No. 08-792

In the Supreme Court of the United States

NATHANIEL GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2510-2521, requires suppression of evidence derived from a court-authorized wiretap, where the wiretap application was approved by a statutorily designated official but the application and order failed to state that fact.

2. Whether the evidence was sufficient to support petitioner's convictions for conspiring with public officials to extort, and aiding and abetting public officials' extortion of, "property from another * * * under color of official right," in violation of the Hobbs Act, 18 U.S.C. 1951.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-59a) is reported at 521 F.3d 514. The opinion of the district court (Pet. App. 60a-101a) is reported at 372 F. Supp. 2d 1025.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2008. A petition for rehearing was denied on July 17, 2008 (Pet. App. 1a-2a). On October 10, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 14, 2008, and the petition was filed on December 15, 2008 (Monday). 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 Northern District of Ohio, petitioner was convicted on one count of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); three counts of conspiring to obstruct interstate commerce by extortion, in violation of 18 U.S.C. 1951(a) (the Hobbs Act, 18 U.S.C. 1951); 12 counts of obstructing interstate commerce by extortion, in violation of the Hobbs Act; and 20 counts of mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 1346. Petitioner also pleaded guilty to one count of income tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 6a-7a. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. *Id.* at 8a. The court of appeals reversed petitioner's convictions on three of the Hobbs Act extortion counts, affirmed petitioner's convictions on the remaining counts, and remanded for resentencing. *Id.* at 1a-59a. On remand, the district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Am. J. 3-4 (Sept. 24, 2008).

1. a. Petitioner operated a consulting business that represented companies interested in obtaining municipal contracts. Beginning in the mid-1990s, petitioner funneled cash and gifts from firms he represented to public officials, in return for their steering contracts to petitioner's clients. Pet. App. 5a-6a.

Petitioner provided the mayor of East Cleveland, Emmanuel Onunwor, with monthly cash payments funded by entities seeking to obtain or retain contracts with the city. Petitioner approached Onunwor about finding

municipal work for one of his clients, Ralph Tyler Company (RTC), a Cleveland engineering firm. After Onunwor replaced the company that had an existing city contract with RTC, and began awarding engineering contracts to RTC, petitioner increased the amount of his monthly payments to Onunwor. Pet. App. 39a-41a.

Another engineering firm, CH2M Hill (CH2M) contracted with East Cleveland to run the city's water department after petitioner arranged for CH2M representatives to meet with Onunwor. CH2M paid RTC, which had no involvement in the water contract, a monthly fee for "consulting services," and RTC passed the payments directly to petitioner's consulting company. After the city contracted with CH2M, petitioner again increased his payments to Onunwor. Pet. App. 41a-42a.

Onunwor also informed partners of a law firm that had contracted to perform tax collection services for the city that if they wanted to keep the contract, they needed to work with petitioner. The law firm entered into a "consulting agreement," under which the firm made monthly payments to petitioner. Pet. App. 40a-41a.

Petitioner also received monthly payments from Honeywell Corporation, which was interested in being hired as a subcontractor on a Houston energy contract. Using funds supplied by Honeywell, petitioner provided Monique McGilbra, the Houston official who oversaw the energy contract, with money and gifts in exchange for her assistance in ensuring that Honeywell was retained as a subcontractor and received payments under the contract. Pet. App. 42a-46a.

b. In January 2002, Assistant United States Attorney (AUSA) David Sierleja applied, pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, for an order authorizing interception

of conversations to and from several business and cellular telephone numbers used by petitioner. Deputy Assistant Attorney General (DAAG) John Malcolm, a Justice Department official designated to review and approve wiretap applications, had authorized the application. The application did not state that it had been approved by a Justice Department official, however, and did not include a copy of the authorization letter. A federal district judge, Judge Oliver, issued an order authorizing the wiretap for a 30-day period. Like the application, the order did not refer to the official Justice Department authorization for the wiretap. Pet. App. 11a, 61a-62a, 64a.

2. After being indicted, petitioner moved to suppress evidence obtained from the wiretap on the ground, *inter alia*, that "the order of authorization * * * under which it was intercepted [wa]s insufficient on its face." 18 U.S.C. 2518(10)(a)(ii). See Pet. App. 66a-67a. As relevant here, petitioner contended (*id.* at 73a-74a) that the government had failed to comply with 18 U.S.C. 2518(1)(a) and (4)(d), which require the wiretap application and order to include "the identity of * * * the officer authorizing the application." 18 U.S.C. 2518(1)(a); see 18 U.S.C. 2518(4)(d).

The district court held a hearing at which AUSA Sierleja testified that, when he applied for the wiretap in January 2002, he told Judge Oliver that he had obtained authorization from a Justice Department official designated to approve wiretap applications. When he met with Judge Oliver, AUSA Sierleja had DAAG Malcolm's authorization letter with him, but he did not show it to Judge Oliver. Pet. App. 13a, 64a-65a, 73a-81a.

