]bsent an indication otherwise," courts presume that Congress incorporated the common law definition of conspiracy, which does not require commission of an overt act. *Id.* at 11a (citing *Whitfield* v. *United States*, 543 U.S. 209 (2005), *United States* v. *Shabani*, 513 U.S. 10 (1994), *Singer* v. *United States*, 323 U.S. 338 (1945), and *Nash* v. *United States*, 229 U.S. 373 (1913)). Because the Hobbs Act does not "mention[] anything about an overt act," the court "decline[d] to read in an overt-act requirement." *Id.* at 13a.

In challenging the jury instructions given at his trial, petitioner relied in part on two Third Circuit decisions that had stated without analysis that an overt act is an element of a Hobbs Act conspiracy. See Pet. App. 14a-15a. The court of appeals explained that the language in those decisions had "originate[d] from a case * * * which dealt not with Hobbs Act conspiracy, but with" the general conspiracy statute, which expressly requires proof of an overt act. *Id.* at 14a. Because the language had "carelessly" been quoted in the Hobbs Act cases, which "consider[ed] issues wholly unrelated to whether an overt act is required for Hobbs Act conspiracy," the court deemed those statements to be non-binding "dicta." *Ibid.*

The court of appeals also rejected petitioner's invocation of the rule of lenity. Pet. App. 16a. The court found that the rule of lenity was inapplicable because "the language of the statute plainly indicates that an overt act is not required for Hobbs Act conspiracy" under "the principles set forth in *Shabani* and *Whitfield*." *Ibid.* The court of appeals therefore concluded that "the District Court did not err, let alone plainly

err, in leaving [an overt-act] requirement out of the jury instructions." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-16) that a conviction for conspiracy to violate the Hobbs Act, 18 U.S.C. 1951(a), requires proof of an overt act. He further argues (Pet. 6-10) that the courts of appeals disagree on that issue. Petitioner's argument lacks merit and is in direct conflict with this Court's precedents. His claim of a circuit conflict does not warrant review because the overt-act issue was not squarely presented in the cases on which he relies, and the circuits that issued those decisions have recognized that the question presented here remains an open one. In any event, this case is a poor vehicle to consider the issue because petitioner's claim is reviewable only for plain error and petitioner cannot satisfy that standard.

1. a. The court of appeals correctly held that proof of an overt act is not required to establish the crime of conspiracy to violate the Hobbs Act, in violation of 18 U.S.C. 1951(a). Section 1951(a) provides that "whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do * * * shall be fined under this title or imprisoned not more than twenty years, or both." *Ibid.* The text of Section 1951(a) contains no language suggesting that commission of an overt act is an element of the Hobbs Act conspiracy offense.

At common law, proof of an overt act was not required to establish a conspiracy. See, *e.g.*, *United States* v. *Shabani*, 513 U.S. 10, 13-14 (1994) ("We have consistently held that the common law understanding of conspiracy 'does not make the doing of any act

other than the act of conspiring a condition of liability.'") (quoting *Nash* v. *United States*, 229 U.S. 373, 378 (1913)); *Bannon* v. *United States*, 156 U.S. 464, 468 (1895) ("At common law it was neither necessary to aver nor prove an overt act in furtherance of the conspiracy."). It is a "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *Shabani*, 513 U.S. at 13. Accordingly, Congress must be presumed to have incorporated the common law meaning of conspiracy when it enacted Section 1951(a).

That inference is further supported by Congress's inclusion of express overt-act requirements in other conspiracy statutes. For example, the general conspiracy statute provides in pertinent part that, "[i]f two or more persons conspire * * * to commit any offense against the United States * * * and *one or more of such persons do any act to effect the object of the conspiracy*, each shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. 371 (emphasis added). Many other criminal conspiracy statutes likewise expressly require proof of an overt act. See, *e.g.*, 18 U.S.C. 1201(c) (conspiracy to kidnap); 18 U.S.C. 1511(a)(1) (conspiracy to obstruct enforcement of criminal laws with the intent to facilitate illegal gambling); 18 U.S.C. 2153(b) (conspiracy to obstruct national defense activities). The inclusion of overt-act requirements in those statutes indicates that Congress states its intent expressly when it seeks to deviate from the common law meaning of a conspiracy offense. See *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least 22 other

