NO. 14-361

In the
Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

BRIEF FOR PETITIONER

DANIEL S. EPPS
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 384-7876

ASHLEY C. PARRISH
ETHAN P. DAVIS
Counsel of Record
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500
edavis@kslaw.com

*Counsel for Petitioner**

* additional counsel listed on inside cover

June 1, 2015

Additional counsel for petitioner:

DAVID M. BARNES
DAVID P. MATTERN
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

MEGAN R. NISHIKAWA
KING & SPALDING LLP
101 Second Street, Suite 2300
San Francisco, CA 94105
(415) 318-1200

JAMES P. SULLIVAN
KING & SPALDING LLP
401 Congress Ave., Suite 3200
Austin, TX 787801
(512) 457-2000

QUESTION PRESENTED

The Hobbs Act defines extortion, in relevant part, as "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b)(2).

The question presented is:

Does a conspiracy to commit extortion require that the conspirators agree to obtain property from someone outside the conspiracy?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
INTRODUCTION 1
OPINIONS BELOW 4
JURISDICTION 4
STATUTORY PROVISIONS INVOLVED 4
STATEMENT OF THE CASE 5
A. Statutory Background 5
B. Factual Background 8
C. Trial and Conviction 9
D. The Decision Below 14
SUMMARY OF ARGUMENT 16
ARGUMENT 20
I. To Establish A Hobbs Act Conspiracy, The Government Must Prove That Two Or More People Agreed Among Themselves To Obtain Property From Another. 20
A. The Statute's Plain Text Requires An Agreement To Obtain Property From Someone Outside The Conspiracy. 21
B. Context And Structure Confirm What The Statute's Plain Text Requires. 23
C. Under The Correct Interpretation Of The Hobbs Act, Petitioner's Conviction Cannot Stand. 26

II. The Fourth Circuit's Reasons For Departing From The Hobbs Act's Plain Terms Are Unpersuasive. 29

A. The Fourth Circuit's Reasoning Is Inconsistent With The Statute's Plain Text. 29

B. The Fourth Circuit's Reasoning Is Inconsistent With Basic Interpretive Principles. 31

1. The Fourth Circuit's Approach Creates A Broad Prohibition On Paying Bribes. 31

2. The Fourth Circuit's Approach Turns Every Act Of Receiving A Bribe Into A Conspiracy To Commit Extortion. 37

3. The Fourth Circuit's Approach Finds No Support In The History Of The Hobbs Act. 39

C. The Fourth Circuit's Approach Is Inconsistent With Principles Of Federalism And Lenity. 42

III. The Fourth Circuit's "Active Participant" Test Is Unworkable And Vague. 46

CONCLUSION 51

TABLE OF AUTHORITIES

Cases

Bilski v. Kappos,
561 U.S. 593 (2010) 25

Bond v. United States,
134 S. Ct. 2077 (2014) 43

Brogan v. United States,
522 U.S. 398 (1998) 48, 50

Burrage v. United States,
134 S. Ct. 881 (2014) 21

Callanan v. United States,
274 F.2d 601 (8th Cir. 1960) 38

Callanan v. United States,
364 U.S. 587 (1961) 38

Carter v. United States,
530 U.S. 255 (2000) 20

Cleveland v. United States,
531 U.S. 12 (2000) 43

Commonwealth v. Kirk,
141 Pa. Super. 123 (1940) 40

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 31

Dominus Rex v. Kinnersley & Moore,
93 E.R. 467 (K.B. 1718) 40

Dowling v. United States,
473 U.S. 207 (1985) 22

Duncan v. Walker,
533 U.S. 167 (2001) 29

Evans v. United States,
504 U.S. 255 (1992) ..... passim

Fischer v. United States,
529 U.S. 667 (2000) 35, 44

Gozlon-Peretz v. United States,
498 U.S. 395 (1991) 25

Grayned v. City of Rockford,
408 U.S. 104 (1972) 21

Green v. United States,
365 U.S. 301 (1961) 50

Gregory v. Ashcroft,
501 U.S. 452 (1991) 43

Grunewald v. United States,
353 U.S. 391 (1957) 45

Iannelli v. United States,
420 U.S. 770 (1975) 37, 39

In re Stephens,
203 N.Y.S. 500 (App. Div. 1924) 41

Jones v. United States,
529 U.S. 848 (2000) 43

Kolender v. Lawson,
461 U.S. 352 (1983) 48

Krulewitch v. United States,
336 U.S. 440 (1949) 45

McCormick v. United States,
500 U.S. 257 (1991) 32, 36

Mississippi ex rel. Hood v. AU Optronics Corp.,
134 S. Ct. 736 (2014) 20

N.Y. Tel. Co. v. N.Y. State Dep't of Labor,
440 U.S. 519 (1979) 33

Octane Fitness, LLC v.
ICON Health & Fitness, Inc.,
134 S. Ct. 1749 (2014) 20

People v. Braun,
303 Ill. App. 177 (1940) 40

People v. Kay,
105 N.Y.S.2d 687
(App. Div. 1951) (per curiam)..... 41

People v. Olson,
15 N.Y.S. 778 (Sup. Ct. 1891) 41

Pinkerton v. United States,
328 U.S. 640 (1946) 38

Ratzlaf v. United States,
510 U.S. 135 (1994) 29

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 24

Rodriguez v. United States,
480 U.S. 522 (1987) (per curiam) 33

Sabri v. United States,
541 U.S. 600 (2004) 35

Sandifer v. United States Steel Corp.,
134 S. Ct. 870 (2014) 20

Scheidler v. Nat'l Org. for Women, Inc.,
537 U.S. 393 (2003) 6, 7, 36, 45

Scheidler v. Nat'l Org. for Women, Inc.,
547 U.S. 9 (2006) 7, 36, 42

Sekhar v. United States,
133 S. Ct. 2720 (2013) ..... passim

Skilling v. United States,
561 U.S. 358 (2010) 28, 45, 48, 49

Smith v. Goguen,
415 U.S. 566 (1974) 21

Sorich v. United States,
129 S. Ct. 1308 (2009) 49, 50

The King v. Kimberty & Mary North,
83 E.R. 297 (K.B. 1661) 40

United States v.
Oakland Cannabis Buyers' Coop.,
532 U.S. 483 (2001) 36

United States v. Brock,
501 F.3d 762 (6th Cir. 2007) ..... passim

United States v. Culbert,
435 U.S. 371 (1978) 5, 47, 49

United States v. Enmons,
410 U.S. 396 (1973) 36

United States v. Inadi,
475 U.S. 387 (1986) 37

United States v. Kenny,
462 F.2d 1205 (3d Cir. 1972) 6

United States v. Lane,
474 U.S. 438 (1986) 27

United States v. Lanier,
520 U.S. 259 (1997) 36

United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, 315 U.S. 521 (1942) 41

United States v. O'Grady, 742 F.2d 682 (2d Cir. 1984) (en banc) 6

United States v. Santos, 553 U.S. 507 (2008) 35

United States v. Spitler, 800 F.2d 1267 (4th Cir. 1986) 12, 13, 20, 48

United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999) 35, 36

Utility Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014) 20, 43

Wilkie v. Robbins, 551 U.S. 537 (2007) 39

Yates v. United States, 135 S. Ct. 1074 (2015) 24, 42

Statutes

18 U.S.C. § 201 33

18 U.S.C. § 210 34

18 U.S.C. § 212 34

18 U.S.C. § 226 34

18 U.S.C. § 666 ..... passim

18 U.S.C. § 1951 ..... passim

18 U.S.C. § 1951 (1976 ed.) 47

18 U.S.C. § 3663 14

18 U.S.C. § 3771 24

28 U.S.C. § 1254 4

4 Commissioners of the Code,
Penal Code of the State of New York § 613
(1865) (reprint 1998) 41

Act of July 3, 1946,
ch. 537, 60 Stat. 420 5

Md. Crim. Code § 9-201 44

Pub. L. No. 98-473, 98 Stat. 1837
(Oct. 12, 1984) 26

Regulations

Fed. R. Crim. P. 8 27

Fed. R. Evid. 801 37

Other Authorities

3 R. Anderson,
Wharton's Criminal Law and Procedure
(1957) 6

4 W. Blackstone,
Commentaries on the Laws of England
(1765) 6

91 Cong. Rec. 11,910 (1945)
(remarks of Rep. Springer) 42

91 Cong. Rec. 11,912 (1945)
(remarks of Rep. Jennings) 42

Brown, George D.,
Should Federalism Shield Corruption? —Mail Fraud, State Law and Post-Lopez *Analysis*,
82 Cornell L. Rev. 225 (1997) 44

Gawey, John S.,
The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes,
87 Notre Dame L. Rev. 383 (2011) 6

H.R. Rep. No. 79-238 (1945) 42

Letter from Raymond J. Dearie, U.S. Attorney for the Eastern District of New York, to the U.S. Court of Appeals for the Second Circuit (Jan. 21, 1983) 7

Oxford English Dictionary (1933) 22

Webster's New International Dictionary (2d ed. 1934) 22

INTRODUCTION

This case requires the Court to determine the proper scope of federal prosecutors' authority under the Hobbs Act, 18 U.S.C. § 1951. The Act forbids both extortion and conspiracy to commit extortion and defines extortion, in relevant part, as the obtaining of property "from another, with his consent, . . . under color of official right." *Id.* § 1951(b)(2). The government interprets that provision very broadly. In its view, when a public official commits extortion by wrongly using his authority to obtain property from a private citizen with the citizen's consent, the public official is also guilty of the further crime of "conspiring" with the citizen to extort that citizen's own property. Petitioner challenges the government's expansive interpretation and argues that, under the statute's plain text, a Hobbs Act conspiracy requires that the conspirators agree among themselves to wrongly obtain property from someone *outside* the ring of conspiracy.

Petitioner Samuel Ocasio is a former Baltimore police officer who was accused of agreeing with owners of a local repair shop to refer damaged cars to the shop in exchange for cash payments. Under this Court's precedent, petitioner's conduct constitutes extortion "under color of official right." *See Evans v. United States*, 504 U.S. 255, 268 (1992). That is because, under the government's allegations, petitioner obtained property from the repair shop owners with their consent when he purportedly accepted payments knowing that they were made in exchange for official acts. *See id.* Not content with

prosecuting petitioner for extortion, however, the government sought to press for additional advantages by bringing a separate count for conspiracy to commit extortion under color of official right. *See* 18 U.S.C. § 371. The government's theory—accepted by the courts below—was that petitioner conspired *with* the owners of the repair shop to extort money *from* the owners of the repair shop. In other words, the repair shop owners were both petitioner's co-conspirators and the victims of their own conspiracy. Petitioner was therefore convicted of conspiring with the repair shop owners to obtain property "from another" even though no "another" was involved.

The government's theory is at war with the statutory text and basic principles of interpretation. When a public official and a private citizen enter a wrongful agreement to exchange property between themselves, no fluent speaker of English would say that they have collectively agreed to obtain property "from another," as the statute requires. The government's interpretation turns the Hobbs Act into a sweeping federal tool for policing the *paying* of bribes, on the view that to bribe an official is to conspire with that official to victimize oneself. It transforms every act of *receiving* a bribe into a conspiracy to commit extortion, eliminating the distinction between a conspiracy and the underlying substantive offense. And it disregards the carefully crafted network of state and federal statutes that have long governed this area of law.

The court of appeals should have rejected the government's attempts to expand its authority far

beyond what that text can reasonably bear. Instead, the Fourth Circuit disregarded the rule of lenity and accepted the government's adventurous reading. Then, seeking to avoid the least desirable consequences of its overly broad interpretation, the Fourth Circuit applied an invented exception to the Hobbs Act that limits punishment only to those who "actively participate" in an act of extortion. That made-up standard is unworkable and vague. Every payment of a bribe is, after all, an act of "active participation" in a bribery scheme. Accordingly, if the exception is to mean anything, something more than a mere payment of a bribe is needed to constitute "active participation." But what that something might be, the Fourth Circuit did not and could not explain, precisely because "active participation" is nowhere to be found in the statute. This Court should reverse the Fourth Circuit's decision allowing this expansion of federal prosecutorial authority under the Hobbs Act.

OPINIONS BELOW

The opinion of the court of appeals is reported at 750 F.3d 399, and reproduced at Pet. App. 1–29. The relevant orders of the district court are unreported and reproduced at Pet. App. 30–44.

JURISDICTION

The court of appeals issued its decision on April 29, 2014. Pet. App. 1. A timely petition for rehearing en banc was denied on May 28, 2014. Pet. App. 45. The petition for certiorari was timely filed and granted on March 2, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

> (a) 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.
>
> (b) As used in this section—
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

The government charged petitioner, a former police officer, with conspiracy under the Hobbs Act, accusing him of agreeing *with* two private citizens to extort property *from* those citizens. The Fourth Circuit upheld petitioner's conviction, accepting the government's theory and ruling that the Act requires no proof of an agreement to obtain property from someone outside the conspiracy, so long as the person whose property is obtained "actively participated" in the conspiracy.

A. Statutory Background

Congress enacted the Hobbs Act in 1946 to address acts of robbery and extortion committed by organized labor. *See* Act of July 3, 1946, ch. 537, § 1(c), 60 Stat. 420; *United States v. Culbert*, 435 U.S. 371, 376–77 (1978). The Act imposes criminal liability on "[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). It defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2). Violations are punishable by up to twenty years' imprisonment. *Id.* § 1951(a).

As this Court has observed, the Hobbs Act targets two types of extortion. The first—extortion "under color of official right"—tracks the common-law offense that occurs when *public officials* take money

(or other property) not due to them under the pretense that they are entitled to it by virtue of their office. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003) (citing 4 W. Blackstone, Commentaries on the Laws of England 141 (1765), and 3 R. Anderson, Wharton's Criminal Law and Procedure § 1393, at 790–91 (1957)). The second addresses the problem of private racketeering and organized crime. To that end, the statute "expand[s] the common-law definition of extortion to include acts by *private individuals*," but only when property is obtained through the wrongful use of actual or threatened force, violence, or fear. *Evans*, 504 U.S. at 261 (emphasis added); *see also Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) ("The crime [of extortion] originally applied only to extortionate action by public officials, but was later extended by statute to private extortion.").

This case involves alleged extortion by a public official "under color of official right." As courts and commentators have noted, federal prosecutors have used this provision as a weapon of choice for prosecuting an ever-wider range of conduct by public officials. *See* John S. Gawey, *The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 Notre Dame L. Rev. 383 (2011). Most significantly, in a 1972 decision, the Third Circuit defined extortion broadly to reach what was effectively local bribery affecting interstate commerce. *United States v. Kenny*, 462 F.2d 1205, 1210–12 (3d Cir. 1972). Since that decision, federal prosecutors have treated the Hobbs Act as "'a special code of integrity for public officials.'" *United States v. O'Grady*, 742 F.2d 682, 694 (2d Cir. 1984) (en banc)

(quoting Letter from Raymond J. Dearie, U.S. Attorney for the Eastern District of New York, to the U.S. Court of Appeals for the Second Circuit (Jan. 21, 1983)).

In 1992, in a fractured decision, this Court endorsed an expansive reading of extortion "under color of official right," holding that extortion by a public official is the "rough equivalent of what we would now describe as 'taking a bribe.'" *Evans*, 504 U.S. at 260; *see also id.* at 276 (Kennedy, J., concurring in part and in the judgment); *id.* at 283 (Thomas, J., dissenting). The Court thus concluded that a public official commits extortion under color of official right when he "obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts"—for example, when he accepts a bribe. *Id.* at 268.

In *Evans*'s wake, the Court has consistently resisted calls to further extend the Hobbs Act's reach. The Court has concluded, for example, that merely interfering with someone's property rights does not qualify as "obtaining of property from another." *Scheidler*, 537 U.S. at 409. Threatening or committing physical violence unrelated to extortion falls outside the Hobbs Act's scope. *See Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 16 (2006). And compelling a person to recommend that his employer approve an investment does not constitute "the obtaining of property from another." *Sekhar*, 133 S. Ct. at 2723.

B. Factual Background

Petitioner, Samuel Ocasio, is a former police officer who began his law-enforcement career with nine years of honorable service for the San Juan Police Department in Puerto Rico. JA 76. In 2007, he was hired by the Baltimore Police Department. *See* JA 74–76; JA 181–82. During his time as a Baltimore police officer, petitioner received numerous accolades and letters of commendation; other officers described him as honest and law-abiding. *See, e.g.*, JA 77–82, 185–90.

In 2011, the government charged petitioner with allegedly receiving payments from the owners of an auto repair shop for referring individuals involved in car accidents. Two brothers, Hernan Alexis Moreno Mejia (who went by the surname Moreno) and Edwin Javier Mejia (who went by Mejia), owned and operated the Majestic Auto Repair Shop in Rosedale, Maryland, near Baltimore. Pet. App. 2. Over the course of several years, Moreno and Mejia paid police officers to encourage car-accident victims to send their vehicles to the shop for repair. Pet. App. 5–6. As Moreno explained at trial, police officers are "the first people to go to [accident] scenes" and could effectively route business to Moreno and Mejia that might otherwise have gone elsewhere. JA 97. Referral fees started out at $150 apiece, but eventually reached $300. Pet. App. 6. By 2011, some sixty officers were making referrals to the brothers, accounting for the vast majority of Majestic's business. JA 96–97, 99–100.