current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so."). Because the Hobbs Act "makes no mention of a required act," the court of appeals correctly "decline[d] to read in an overt-act requirement." Pet. App. 13a.[1]

b. In holding that conspiracy under the Hobbs Act does not require proof of an overt act, the court of appeals correctly applied this Court's precedents. In a series of cases, this Court has declined to require an overt act when a statute criminalizing conspiracy does not "expressly make the commission of an overt act an element of the conspiracy offense." *Whitfield*, 543 U.S. at 214. First, in *Nash*, the Court held that the Sherman Act, ch. 647, 26 Stat. 209 (current version at 15 U.S.C. 1 *et seq.*), which contains no express overt-act element, "punishes the conspiracies at which it is aimed on the common law footing." 229 U.S. at 378. The Court recognized that the general conspiracy statute contained an overt-act requirement, but the Court could "see no reason for reading [that requirement] into the Sherman Act" given the textual differences between the two statutes. *Ibid.*

Similarly in *Singer* v. *United States*, 323 U.S. 338 (1945), the Court held that no overt act is necessary to prove a conspiracy to violate the Selective Training

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[1] Petitioner suggests (Pet. 10 n.3) that the government argued in *United States* v. *Manzo*, 636 F.3d 56 (3d Cir. 2011), that Hobbs Act conspiracy requires an overt act. That is incorrect. The government's brief in *Manzo* stated that "[a] Hobbs Act conspiracy requires the Government to prove an agreement to commit the substantive offense." U.S. Appellant Br. at 11, *Manzo*, *supra* (No. 10-2489). At no point in the *Manzo* proceedings did the government suggest that an overt act is an element of a Hobbs Act conspiracy. See Gov't C.A. Br. 75 n.16.

and Service Act of 1940, ch. 720, 54 Stat. 885 (current version at 50 U.S.C. App. 301 *et seq.*). *Singer*, 323 U.S. at 340. The statute made it a crime to evade selective service registration "or conspire to do so" in several different ways. *Ibid.* The Court interpreted that language to incorporate the common law definition of conspiracy, and it held that "[t]he section does not require an overt act for the offense of conspiracy." *Ibid.*

In *Shabani*, the Court likewise held that the drug conspiracy statute, 21 U.S.C. 846, does not require proof of an overt act because the text lacks express language to that effect. 513 U.S. at 13. The Court explained that "*Nash* and *Singer* give Congress a formulary: by choosing a text modeled on § 371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, it dispenses with such a requirement." *Id.* at 14 (internal quotation marks and citation omitted). The Court explained that it had "not inferred [an overt-act] requirement from congressional silence in other conspiracy statutes," *id.* at 13, and it faulted the lower court for interpreting the drug conspiracy statute in the same way as the general conspiracy statute while "ignor[ing] the textual variations between the two provisions," *id.* at 15.

The Court reaffirmed that analysis in *Salinas* v. *United States*, 522 U.S. 52 (1997), which concerned the conspiracy offense in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d). The Court noted that the statute contained "no requirement of some overt act or specific act, * * *, unlike the general conspiracy provision." 522 U.S. at 63. The Court therefore interpreted "[t]he RICO

conspiracy provision" to be "more comprehensive than the general conspiracy offense in § 371." *Ibid.*

Most recently, in *Whitfield*, this Court applied the same mode of analysis in holding that the money-laundering conspiracy statute, 18 U.S.C. 1956(h), does not require proof of an overt act. 543 U.S. at 213. The Court explained that the decisions in *Nash* and *Singer* "provide[] clear and predictable guidance to Congress" that it must include an express overt-act requirement if it wishes to depart from the common law understanding of conspiracy. *Id.* at 216. The Court rejected the defendant's argument that Congress had intended the money-laundering conspiracy statute to incorporate the overt-act requirement from the general conspiracy statute, explaining that "[m]ere use of the word 'conspires' surely is not enough to establish the necessary link between these two separate statutes." *Id.* at 215. Instead, the Court followed the "governing rule for conspiracy statutes" that, if "the text [of the statute] does not expressly make the commission of an overt act an element of the conspiracy offense, the Government need not prove an overt act to obtain a conviction." *Id.* at 214.

Because the Hobbs Act does not expressly require an overt act to commit the offense of conspiracy, the court of appeals correctly followed *Nash*, *Singer*, *Shabani*, *Salinas*, and *Whitfield* in declining to read an overt-act requirement into the statute.

c. Petitioner's contrary arguments lack merit. Petitioner contends (Pet. 11) that "[t]he most logical interpretation of Section 1951(a)'s two-word reference to a conspiracy offense is that Congress intended to incorporate the then-existing requirements of the general federal conspiracy standard [in 18 U.S.C.

371], including proof of an overt act." This Court rejected a similar argument in *Whitfield*, explaining that "[m]ere use of the word 'conspires' * * * is not enough to establish the necessary link" between the general conspiracy statute and other conspiracy offenses. 543 U.S. at 215. Instead of presuming that Congress intended to incorporate the elements of the general conspiracy offense in a statute that omits an overt-act requirement, the Court has drawn precisely the opposite inference, citing the textual variation as evidence that Congress "knows how to impose [an overt-act] requirement when it wishes to do so." *Id.* at 216; see *Shabani*, 513 U.S. at 14 ("In light of th[e] additional element [of an overt act] in the general conspiracy statute, Congress' silence in [other conspiracy statutes] speaks volumes.").

Petitioner suggests (Pet. 12-15) that the Hobbs Act conspiracy offense can be distinguished from the conspiracy statutes this Court has previously held do not require proof of an overt act. Petitioner observes (Pet. 13) that, rather than creating a "standalone" conspiracy crime, the Hobbs Act "creates a conspiracy offense through the inclusion of a two-word phrase ('or conspires') in the sentence that establishes the substantive offense." According to petitioner (Pet. 14), that structure shows that Congress did not intend to "dispense with a well-established element of a federal conspiracy offense."

Petitioner's argument contradicts this Court's analysis in *Singer*, which held that conspiracy to violate the Selective Training and Service Act does not require proof of an overt act. Like the Hobbs Act, the Selective Training and Service Act prohibits conspiracy by including the operative language "in the sen-

tence that establishes the substantive offense," Pet. 13, rather than by creating a standalone conspiracy offense. Thus, just as the Hobbs Act makes it a crime to "obstruct[], delay[], or affect[] commerce * * *, by robbery or extortion * * * *or conspire[] so to do*," 18 U.S.C. 1951(a) (emphasis added), the Selective Service and Training Act makes it a crime to, *inter alia*, "evade registration or service * * * *or conspire to do so*," *Singer*, 323 U.S. at 339-340 (quoting 50 U.S.C. 311) (emphasis added). The Court in *Singer* understood the Selective Training and Service Act to "punish[] conspiracy 'on the common law footing,'" and it declared that "[t]he section does not require an overt act for the offense of conspiracy." *Id.* at 340 (quoting *Nash*, 229 U.S. at 378). Petitioner offers no reason why the Hobbs Act—which uses the same sentence structure—should be interpreted in a fundamentally different way.

Finally, petitioner's reliance on the rule of lenity (Pet. 15-16) is misplaced. The rule of lenity "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of [a statute], such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute." *Chapman* v. *United States*, 500 U.S. 453, 463 (1991) (internal quotation marks, brackets, and citation omitted). The rule of lenity is inapplicable here because "settled principle[s] of statutory construction" demonstrate that Congress did not require proof of an overt act to establish the crime of Hobbs Act conspiracy. *Shabani*, 513 U.S. at 13; see *id.* at 17 (rejecting defendant's reliance on the rule of lenity); *Salinas*, 522 U.S. at 66 (same).