In March 2011, the Federal Bureau of Investigation arrested Moreno, Mejia, and seventeen

police officers, including petitioner. JA 28–29. The initial indictment charged a wide-ranging conspiracy in which Moreno and Mejia were the key players linking numerous police officers together. Moreno and Mejia subsequently accepted plea agreements in exchange for cooperating with the government, as did most of the officers, pleading guilty to the government's conspiracy charges. Pet. App. 3.

C. Trial and Conviction

Petitioner, along with another officer, Kelvin Manrich, pleaded not guilty and the two men were tried jointly. None of the specific acts of extortion alleged against petitioner, however, in any way involved Manrich (or vice versa). The two men patrolled different areas of the city and there is no indication that, until their arrests, they had ever even heard of each other. The only justification for the joint trial was that both men were charged with involvement in the same conspiracy.

The superseding indictment charged petitioner with three counts of substantive extortion based on three separate incidents in which he allegedly accepted payments in exchange for referring business to Majestic. JA 41–42; *see also* Pet. App. 3–5. In addition, the government included a separate charge for conspiracy to commit extortion. JA 33, 42 (pleading charge under general conspiracy statute, 18 U.S.C. § 371). The conspiracy charge alleged that petitioner conspired "with Moreno and Mejia to obstruct, delay, and affect commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain under color of official right, money and other property from

Moreno, Mejia, and [the Majestic Repair Shop], with their consent . . . in violation of [the Hobbs Act]." JA 36. The elements of the conspiracy charge were materially identical to the substantive extortion charge, with the government accusing petitioner of conspiring *with* the people who paid him to obtain property *from* the people who paid him.

Consistent with the indictment, the government's theory at trial was that Moreno and Mejia were petitioner's co-conspirators. In its closing argument, for example, the government described the conspiracy as including Moreno and Mejia. The prosecutor told the jury: "You heard from Alex Moreno. You heard from his brother. You heard telephone calls, repeated calls from multiple people discussing the sending of cars in exchange for money. That's all evidence of an agreement." JA 196.

The government fought hard to charge this case as a conspiracy for a reason: The conspiracy charge enabled the government to introduce a great deal of evidence at trial that otherwise would have been inadmissible. In particular, the charge enabled the government to prosecute petitioner and Manrich jointly as co-conspirators, even though there was no indication that they even knew of each other's existence before trial. Charging the case as a conspiracy also enabled the government to present evidence offered to show that petitioner made additional referrals to the repair shop (that is, additional acts of substantive extortion) that were not charged in the indictment, as well as acts committed and statements made by other officers. *See* Pet. App. 18 n.11; *see also* JA 165, 170–71

(admitting evidence that Manrich admitted to being involved in a "conspiracy" and accepting "kickbacks"). The jury also heard extensive evidence about an occasion on which petitioner sent his own car to the shop for repair, and allegations that the repair shop owners fraudulently added damage to his car and then sought reimbursement for repairing that damage from petitioner's insurer, which in turn sought subordination of the claim from Erie Insurance Co. Pet. App. 12–13.

Before the trial court, petitioner repeatedly objected to the conspiracy charge and the government's underlying legal theory. Pet. App. 13–15. Petitioner argued that under the Hobbs Act, a defendant is guilty of conspiracy to commit extortion only if he and another person agree to a scheme to obtain property from "another"—that is, from a person outside the conspiracy. In support, petitioner cited the Sixth Circuit's decision in *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007) (Sutton, J.). *Brock* held that two supposed co-conspirators "did not agree, and could not have agreed, to obtain property from 'another' when no other person was involved—when the property . . . went from one coconspirator . . . to another." *Id.* at 767.

The evidence at trial showed at most that petitioner and the repair shop owners had agreed and exchanged money between themselves; the government offered no evidence that petitioner conspired to obtain property from "another" outside the conspiracy. Accordingly, before trial, petitioner proposed jury instructions directing the jury that it must acquit him if it found that "the only person or

persons from whom [he] conspired to obtain money . . . were also members of the conspiracy." Pet. App. 14 n.9; *see also id.* at 30–31; JA 51–52. The government responded with a motion *in limine* seeking an order "precluding the defense from asserting or suggesting in any jury address that the government is required to prove that the defendants obtained money or property from a non-member of the charged conspiracy in order to prove the charges in this case." JA 57. The district court did not rule on either motion before trial.

At the close of the government's evidence, petitioner moved for a judgment of acquittal, reiterating his arguments under *Brock*. The district court denied the motion, *see* Pet. App. 42; JA 175–79, and concluded that petitioner's arguments were precluded by *United States v. Spitler*, 800 F.2d 1267 (4th Cir. 1986). JA 178–79.

In *Spitler*, a Maryland State Highway Administration official demanded and received "various items of value" from a corporation that performed highway-related services for the state. 800 F.2d at 1269, 1278–79. Russell Spitler, the corporation's vice president, had instructed his employees to accommodate the official's demands and, as a result of that conduct, was charged with conspiring to commit extortion. *Id.* at 1275. On appeal, Spitler argued that he could not be guilty of conspiracy to commit extortion because he had merely acquiesced in the official's extortionate demands. *See id.* The Fourth Circuit rejected that argument and upheld his conviction. In the Fourth Circuit's view, when a person "exhibits conduct more

active than mere acquiescence" in the face of a public official's extortionate demand "he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy." *Id.* at 1276. The court acknowledged that "[t]he degree of activity necessary for a purported victim of extortion to be a perpetrator of it, so that in reality he is not a victim but a victimizer" was a question "of no little significance." *Id.* at 1277 (internal quotation marks and citation omitted). Nonetheless, the Fourth Circuit concluded that it was unnecessary to "paint with a broad brush and declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator." *Id.* at 1278.

Applying *Spitler*, the district court rejected petitioner's arguments based on *Brock*, JA 178–79, as well as petitioner's proposed jury instructions, JA 190. Then, on the final day of trial, Manrich withdrew from the proceedings and pleaded guilty. Pet. App. 15. The district court instructed the jury that because Manrich's acts of extortion were charged as overt acts in furtherance of a common conspiracy, it could consider those acts when deliberating on the conspiracy charge against petitioner. JA 220; *see also* Pet. App. 18 n.11. The court also instructed the jury that it could consider the acts committed and statements made by petitioner's supposed co-conspirators, "even if such acts were done and statements were made in the [petitioner's] absence and without his knowledge." JA 219.

The jury found petitioner guilty on all counts, and the district court sentenced him to eighteen months of imprisonment and three years of supervised release. Pet. App. 15. It further ordered petitioner to make restitution under the Victim and Witness Protection Act, 18 U.S.C. § 3663. The court ordered him to pay $1,500 in restitution to the Baltimore Police Department—$300 for each of five separate acts of referring accident victims to the repair shop owners, including the three acts charged as substantive extortion counts plus two others that were not charged but about which the prosecution submitted evidence at trial. Pet. App. 32–37. Concluding that the fraudulent insurance claim was part of the conspiracy, the court also ordered petitioner to pay $1,870.58 in restitution to Erie Insurance. Pet. App. 15–16.

D. The Decision Below

Petitioner appealed his conviction and sentence. He argued that the district court erred by declining to grant his motion of acquittal on the conspiracy charge, and that his substantive extortion convictions required reversal because of the potential for "spillover prejudice." Ocasio CA4 Br. 20–22, 25–42. He also challenged the legal basis of the restitution award. *Id.* at 22–24, 42–53. In its brief on appeal, the government reiterated its theory that petitioner conspired to extort property from his co-conspirators, telling the Fourth Circuit that petitioner conspired "with the operators of a local automobile repair and towing company, Majestic Auto Repair Shop LLC . . . to obtain cash payments" from those same operators. Gov't CA4 Br. 2.

In a published opinion, the Fourth Circuit affirmed, except that it vacated the restitution award to Erie Insurance. Pet. App. 25–28. The Fourth Circuit reaffirmed the approach it announced in *Spitler* and rejected the Sixth Circuit's holding in *Brock*. Pet. App. 19–25. In reaching that conclusion, the Fourth Circuit acknowledged that *Brock* "focused on the language of the Hobbs Act," reasoning that "an agreement to obtain 'property from another' . . . [means] an agreement to obtain property from someone outside the conspiracy." Pet. App. 22 (quoting *Brock*, 501 F.3d at 767). It also recognized that the textual requirement that the conspirators agree to obtain "'property from another' and do so 'with his consent'" does not "appl[y] naturally to the conspirators' own property or to their own consent." *Id.* (quoting *Brock*, 501 F.3d at 768). Nonetheless, the Fourth Circuit concluded that the Hobbs Act's "from another" language "provides only that a public official cannot extort himself." Pet. App. 23. Accordingly, "a person like Moreno and Mejia, who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme, can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement." Pet. App. 22.