2. Petitioner contends (Pet. 6-10) that there is a circuit split on the question whether an overt act is a required element of a Hobbs Act conspiracy. But only two courts of appeals have expressly considered that issue after adversarial briefing by the parties, and both have concluded that no overt act is necessary. See Pet. App. 10a-16a; *United States* v. *Pistone*, 177 F.3d 957, 960 (11th Cir. 1999).[2] As petitioner observes (Pet. 7-9), the Fifth, Sixth, and Seventh Circuits have occasionally stated without analysis that an overt act is an element of Hobbs Act conspiracy. Decisions in those circuits have not been consistent, however, and petitioner cites no decision in which one of those courts has reversed a Hobbs Act conspiracy conviction for failure to prove an overt act.[3] Those courts likely

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[2] Other courts of appeals have stated that the government need not prove an overt act to sustain a Hobbs Act conspiracy conviction, although the issue does not appear to have been in dispute in those cases. See, *e.g.*, *United States* v. *Monserrate-Valentin*, 729 F.3d 31, 62 (1st Cir. 2013); *United States* v. *Ocasio*, 750 F.3d 399, 410 n.12 (4th Cir. 2012), cert. granted on unrelated question, No. 14-361 (Mar. 2, 2015); *United States* v. *Clemente*, 22 F.3d 477, 480 (2d Cir.), cert. denied, 513 U.S. 900 (1994).

[3] In all but one of the decisions that petitioner cites, the defendants' conspiracy convictions were affirmed. See *United States* v. *Box*, 50 F.3d 345, 348-353, 360 (5th Cir.), cert. denied, 516 U.S. 918 (1995), and 516 U.S. 1049 (1996); *United States* v. *Stephens*, 964 F.2d 424, 427-429, 437 (5th Cir. 1992); *United States* v. *Hickman*, 151 F.3d 446, 455 (5th Cir. 1998); *United States* v. *Benton*, 852 F.2d 1456, 1469 (6th Cir.), cert. denied, 488 U.S. 993 (1988); *United States* v. *Butler*, 618 F.2d 411, 416-417 (6th Cir.), cert. denied, 447 U.S. 927 (1980); *United States* v. *Stodola*, 953 F.2d 266, 270-273 (7th Cir.), cert. denied, 506 U.S. 834 (1992); *United States* v. *Tuchow*, 768 F.2d 855, 869-870, 875 (7th Cir. 1985). In the remaining case, the defendant's conviction was reversed for reasons unrelated to an overt-act requirement. See *United States* v. *Richardson*,

will conform their analysis to this Court's precedents in any case where the overt-act issue is squarely presented, just as the Third Circuit did in this case when it rejected dicta from prior decisions. See Pet. App. 14a.

Petitioner asserts that the Fifth Circuit "has time and again" stated that Hobbs Act conspiracy requires proof of an overt act. Pet. 7-8 (citing, *inter alia*, *United States* v. *Stephens*, 964 F.2d 424 (5th Cir. 1992)). In its earliest decision discussing that issue, however, the Fifth Circuit interpreted the predecessor to the Hobbs Act to "*not* require an overt act to complete the offense," likening the statute to "the one in the Singer case." *Ladner* v. *United States*, 168 F.2d 771, 773 (1948) (emphasis added); see *United States* v. *Pascacio-Rodriguez*, 749 F.3d 353, 360-364 & n.45 (5th Cir. 2014) (including Hobbs Act in list of "federal statutes that deal with conspiracies * * * that * * * do not" require an overt act). The Fifth Circuit likely will follow *Ladner* in any future case in which this discrepancy is brought to its attention. See *Boyd* v. *Puckett*, 905 F.2d 895, 897 (5th Cir.) ("Our rule in this circuit is that where holdings in two of our opinions are in conflict, the earlier opinion controls and constitutes the binding precedent in this circuit."), cert. denied, 498 U.S. 988 (1990).

The Sixth and Seventh Circuits have similarly been inconsistent when listing the elements of Hobbs Act conspiracy. Petitioner cites several decisions stating without any analysis that an overt act is an element of

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596 F.2d 157, 164 (6th Cir. 1979). Petitioner cites no case, and we are aware of none, in which a Hobbs Act conspiracy conviction has been reversed for failure to prove an overt act in furtherance of the conspiracy.