In the Fourth Circuit's view, *Spitler*'s active-participation standard ensures that the "consent" element does not make a conspiracy out of every act of extortion. Pet. App. 23–24. The court described *Spitler* as "recogniz[ing] the extremes of a spectrum of conduct ranging from 'mere acquiescence' (which is not punishable under conspiracy principles) to active solicitation and inducement" (which is). Pet. App.

20–21. Nonetheless, the Fourth Circuit again declined to identify when a payor participates actively enough to transform from an acquiescing victim into a guilty co-conspirator.

SUMMARY OF ARGUMENT

This Court should reverse the Fourth Circuit's decision. It cannot be reconciled with the text and structure of the Hobbs Act, and it is contrary to basic principles of federal criminal law.

I. The Hobbs Act imposes criminal liability on "whoever" conspires to commit "extortion" and defines extortion as the obtaining of property "from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b). The natural and only plausible reading of the statute requires that the alleged conspirators agree among themselves to obtain property "from another"—that is, from someone outside the conspiracy. When the only property that changes hands is between the conspirators themselves—typically, between a public official and the private citizen who pays a bribe—the government has no authority to prosecute for conspiracy. Any fluent speaker of English would agree. If a public official proposes to a private citizen that they agree together to obtain property "from another," it would make no sense for the official to tell the citizen that the "another" he has in mind is that same citizen.

This straightforward reading is confirmed by the Hobbs Act's structure and the context in which the "from another" language appears. The Act imposes liability on "whoever" conspires to obtain property

from "another," making clear that the person who is punished cannot be the same person from whom the property is obtained. Similarly, the statutory requirement that the extortionate payment be "obtained" with the another's "consent" reinforces this reading. When two people merely exchange property between themselves, there is no sense in which they have conspired to obtain their own consent. It makes no sense to say that the victim of the conspiracy (the person who gives up his property) is also a conspirator (the person who agrees to obtain the property). Moreover, giving effect to the "from another" requirement avoids rendering practically irrelevant other federal statutes, such as 18 U.S.C. § 666, that carefully specify the circumstances under which the paying of bribes to state officials is prohibited by federal law.

Under a proper interpretation of the Hobbs Act, petitioner's conviction cannot stand. The government offered no evidence at trial that petitioner conspired with anyone to obtain property "from another." Instead, the government pursued the theory that petitioner conspired with the people who paid him to obtain property from the people who paid him. The district court should have granted petitioner's motion for acquittal or, failing that, the Fourth Circuit should have reversed his conviction.

II. The plain statutory text should have been the beginning and end of this case. Instead, the Fourth Circuit adopted an interpretation of the Hobbs Act that is contrary to the text and unpersuasive. The Fourth Circuit's interpretation effectively ignores the statute's "from another"

language, relying on the outlandish view that to bribe an official is to conspire with that official to victimize oneself. And it assumes that the payor of a bribe can be both the "whoever" who is punished and the "another" from whom property is obtained.

The Fourth Circuit offered no compelling reason to depart from the Hobbs Act's plain text. To the contrary, the relevant canons and available indicia of Congressional intent point in the other direction. For example, the Fourth Circuit's reading would turn every payment of a bribe to a public official into a conspiracy to commit extortion. But this Court has never construed the Hobbs Act to impose criminal liability on bribe *payors*, and nothing in the text of the Hobbs Act suggests that Congress intended that result. Similarly, the Fourth Circuit's interpretation would all but dissolve the distinction between substantive extortion and conspiracy to commit extortion. Every act of extortion under the Hobbs Act requires the victim's "consent," so the government would be able to turn almost every bribery case into a conspiracy, giving the government the benefit of generous evidentiary and joinder rules. And the Fourth Circuit's interpretation runs afoul of the principle that, unless Congress speaks clearly, a conspiracy provision should have different ingredients than the underlying substantive offense.

Historical evidence supporting a broad understanding of extortion conspiracies would likely be insufficient to overcome the textual and practical problems with the Fourth Circuit's interpretation. But even here, the Fourth Circuit came up short; neither it nor the government has pointed to any

support for the notion that someone can conspire to extort his own property in either historical practice or the purposes of the Hobbs Act. Early cases generally involved conspiracies to extort property from someone *outside* the conspiracy. And Congress enacted the statute to address the problem of labor racketeering, not to grant the federal government sweeping authority to prosecute private citizens accused of bribing state officials.

Finally, if any doubt remained concerning the problems with the Fourth Circuit's interpretation, well-settled federalism and lenity principles provide the final nails in the coffin. All fifty States already punish bribery, and absent clear and unmistakable language, Congress does not intend to extend the reach of federal criminal law into areas of traditional state concern. In any event, if there were ambiguity, the rule of lenity would require resolving it in favor of the accused.

III. Perhaps recognizing the problems caused by its atextual reading, the Fourth Circuit sought to avoid some of those troubling consequences by imposing an "active participant" limitation on conspiracy liability. Under that requirement, a defendant may be convicted of conspiring to obtain his own property—but only if he participates "actively" enough that he is not a victim of the extortion. That test has no basis in the Hobbs Act and is unworkably vague. Indeed, the Fourth Circuit essentially admitted as much, explicitly refusing to "declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to

prosecution." Pet. App. 21 (quoting *Spitler*, 800 F.2d at 1278).

This Court has consistently declined to replace clear statutory text with amorphous, judicially created standards, and the Fourth Circuit's refusal to explain the line between innocent and criminal conduct is inconsistent with basic due process principles. Because these difficulties are avoided by applying the Hobbs Act's plain text, the Fourth Circuit's active-participant requirement is a solution in search of a problem. The better course is to reject the Fourth Circuit's reading and to reverse the judgment below.

ARGUMENT

I. To Establish A Hobbs Act Conspiracy, The Government Must Prove That Two Or More People Agreed Among Themselves To Obtain Property From Another.

"In analyzing a statute," this Court "begin[s] by examining the text." *Carter v. United States*, 530 U.S. 255, 271 (2000); *see also, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 741 (2014). Unless otherwise defined, statutory terms are "interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (internal quotation marks omitted); *see also Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 876 (2014). They should also be interpreted in context and in light of the statutory structure as a whole. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014).

These basic rules of interpretation carry special force in the interpretation of criminal statutes, a context where vagueness and imprecision are to be avoided. A criminal statute must give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Smith v. Goguen*, 415 U.S. 566, 574 (1974) (criminal statute must draw "clear lines" between conduct that is prohibited and conduct that is not). Accordingly, courts should not "give the text a meaning that is different from its ordinary, accepted meaning." *Burrage v. United States*, 134 S. Ct. 881, 891 (2014).

In this case, the statutory text, structure, and common sense all point in one direction: The crime of conspiracy to commit extortion under the Hobbs Act requires that the government prove that the alleged conspirators agreed among themselves to obtain property from a person outside the conspiracy.

A. The Statute's Plain Text Requires An Agreement To Obtain Property From Someone Outside The Conspiracy.

The Hobbs Act punishes "whoever" commits "extortion or attempts or conspires so to do," and defines extortion as "the obtaining of property *from another*, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). As the Sixth Circuit has concluded, the natural reading of that language forecloses the possibility of a Hobbs Act conspiracy between a public official and the payor of a bribe or other illicit payment. *See Brock*, 501 F.3d at 767–71. Two people can conspire to commit extortion under color of official right only if they

agree to obtain property "from another" person outside the conspiracy. When two people merely agree to exchange property between themselves, they have not agreed to obtain property "from another." Their agreement does not concern "another" at all—only themselves.

This straightforward reading is consistent with the common, contemporaneous understanding of the language that Congress chose when it enacted the Hobbs Act. The term "another" was understood to mean (just as it means today) one more person or thing *in addition* to those already identified. *See, e.g.*, Oxford English Dictionary 348 (1933) ("[o]ne more, one further"); Webster's New International Dictionary 110 (2d ed. 1934) ("[o]ne more; a second or additional one"; "[a]ny or some other; any different person, indefinitely; any one or thing else; some one or thing else . . ."). And "to conspire" was understood (as it still is) to refer to two or more people agreeing to do something against the law. *See, e.g.*, Oxford English Dictionary 870 (defining "conspiracy" as "an agreement between two or more persons to do something criminal, illegal, or reprehensible"). A conspiracy to commit extortion under the Hobbs Act thus requires a wrongful "agreement between two or more persons" to obtain property from "[o]ne more," "[o]ne further," or "an additional one"—in other words, an agreement to obtain property from someone other than the conspirators themselves.

Interpreting the statute any other way would make no sense. *Cf. Dowling v. United States*, 473 U.S. 207, 216 (1985) (adopting interpretation consistent with "common-sense meaning of the

statutory language"). If two people agree that one will pay the other a bribe, no speaker of English would say that they have agreed to "obtain property from another, with his consent." Imagine such a conversation: John, a policeman, says to Susan, a civilian, "Let us agree to obtain money from another, by getting that person's consent through use of my right and authority as a public official." Susan then asks, "Who did you have in mind?" If John were to answer, "Oh, I meant *you* should pay me," Susan would rightly be confused. No one speaks that way—and there is no reason to think Congress spoke that way when enacting a criminal statute.

B. Context And Structure Confirm What The Statute's Plain Text Requires.

Reading the statute by its plain terms to require that the parties agree to obtain property from someone outside the conspiracy is reinforced by the Hobbs Act's structure and the context in which the "from another" language appears.

The Act imposes criminal liability only on parties who conspire "[to] obstruct[], delay[], or affect[] commerce" by "obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(a), (b)(2). But when a public official and a citizen merely agree to *exchange* property between themselves, it cannot be said that both parties are agreeing to *obtain* the property. As this Court has noted, "[o]btaining property . . . requires that the *victim* 'part with' his property . . . and that the *extortionist* 'gain possession' of it." *Sekhar*, 133 S. Ct. at 2725 (emphasis added; citations omitted). A party cannot at the same time be both a victim of an

extortion conspiracy (the party who parts with his rightful property) and also one of the conspiratorial extortionists (the party who conspires with others to wrongly obtain possession of the same property). *Cf.* 18 U.S.C. § 3771 (giving "crime victims" rights to confer with prosecutors and to testify at plea, sentencing, and parole hearings).

To the contrary, because the Act punishes "whoever" conspires to obtain property from "another," it makes clear that the "whoever" and the "another" must be *different* people. If the payor of a bribe could be convicted of conspiring to commit extortion, he would be both the "whoever" who is punished as well as the "another" from whom property is obtained. There is no reason to conclude that Congress intended such a linguistic mess.

The Act also requires that an extortionate payment be obtained "with [the payor's] consent." When two people agree to exchange property between themselves, however, it makes no sense to say that they have conspired to obtain their own consent. "How do (or why would) people conspire to obtain their own consent?" *Brock*, 501 F.3d at 767. Indeed, "[t]he context in which the consent requirement appears confirms that it must be taken seriously." *Id.* at 767; *see also Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (holding that statutory language should be interpreted in context) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). "The Hobbs Act prohibits not only extortion but robbery as well; what separates the two is the payor's consent," meaning that "[f]ailure to respect the consent

requirement blurs the line between robbery and extortion." *Brock*, 501 F.3d at 767–68.

Moreover, interpreting the Act according to its plain terms avoids rendering Congress's separate bribery statutes superfluous. *See Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010) ("[T]he canon against interpreting any statutory provision in a manner that would render another provision superfluous . . . applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times."). It also avoids overriding the specific limits Congress has placed on federal bribery statutes, contrary to the fundamental canon that the specific controls the general. *See, e.g.*, *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991).

When Congress has chosen to criminalize paying bribes to state and local officials, it has carefully specified the required circumstances. For instance, if the government pursues a bribery charge against a state official under 18 U.S.C. § 666, it must meet certain burdens: The statute requires proof that the defendant gave something of value to a public official while "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more." *Id.* § 666(a)(1)(B). The government must prove that the "State, local or Indian tribal government, or any agency thereof" that employed the public official "receive[d], in any one[-]year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal

assistance." *Id.* § 666(b). And upon proving those requirements, the maximum penalty available is ten years' imprisonment. *Id.* § 666(a).

Significantly, Congress enacted § 666 in 1984—nearly four decades after the Hobbs Act. *See* Pub. L. No. 98-473, § 1104, 98 Stat. 1837, 2143 (Oct. 12, 1984). There is no reason Congress would have gone to the trouble if all of the conduct covered by § 666 (and more) was already made criminal via Hobbs Act conspiracy liability. Instead, the Hobbs Act and § 666 sensibly co-exist because the Hobbs Act authorizes federal prosecutions of only corrupt public officials and, in limited circumstances, the private citizens (or other officials) who conspire with those officials to obtain property from parties outside the conspiracy.

C. Under The Correct Interpretation Of The Hobbs Act, Petitioner's Conviction Cannot Stand.

The text, structure, and context of the Hobbs Act should have been sufficient to resolve this case. At trial, the government failed to prove that petitioner conspired with anyone to obtain property "from another"—that is, from someone outside the conspiracy. Instead, the government's theory was that petitioner conspired with Moreno and Mejia to extort property from Moreno and Mejia. As a result, petitioner should have been acquitted of the charge of conspiracy to commit extortion as a matter of law. Failing that, the Fourth Circuit should have reversed his conspiracy conviction, while also reversing his substantive extortion convictions in light of the undeniable potential for spillover prejudice due to the

admission of highly prejudicial evidence solely because of the conspiracy charge. Absent the conspiracy charge, petitioner could not have been tried jointly with Manrich—with whom he had no connection other than the government's assertion that both had conspired with Moreno and Mejia to extort Moreno and Mejia. *See* Fed. R. Crim. P. 8(b); *see also United States v. Lane*, 474 U.S. 438, 447 (1986) (noting that "joinder under Rule 8 [was] proper" when an indictment "charged all the defendants with one overall count of conspiracy").

Perhaps recognizing the problems with the way the government chose to frame and litigate its case, the Fourth Circuit mused in a footnote that petitioner's co-conspirators could have been other police officers (not the repair shop owners), thereby curing the problem with the conspiracy charge. *See* Pet. App. 25 n.14. But that effort to save the government from itself—raised *sua sponte* and for the first time by the Fourth Circuit—is flatly inconsistent with the way the government framed and litigated its case. The government did not argue that Moreno and Mejia were outside the conspiracy. Far from it; in the government's view, Moreno and Mejia were integral to the conspiracy from the very beginning.

The conspiracy count alleged that petitioner "'agree[d] . . . with other [police officers], *and with Moreno and Mejia* . . . to unlawfully obtain under color of official right, money and other property *from Moreno, Mejia, and [the Majestic Repair Shop]*, with their consent.'" Pet. App. 4 (quoting JA 36) (emphasis added). Under any fair reading, the

indictment alleged a conspiracy that included an agreement with Moreno and Mejia—the alleged bribe-payors—to obtain property from them (and not from anyone else). *See* JA 36; Pet. App. 4. Moreover, the government focused its case-in-chief on proving that petitioner had conspired with Moreno and Mejia to obtain property from Moreno and Mejia—that is, that the two men were both petitioner's co-conspirators and also the victims from whom property was supposedly obtained. *See, e.g.*, JA 64–66; JA 95–98. Indeed, the government was so confident in its reading of the statute that it moved *in limine* to preclude petitioner from arguing that the jury needed to find that he sought to obtain property from someone outside the conspiracy. JA 57–62. And on appeal, the government continued to argue that petitioner's co-conspirators were Moreno and Mejia. *See* Gov't CA4 Br. 2.

Even if the jury could have convicted petitioner on the basis of a theory that bears no resemblance to the one the government advanced at trial, what matters for present purposes is that the jury *could have* convicted petitioner on the basis of a conspiracy that included Moreno and Mejia (and almost surely did so). "[C]onstitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that *may rest on a legally invalid theory*." *Skilling v. United States*, 561 U.S. 358, 414 (2010) (emphasis added). The Fourth Circuit must have understood this, which may explain why it relegated its police-officer-only theory to a footnote.

II. The Fourth Circuit's Reasons For Departing From The Hobbs Act's Plain Terms Are Unpersuasive.

The Fourth Circuit should have started and ended its analysis with the plain text of the Hobbs Act. Instead, the Fourth Circuit credited the government's theory that petitioner could be guilty of conspiring *with* the owners of the repair shop to extort property *from* the same repair shop owners. This reading has innumerable problems that only underscore why failing to enforce the statutory text was a mistake.

A. The Fourth Circuit's Reasoning Is Inconsistent With The Statute's Plain Text.

According to the Fourth Circuit, the statute's "from another" language "provides only that a public official cannot extort himself." Pet. App. 23. But no statutory language is needed to confirm the metaphysical impossibility of paying oneself a bribe with one's own money. By making proof of a mere obtaining of property sufficient for a Hobbs Act conspiracy, the government's interpretation erases the requirement of obtaining property "from another." That alone should be cause to reject the Fourth Circuit's interpretation. *See Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994) ("Judges should hesitate . . . to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense."); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is [this Court's] duty to give effect, if

possible, to every clause and word of a statute.") (internal quotation marks omitted).