the offense. See Pet. 8-9. Both circuits have more recently stated, however, that it is an open question whether Hobbs Act conspiracy requires an overt act. See *United States* v. *Rogers*, 118 F.3d 466, 474 n.8 (6th Cir. 1997) (noting that Sixth Circuit precedent has not been consistent on this point, and declining to resolve the issue); *United States* v. *Corson*, 579 F.3d 804, 810 n.† (7th Cir. 2009) (explaining that Seventh Circuit cases "list[ing] an overt act as an element, without discussion of the issue," are inconsistent with decisions from other circuits, and declining to "consider whether proof of an overt act was required" when defendant did not challenge jury instructions that omitted any reference to an overt act), cert. denied, 539 U.S. 997 (2010). Because the Sixth and Seventh Circuits appear willing to consider in an appropriate case whether Hobbs Act conspiracy requires proof of an overt act, the existence of inconsistent decisions within those circuits provides no basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

When the issue is squarely presented in a future case, the Fifth, Sixth, and Seventh Circuits likely will hold that a conviction for Hobbs Act conspiracy does not require proof of an overt act. In all of those jurisdictions, references to the purported need for an overt act have been incorporated into Hobbs Act case law through citations to cases that involved *other* conspiracy statutes. In the Fifth Circuit, the overt-act language originated in decisions concerning the general conspiracy statute, which expressly requires proof of an overt act. See *United States* v. *Villarreal*, 764 F.2d

1048, 1051 (5th Cir.) (citing *United States* v. *Lyons*, 703 F.2d 815, 822 (5th Cir. 1983), which concerned conspiracy under 18 U.S.C. 371), cert. denied, 474 U.S. 904 (1985). In the Sixth and Seventh Circuits, the overt-act language was borrowed from decisions concerning the drug conspiracy statute, 21 U.S.C. 846, which this Court subsequently held did *not* require proof of an overt act. See *United States* v. *Butler*, 618 F.2d 411, 414 (6th Cir.) (citing *United States* v. *Williams*, 503 F.2d 50, 54 (6th Cir. 1974), which involved the drug conspiracy statute), cert. denied, 447 U.S. 927 (1980), and 449 U.S. 1089 (1981); *United States* v. *Tuchow*, 768 F.2d 855, 869 (7th Cir. 1985) (citing *United States* v. *Mayo*, 721 F.2d 1084 (7th Cir. 1983), and *United States* v. *Roman*, 728 F.2d 846 (7th Cir.), cert. denied, 466 U.S. 977 (1984)—both of which concerned the drug conspiracy statute).

Moreover, nearly all of the decisions petitioner cites were issued before *Shabani* and *Whitfield*, which set forth a clear rule of construction that directly applies to Hobbs Act conspiracy. As the Sixth Circuit recently recognized in holding that the wire-fraud conspiracy statute does not require proof of an overt act, "prior decisions requiring [such] proof * * * cannot be read to contradict the Supreme Court's guidance on this subject." *United States* v. *Rogers*, 769 F.3d 372, 381 (2014).[4] This Court's review therefore is not warranted at this time.

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[4] The court in *Rogers* observed that the Committee Commentary to Sixth Circuit Pattern Criminal Jury Instruction 3.01A "instruct[s] district courts to delete all references to overt acts in pattern instructions involving statutes that contain their own separate conspiracy provisions that do not require an overt act,

3. Finally, this case would not be a suitable vehicle for addressing the question whether Hobbs Act conspiracy requires proof of an overt act. Because petitioner did not object to the jury instructions listing the elements of Hobbs Act conspiracy, his claim is reviewable only for plain error. See Pet. App. 10a; Fed. R. Crim. P. 52(b).[5] To establish reversible plain error, petitioner would have to show (1) that there was an error, (2) that was obvious, (3) that affected his substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); see *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). Petitioner has not alleged that he can satisfy that test, and he clearly cannot.

Even if petitioner could show that the district court erred in failing to instruct the jury that an overt act is an element of Hobbs Act conspiracy, he could not establish his entitlement to relief under the remaining

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including * * * [18 U.S.C.] 1951." 769 F.3d at 381 (emphasis and internal quotation marks omitted).