With no answer to these basic textual problems, the government has tried to muddy the waters. At the certiorari stage, the government asserted that "if a bribe-payor . . . can be 'another' for purposes of a substantive Hobbs Act violation, it is difficult to see how that same person can lose his status as 'another' solely by virtue of a conspiracy charge." Opp. 8. According to the government, the Hobbs Act "itself proscribes not just interfering with commerce by extortion but also 'conspir[ing] so to do,' which suggests that 'property from another' and 'with his consent' mean the same thing both in substantive and in conspiracy cases." *Id.*

Instead of offering a persuasive reading of the statutory text, the government is merely playing games with words. The phrase "from another" refers to the bribe-payor in both the substantive crime and conspiracy contexts, as the bribe-payor is, by definition, the one from whom property is obtained. But the bribe-payor does not "lose[] his status as 'another'" when he is charged with conspiracy. Instead, the point is that the bribe-payor cannot be *both* a conspirator and the "another" from whom the conspirators wrongly obtain property. If the bribe-payor could occupy both roles, then he could be guilty of conspiring to obtain property from himself, not "from another" as the statute requires.

B. The Fourth Circuit's Reasoning Is Inconsistent With Basic Interpretive Principles.

Because the Hobbs Act's text is clear, there is no need to turn to other canons of construction, for they "are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others"—namely, the canon that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* at 254 (internal quotation marks omitted).

Even if the text were not clear, however, the Fourth Circuit's interpretation suffers from other insurmountable interpretive difficulties: It creates a broad prohibition on *paying* bribes by transforming every payment of a bribe into a conspiracy to commit extortion; it turns every act of receiving a bribe into a conspiracy to extort; and it finds no support in any indicia of Congressional intent.

1. The Fourth Circuit's Approach Creates A Broad Prohibition On Paying Bribes.

In failing to adhere to the statutory text, the Fourth Circuit's interpretation transforms the Hobbs Act into an all-purpose bribery statute that imposes criminal liability not only on public officials who take

bribes but also on private citizens who pay them. Consider how the conspiracy provision might work in a typical case involving bribery. By accepting a bribe, a public official commits extortion under color of official right. *See Evans*, 504 U.S. at 268. That transaction, by definition, involves an agreement between the public official and the bribe-payor, because the payment is made "*in return for* official acts." *Id.* (emphasis added). If, as the Fourth Circuit has concluded, no proof of an agreement to obtain property from someone outside the conspiracy is necessary, *every* payment of a bribe is also, by definition, a conspiracy to commit extortion under color of official right. By agreeing to the bribe, the public official and the bribe-payor are necessarily agreeing to a scheme in which the public official obtains the bribe-payor's money or other property in violation of the Hobbs Act.

Interpreting the Hobbs Act to provide this sort of duplicative criminal coverage makes little sense. Among other things, it would dramatically expand the statute's reach far beyond conduct constituting the substantive crime of extortion. This Court has never construed the Hobbs Act to impose criminal liability on the *payor* of a bribe, and not even the government would contend that the substantive offense of extortion directly encompasses the *paying* of bribes to public officials. *Cf. McCormick v. United States*, 500 U.S. 257, 280 (1991) (Scalia J., concurring) ("[W]here the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion—and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am

aware of) it punishes not only the person receiving the payment but the person making it."). Yet if a public official can be convicted of conspiring with a private citizen to obtain that citizen's own property, then the private citizen can also be convicted for participating in the same conspiracy. *See Brock*, 501 F.3d at 768.

There is no reason to think that Congress intended the statute to effect such an extraordinary expansion in federal law. "Having opted not to punish the giving of bribes directly, Congress should not be treated as having prohibited them through the sleight of indictment of an extortion conspiracy." *Id.*; *cf. N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 537–38 (1979) (when Congress "explicitly" proscribes conduct and yet is silent with respect to closely related conduct, the absence of such a proscription is a "strong indication that Congress did not intend" to proscribe the latter conduct).

When Congress has passed statutes forbidding payments to public officials—as it has many times—it has legislated with much greater care and precision. *Cf. Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice"). For example, Congress has made it an offense to "give[], offer[] or promise[] anything of value" to a federal official. 18 U.S.C. § 201(b)(1). It has criminalized "pay[ing] or offer[ing] or promis[ing] any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any

appointive office or place under the United States for any person." *Id.* § 210. It has forbidden "an officer, director, or employee of a financial institution" to loan or give money to a federal examiner "who examines or has authority to examine such . . . institution." *Id.* § 212(a). And it has proscribed compromising the security of "any secure or restricted area or seaport" by "corruptly giv[ing], offer[ing], or promis[ing] anything of value to any public or private person." *Id.* § 226(a)(1).

Similarly, Congress has delineated with care the circumstances under which federal prosecutions of state officials for bribery may be appropriate. Consider, for example, the specific requirements Congress imposed under 18 U.S.C. § 666 for prosecuting bribe-payors, discussed above, and why the Hobbs Act—unleashed from its textual moorings—is a much more potent prosecutorial tool. The government would have no need to prove that the improper payment was made to influence the state official in connection with transactions involving $5,000 or more in value, *see* 18 U.S.C. § 666(a)(2); rather, under the Hobbs Act, simply proving that the agreed-on payment was to be made in exchange for official action would be enough. *See Evans*, 504 U.S. at 268. Nor would the government need to show that the relevant governmental unit accepted any federal benefits, *see* 18 U.S.C. § 666(b), for the Hobbs Act contains no such jurisdictional requirement. Moreover, violations of the Hobbs Act carry a maximum penalty of twenty years in prison, double that available under § 666.

The Hobbs Act thus offers federal prosecutors significant advantages over § 666—and perhaps most importantly, it serves as a more powerful *in terrorem* weapon for obtaining guilty pleas given its higher maximum penalty. In light of all the benefits of charging under the Hobbs Act, what rational prosecutor would ever charge under § 666 if Hobbs Act conspiracies were interpreted to encompass all the same territory (and more)? Perhaps the answer is that the rational prosecutor would charge *both* crimes, in order to make it all the easier to obtain a guilty plea. *Cf. United States v. Santos*, 553 U.S. 507, 516 (2008) (plurality op.) ("Prosecutors, of course, would acquire the discretion to charge the lesser lottery offense, the greater money-laundering offense, or both—which would predictably be used to induce a plea bargain to the lesser charge."). But while federal prosecutors surely appreciate having as many plea-bargain-inducing tools as possible, there is no reason to conclude that was Congress's intent when it enacted the Hobbs Act.

Interpreting similar criminal provisions, this Court has recognized that "a narrow, rather than a sweeping, prohibition is more compatible with the fact that" each federal prohibition on improper payments to public officials is only "one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 409 (1999); *see also Sabri v. United States*, 541 U.S. 600, 605 (2004); *Fischer v. United States*, 529 U.S. 667, 681 (2000) (rejecting interpretation that "would turn almost every act of . . . bribery into a federal

offense, upsetting the proper federal balance"). In short, because "this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions . . . a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Sun-Diamond*, 526 U.S. at 412.

Against this backdrop, the Fourth Circuit's decision should not be allowed to render the Hobbs Act a meat axe sharpened for federal use against all bribery of state and local officials. Indeed, the Fourth Circuit's approach disregards another fundamental interpretative principle; namely, that the Hobbs Act, like all federal criminal statutes, does not grant courts authority to create a federal common law of crimes, or to enforce vague criminal law standards that would effectively authorize the substitution of prosecutorial and judicial judgments about who is a bad actor for Congress's judgments about the elements of criminal offenses. "[U]nder our constitutional system . . . federal crimes are defined by statute rather than by common law." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001); *see also United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."). This Court has accordingly rebuked parties, including the government, for efforts to strain the text of the Hobbs Act beyond what it can bear. *See, e.g.*, *Scheidler*, 547 U.S. at 16; *Scheidler*, 537 U.S. at 409; *McCormick*, 500 U.S. at 271–74; *United States v. Enmons*, 410 U.S. 396, 410–12 (1973).

2. The Fourth Circuit's Approach Turns Every Act Of Receiving A Bribe Into A Conspiracy To Commit Extortion.

The Fourth Circuit's approach also all but dissolves the longstanding distinction between a substantive offense and a conspiracy to commit that offense. To secure a conviction for substantive extortion under the Hobbs Act, the government must prove that the bribe-payor "consent[ed]," 18 U.S.C. § 1951(b)(2); in other words, the government must establish that the bribe-payor and the public official *agreed* to exchange property between themselves. But "[t]he essence of the crime of conspiracy is *agreement*." *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (emphasis added). The Fourth Circuit's interpretation thus allows the government to add, or threaten to add, a charge of conspiracy to practically every indictment alleging substantive Hobbs Act extortion, even when precisely the same conduct forms the basis of both charges.

Undermining the Hobbs Act's distinction between extortion and conspiracy to commit extortion would open the door for prosecutors to employ, just as they did below, the extremely potent evidentiary and party-joinder rules that conspiracy charges make available. *See, e.g.*, Fed. R. Evid. 801(d)(2)(E) (providing that statements "made by the party's coconspirator during and in furtherance of the conspiracy" are admissible against the party); *United States v. Inadi*, 475 U.S. 387, 398–99 (1986) (noting that the "co-conspirator rule apparently is the most frequently used exception to the hearsay rule"). But

it has been "long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). Where the conspiracy presents no danger greater than the substantive offense—that is, "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime"—a defendant cannot be convicted for both. *Id.*

In *Callanan v. United States*, the Court made clear that the treatment of conspiracy and substantive offenses as distinct crimes is a basic "presupposition" of the Hobbs Act. 364 U.S. 587, 594 (1961). Rejecting the defendant's argument that Congress did not intend to allow cumulative punishments for both extortion and conspiracy to extort, the Court concluded that cumulative punishment was permissible because the case involved "a defendant convicted of violating two separate provisions of a statute, whereby Congress defined *two historically distinctive crimes composed of differing components*." *Id.* at 597 (emphasis added). That is, the "presupposition" that the Hobbs Act's substantive and conspiracy provisions necessarily define distinct and separate offenses with different elements was critical to the Court's conclusion that Congress intended to permit cumulative punishment for both offenses. And indeed, the defendant in *Callanan*, unlike petitioner here, had conspired to extort property from a company *outside* the conspiracy. *See id.*; *Callanan v. United States*, 274 F.2d 601, 602 (8th Cir. 1960).

In any event, if Congress had intended to permit cumulative punishment for the same conduct as both substantive extortion and conspiracy to commit extortion, it would have spoken clearly and unmistakably. *Cf. Iannelli*, 420 U.S. at 791 (finding that "the history and structure of the Organized Crime Control Act of 1970 manifest a clear and unmistakable legislative judgment" that the substantive offense and conspiracy should be punished cumulatively). Neither the Fourth Circuit nor the government has pointed to any evidence that Congress here clearly and unmistakably authorized double punishment for identical conduct. Instead, the more natural conclusion is that Congress provided conspiracy liability to account for blameworthy conduct that would otherwise go unpunished—such as when a private citizen assists a public official in obtaining property from some other person.

3. The Fourth Circuit's Approach Finds No Support In The History Of The Hobbs Act.

The Fourth Circuit's view also finds no support in the background of the Hobbs Act. *See Sekhar*, 133 S. Ct. at 2724–26) (consulting the common law meaning of the relevant terms). Common law cases support what the Hobbs Act's plain text requires, and neither the government nor the Fourth Circuit has identified any relevant common-law practice to the contrary. *See Wilkie v. Robbins*, 551 U.S. 537, 564 n.12 (2007) (noting that there is "no basis for believing that Congress thought of broadening the

definition of extortion under color of official right beyond its common law meaning").

Early English decisions addressing conspiracies to extort appear to have generally involved agreements between two or more people to obtain property from some other person. *See, e.g.*, *Dominus Rex v. Kinnersley & Moore*, 93 E.R. 467, 467 (K.B. 1718) ("defendants Kinnersley and Moore, being evil disposed persons, in order to extort money from my Lord Sutherland, did conspire together to charge my lord with endeavouring to commit sodomy with the said Moore"); *The King v. Kimberty & Mary North*, 83 E.R. 297, 297 (K.B. 1661) ("[Kimberty and Mary North] were indicted for conspiring to indict J.S. . . . with intent to extort money from him."). Early state court cases involving conspiracies to commit extortion under color of official right are similar. *See, e.g.*, *People v. Braun*, 303 Ill. App. 177, 178 (1940) ("officials of the village of Dixmoor, Illinois . . . were charged with conspiring unjustly and oppressively to extort money from motorists"); *Commonwealth v. Kirk*, 141 Pa. Super. 123, 127–28 (1940) (the "Secretary of Highways" and the "Chief Engineer of the Department of Highways . . . conspired to extort bond business and moneys from contractors engaged in the performance of highway construction contracts").

The state statute that formed the genesis of the Hobbs Act likewise provides no support for the Fourth Circuit's decision. The Hobbs Act "was modeled after § 850 of the New York Penal Law (1909), which was derived from the famous Field Code, a 19th-century model penal code." *Sekhar*, 133

S. Ct. at 2724 (citing 4 Commissioners of the Code, Penal Code of the State of New York § 613, at 220 (1865) (reprint 1998)). Congress "borrowed, nearly verbatim, the New York statute's definition of extortion." *Id.* Early New York cases addressing extortion conspiracies appear to have involved at least two people who agreed to obtain property from another person. *See, e.g.*, *People v. Kay*, 105 N.Y.S.2d 687, 688 (App. Div. 1951) (per curiam) (police officers conspired with two civilians to "extort[] certain English pounds" from other people after a traffic stop); *In re Stephens*, 203 N.Y.S. 500, 504–05 (App. Div. 1924) (defendant, "in conspiracy with the district attorney, extorted the sum of $20,500 from the Emerson Motors Company as a fee for undertaking to use his personal influence with the district attorney to save the company from indictment"); *People v. Olson*, 15 N.Y.S. 778, 778 (Sup. Ct. 1891) (defendant contractors were charged "with the crime of conspiracy, in attempting to cheat and defraud the city of Buffalo out of a sum of money").

Nor is there anything in the Hobbs Act's history to suggest that Congress was seeking to enact, through the indirect means of conspiracy liability, a federal prohibition on the paying of bribes. "The present form of the statute is a codification of a 1946 enactment, the Hobbs Act, which amended the federal Anti-Racketeering Act." *Evans*, 504 U.S. at 261. Congress enacted the Hobbs Act to overrule this Court's interpretation of the Anti-Racketeering Act in *United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America*, 315 U.S. 521 (1942), which the Act's supporters thought "had mistakenly exempted

labor from laws prohibiting robbery and extortion." *Evans*, 504 U.S. at 263; *see also* H.R. Rep. No. 79-238, at 1–10 (1945). The debates in Congress thus focused on crafting the Hobbs Act to prohibit labor "racketeering" while still permitting "legitimate" labor activity. *See, e.g.*, 91 Cong. Rec. 11,910 (1945) (remarks of Rep. Springer) ("To my mind this is a bill that protects the honest laboring people in our country."); *id.* at 11,912 (remarks of Rep. Jennings) ("The bill is one to protect the right of citizens of this country to market their products without any interference from lawless bandits."). There is nothing to suggest that Congress intended the Hobbs Act to grant federal prosecutors the sweeping authority allowed by the Fourth Circuit's decision below.

C. The Fourth Circuit's Approach Is Inconsistent With Principles Of Federalism And Lenity.

If any further reasons to reject the Fourth Circuit's reading were needed, principles of federalism provide them. This Court has rightfully been reluctant to "federalize much ordinary criminal behavior . . . that typically is the subject of state, not federal, prosecution." *Scheidler*, 547 U.S. at 20. As Justice Kagan recently recognized, the federal criminal code is in many respects "too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion." *Yates*, 135 S. Ct. at 1101 (Kagan, J., dissenting). Of course, "this Court does not get to rewrite the law." *Id.* But neither does the Executive Branch. *See generally Utility Air*

Regulatory Grp., 134 S. Ct. at 2446 (government may not "rewrite clear statutory terms to suit its own sense of how the statute should operate").

Where, as here, there is no plausible textual support for the government's theory, the Court should not hesitate to reject the government's attempt to further extend the reach of federal criminal law into territory occupied by the States. As this Court has often noted, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Federalism concerns thus require that federal criminal statutes intruding on traditional state prerogatives be given a narrow construction unless Congress's contrary intent is "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (internal quotation marks omitted). In short, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000) (internal quotation marks omitted); *see also Cleveland v. United States*, 531 U.S. 12, 24 (2000) (rejecting "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress").