[5] Petitioner states (Pet. 5) that he "argued that a Hobbs Act conspiracy charge requires proof of an overt act in his motion for acquittal before the case was submitted to the jury." See Pet. 4 (stating that petitioner "argued that a Hobbs Act conspiracy requires proof of an overt act" in his motion for a judgment of acquittal "[f]ollowing the close of the government's case"). That is not correct. Petitioner made a general motion for acquittal at the close of the government's case, stating only that the government had not shown that he "conspired to extort anything from anyone." 9/26/11 Tr. 13. Petitioner did not specifically contend that the government was required to prove an overt act, and he subsequently confirmed that he had no objection to the jury instruction on Hobbs Act conspiracy, which did not identify an overt act as an element. 10/6/11 Tr. 3. Petitioner's challenge to that instruction therefore is reviewable only for plain error.

prongs of the plain-error inquiry. To qualify as "plain," an error must be "clear" or "obvious," *Olano*, 507 U.S. at 734, and not "subject to reasonable dispute," *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). Petitioner has not identified any authoritative holding that the commission of an overt act is an element of Hobbs Act conspiracy—nor could he do so in light of this Court's decisions in *Nash*, *Singer*, *Shabani*, *Salinas*, and *Whitfield*.

Petitioner also has not satisfied the third prong of the plain-error standard, which requires him to "show[] that the [asserted] error was prejudicial," *i.e.*, that it "affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. Petitioner cannot establish that a reasonable jury probably would have acquitted him if it had been instructed that Hobbs Act conspiracy requires proof of an overt act. To the contrary, as the district court observed, the evidence at trial overwhelmingly established that petitioner had committed *many* overt acts in furtherance of the conspiracy. Pet. App. 86a (observing that petitioner had "committed numerous overt acts, such as [his] continued meetings and discussions with Mazzocchi").

Even under conspiracy statutes that *do* impose an overt-act requirement, the overt act need not be criminal or unlawful in itself. "Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975). Petitioner does not dispute that the government proved multiple overt acts in this case, including his meetings with Parlavecchio to discuss dividing the Newark demolition work between Mazzocchi and Cooper; his efforts to persuade the Demolition Director to give work to Mazzocchi; his receipt of

funds from Cooper's subcontracting work; his attempt to steer demolition work for the New Jersey Devils arena to Mazzocchi; and his demands for contributions from Mazzocchi to help him influence the demolition contracting process. Pet. App. 4a-7a. Indeed, petitioner concedes that many of those acts occurred. See Pet. 3 (acknowledging that petitioner "was regularly in contact with Cooper, Parlavecchio, and Mazzocchi"; that the four men "discussed an arrangement under which Mazzocchi's company would obtain demolition jobs from Newark in exchange for using" Cooper's company as a subcontractor; that petitioner "ask[ed] Newark's Demolition Director to give work to Mazzocchi's company"; and that petitioner "sought political and charitable donations from Mazzocchi").

Notwithstanding that evidence, petitioner asserts (Pet. 2) that "the absence of an overt act requirement likely played a determinative role in the jury's decision to convict" because petitioner was acquitted on "three substantive Hobbs Act violations." But "[i]t is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy"; rather, "[t]he function of the overt act in a conspiracy prosecution is simply to manifest that the conspiracy is at work." *Yates* v. *United States*, 354 U.S. 298, 334 (1957) (internal quotation marks omitted), overruled on other grounds by *Burks* v. *United States*, 437 U.S. 1 (1978). Petitioner makes no meaningful effort to dispute that the conspiracy was at work in this case.

Finally, petitioner cannot show that the asserted error, even if prejudicial, "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," *Olano*, 507 U.S. at 736 (citation omit-

ted). A "plain error affecting substantial rights does not, without more, satisfy [that] standard." *Id.* at 737. For that reason, too, petitioner would not be entitled to relief. This Court's review therefore is not warranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2015

[6] On March 2, 2015, this Court granted the petition for a writ of certiorari in *Ocasio* v. *United States*, No. 14-361, which presents the question whether conspiracy to commit extortion in violation of the Hobbs Act requires the conspirators to agree to obtain property from someone outside the conspiracy. This case does not implicate the issue being reviewed in *Ocasio* because petitioner and Cooper conspired to obtain property from Mazzocchi, who was cooperating with the government and was not charged as part of the scheme.