If left uncorrected, the Fourth Circuit's Hobbs Act interpretation will transform every payment of a bribe to a state or local official into a federal conspiracy to commit extortion, thus displacing the

many state laws that already punish such bribery. *See, e.g.*, Md. Crim. Code § 9-201 (bribery of public employee). This Court has previously avoided interpretations of federal criminal law that "would turn almost every act of . . . bribery into a federal offense" because doing so would "upset[] the proper federal balance." *Fischer*, 529 U.S. at 681 (interpreting 18 U.S.C. § 666). Similarly, here, the Hobbs Act does not speak with nearly enough clarity to justify such a dramatic shift in the balance between federal and state criminal laws.

Nor is there any sound policy justification for such a shift. This is not a situation where for structural reasons state and local prosecutors might be expected to under-enforce state criminal laws. Whatever concerns might exist regarding the willingness of state and local prosecutors to take on corrupt state and local officials do not apply to private citizens who pay bribes. As the vast network of state bribery statutes illustrates, the states are perfectly capable of policing that type of misconduct themselves. *See* George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post*-Lopez *Analysis*, 82 Cornell L. Rev. 225, 275 & n.431 (1997) (listing the bribery statutes in all fifty States).

In any event, even if the government could overcome these federalism concerns, it cannot come close to showing that the terms of the Hobbs Act unambiguously support its position. In these circumstances, the rule of lenity requires resolving any uncertainty in petitioner's favor. As this Court has recognized, "[w]hen there are two rational

readings of a criminal statute, one harsher than the other," the rule of lenity instructs the Court "to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler*, 537 U.S. at 409 (applying the rule of lenity to the Hobbs Act) (internal quotation marks omitted); *see also Skilling*, 561 U.S. at 411 (applying the rule of lenity to "resist the Government's less constrained construction absent Congress' clear instruction otherwise").

This rule is particularly relevant to conspiracy offenses, which pose a special risk to individual liberties. As Justice Jackson noted long ago, the "federal law of conspiracy" is an "elastic, sprawling and pervasive offense" and the "unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." *Krulewitch v. United States*, 336 U.S. 440, 445–46 (1949) (Jackson, J., concurring in judgment). Accordingly, this Court has "warned" that "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions" should be met with "disfavor." *Grunewald v. United States*, 353 U.S. 391, 404 (1957).

The Fourth Circuit's interpretation does not come close to complying with these bedrock principles of lenity. Even if the statute did not clearly foreclose the government's position, there would be no basis for reaching the opposite conclusion—that Congress clearly criminalized conspiracies between bribe-payors and bribe-takers. The Hobbs Act is at best

ambiguous, for Congress did "not clearly criminalize paying bribes to public officials by the mere act of adding a conspiracy clause to the Hobbs Act." *Brock*, 501 F.3d at 768. For this reason too, the Fourth Circuit's decision should be reversed.

III. The Fourth Circuit's "Active Participant" Test Is Unworkable And Vague.

In an effort to prevent its interpretation from swallowing the distinction between the substantive crime and a conspiracy to commit that crime, the Fourth Circuit engrafted onto the Hobbs Act an amorphous test that provides for conspiracy liability only when the payor's participation in the conspiracy qualifies as sufficiently "active" to merit federal criminal punishment. According to the Fourth Circuit, someone who "actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme . . . can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement." Pet. App. 22. The court of appeals thus doubled down on its error by replacing a statutory requirement ("from another") with one found nowhere in the text. The court's fabricated test creates more problems than it is supposed to solve.

The most obvious problem with the Fourth Circuit's active-participant test is that it has no basis in the statutory text. *Accord Brock*, 501 F.3d at 771. The Hobbs Act refers to another's "consent" and does not draw any lines based on how active the "another" is in encouraging the public official to break the law or how enthusiastically the "another" parts with his property. As *Brock* put it, "[b]ecause all Hobbs Act

prosecutions require the 'consent' of the payor, it will be difficult to ascertain what level of enthusiasm, ambivalence or regret is required to escape prosecution." *Id.*

This Court has previously declined to read into the Hobbs Act additional elements beyond those appearing in its text. In *United States v. Culbert*, for example, the Court rejected a defendant's argument that the government had to prove not only that the defendant "violated the express terms of the Act," but also that "his conduct constituted 'racketeering.'" 435 U.S. at 372. The Court refused to read the statute that way, observing that "the absence of any reference to 'racketeering'—much less any definition of the word—is strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation." *Id.* at 373. Instead, as the Court observed, "the statutory language sweeps within it all persons who have 'in any way or degree . . . affect[ed] commerce . . . by robbery or extortion.'" *Id.* (quoting 18 U.S.C. § 1951(a) (1976 ed.)).

A similar conclusion should follow here. Because the Hobbs Act already draws clear distinctions, "what warrant do [courts] have to draw several more on [their] own? Either the Act picks up all perpetrators, acquiescors and victims, or it picks up none of them." *Brock*, 501 F.3d at 771. And while the Fourth Circuit may have crafted its active-participant requirement with the goal of protecting less blameworthy individuals from punishment, this Court has made clear that judges have no license to create exceptions to federal criminal laws that have no basis in the text. *See Brogan v. United States*, 522

U.S. 398, 406 (1998) (rejecting argument that "criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions"). The Fourth Circuit's creativity is especially unjustified given that it is necessary only because the court refused to apply the language of the statute as written. A court should not invent an *unwritten* element of a criminal statute ("actively participates") to solve problems resulting from its failure to apply a *written* one ("from another").

Even if the active-participant standard had some textual pedigree, however, it still ought to be rejected because it is unworkable and hopelessly vague. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling*, 561 U.S. at 364 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The active participant test, set against the backdrop of preexisting requirements of agreement and consent, satisfies neither of these requirements.

Seemingly unconcerned about these problems, the Fourth Circuit expressly declined to "declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator." *Spitler*, 800 F.2d at 1278; *see also* Pet. App. 21. But a criminal statute that establishes no readily drawn line, bright or otherwise, between innocent and guilty conduct is fundamentally inconsistent with due process. "How

can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?" *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). This Court has been careful to interpret federal criminal statutes to avoid such vagueness concerns. *See, e.g.*, *Skilling*, 561 U.S. at 403–04. Indeed, one reason the Court refused to read an unwritten racketeering element into the Hobbs Act was that doing so "might create serious constitutional problems, in view of the absence of any definition of racketeering in the statute." *Culbert*, 435 U.S. at 374. Fortunately, here, as in *Culbert*, this Court "need not concern [itself] with these potential constitutional difficulties because a construction that avoids them is virtually compelled by the language and structure of the statute." *Id.*

Perhaps recognizing the vagueness problems inherent in the Fourth Circuit's made-up test, the government has tried to rescue it by suggesting that active participation "is essential to the formation of a conspiracy." Opp. 9. According to the government, the Fourth Circuit's test should be read to inquire "whether a defendant is simply complying with an official demand—or is instead becoming a conspirator by knowingly participating in the criminal agreement." *Id.* But even after this rescue mission, the government is left stuck between a rock and a hard place. Under its view of "active participation," virtually every substantive extortion offense also constitutes an additional conspiracy to commit extortion, for the Hobbs Act's "with his consent" requirement for substantive extortion ensures that

every bribe-payor is "knowingly participating in the criminal agreement." Simply put, if "active participation" is to add something substantial, and thus make up for the loss of the statutory element requiring wrongfully obtaining property "from another," then it must require something beyond a knowing agreement to make a *quid pro quo* payment to a public official. But neither the Fourth Circuit nor the government has explained what this additional element might be.

At bottom, an "active participant" test is well crafted in one sense only: it allows prosecutors and courts to punish "conspiracy" whenever they conclude by their own lights that a payor is a malefactor and to avoid imposing such punishment whenever they conclude a payor is blameless. But this advantage, such as it is, is also the test's fatal flaw. Under our system of justice, "[b]ad men, like good men, are entitled to be tried and sentenced in accordance with law." *Sorich*, 129 S. Ct. at 1208 (Scalia, J., dissenting from denial of certiorari) (quoting *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting)). Respecting criminal law as law requires enforcing statutory text as it is written instead of allowing courts to make "case-by-case exceptions" based on their own assessment of blameworthiness. *Brogan*, 522 U.S. at 406.

CONCLUSION

The decision of the Fourth Circuit should be reversed, and the case should be remanded for further proceedings.

June 1, 2015

Respectfully submitted.

ASHLEY C. PARRISH
ETHAN P. DAVIS
Counsel of Record
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500
edavis@kslaw.com

DANIEL S. EPPS
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 384-7876

DAVID M. BARNES
DAVID P. MATTERN
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

MEGAN R. NISHIKAWA
KING & SPALDING LLP
101 Second Street, Ste 2300
San Francisco, CA 94105
(415) 318-1200

JAMES P. SULLIVAN
KING & SPALDING LLP
401 Congress Ave., Ste 3200
Austin, TX 787801
(512) 457-2000

Counsel for Petitioner