The district court denied the suppression motion. Pet. App. 60a-101a. The court found that DAAG Mal-

colm had approved the application before it was submitted to Judge Oliver and that "Judge Oliver had notice that a specially-designated official approved the application." *Id.* at 76a. The court concluded that those circumstances "sufficiently fixed responsibility with the Justice Department," and thus served the statutory purpose of "ensur[ing] accountability by a high-level executive official." *Id.* at 78a. Stating that it was unable to "discern any resultant prejudice" to petitioner from the violations of the statutory identification requirements, *id.* at 80a, the court concluded that the failure to identify any authorizing official in the application and order did not, on the facts of this case, warrant suppression of the wiretap evidence. *Id.* at 73a-81a.

As noted above, after a jury trial, petitioner was convicted of multiple counts of violations of RICO, conspiracy to obstruct and obstruction of interstate commerce by extortion in violation of the Hobbs Act, and mail and wire fraud. He also pleaded guilty to one count of income tax evasion. Pet. App. 4a. The district court sentenced him to 180 months of imprisonment, to be followed by three years of supervised release. *Id.* at 8a.

3. The court of appeals reversed three of petitioner's Hobbs Act convictions, affirmed his other convictions, and remanded for resentencing. Pet. App. 3a-59a.

a. As relevant here, the court held that the failure of the wiretap application and order to identify the authorizing official did not require suppression of evidence derived from the wiretap. Pet. App. 15a-23a. Noting that DAAG Malcolm "had authority to, and did in fact, authorize" the application, *id.* at 21a, and that Judge Oliver had notice of the authorization before he issued the order, *id.* at 22a, the court held that petitioner was not prejudiced by the government's "breach of a re-

quirement that does not 'occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.'" *Id.* at 22a-23a (quoting *United States* v. *Chavez*, 416 U.S. 562, 578 (1974)).

b. Petitioner contended, *inter alia*, that the evidence was insufficient to support his convictions under the Hobbs Act, 18 U.S.C. 1951. Pet. App. 34a-52a. The Hobbs Act makes it unlawful to "obstruct[], delay[], or affect[] commerce * * * by * * * extortion," or to "conspire[] to do so." 18 U.S.C. 1951(a). Section 1951(b)(2) 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."

While petitioner's appeal was pending, Pet. App. 34a, the Sixth Circuit issued its decision in *United States* v. *Brock*, 501 F.3d 762 (2007). In *Brock*, private citizens who bribed a public official were convicted of conspiring with the official to extort their own property "under color of official right," in violation of the Hobbs Act. *Id.* at 764-767. The Sixth Circuit reversed, holding that "[t]o be covered by the statute, the alleged conspirators * * * must have formed an agreement to obtain 'property from *another*,' which is to say, formed an agreement to obtain property from someone outside the conspiracy." *Id.* at 767. The court also observed that "[w]hile the definition of extortion 'under color of official right' correctly extends to public officials who *accept* a bribe when there is a quid pro quo for the payment, neither the Supreme Court nor our court has construed the statute to cover private individuals who *offer* a bribe to public officials." *Id.* at 768 (citations omitted). The court stated, however, that private individuals may be convicted of "violating the Hobbs Act when they con-

spire with public officials or aid and abet them in an extortion scheme," *id.* at 768-769, based on proof that the scheme involved "the obtaining of property of another, with his consent." 18 U.S.C. 1951(b)(2).

In supplemental briefing, petitioner argued that *Brock* required reversal of his Hobbs Act convictions because the government failed to prove that he conspired with public officials to obtain, or aided and abetted public officials in obtaining, "property from another"—*i.e.*, from a third party. Pet. App. 38a-39a.

Applying *Brock* (Pet. App. 34a-39a, 52a), the court of appeals affirmed petitioner's convictions on the Hobbs Act counts involving payments to Onunwor. *Id.* at 39a-42a. Citing the "overwhelming evidence that [petitioner's] monthly cash payments to Onunwor were funded by entities seeking to obtain or retain contracts with the city," *id.* at 40a, the court held that petitioner "conspired with, and aided and abetted, Onunwor's extortion of 'property from another, with [their] consent,' by funneling payments from [petitioner's] clients, seeking municipal contracts, to Onunwor while he was acting under color of official right." *Id.* at 42a. The court also affirmed petitioner's Hobbs Act convictions involving gifts to Houston official McGilbra, *id.* at 42a-47a, finding that "the evidence showed that the payments and privileges bestowed upon McGilbra did not originate with" petitioner. *Id.* at 47a. Rather, petitioner's "corporate clients, seeking government contracts, funneled the illegal payments through [petitioner] to McGilbra." *Ibid.* The court reversed petitioner's convictions on three other Hobbs Act counts, concluding that the government had failed to prove that the payments to public officials came from another. *Id.* at 47a-50a, 52a.

ARGUMENT

1. Petitioner contends (Pet. 4-16) that the omission of the authorizing official's identity from the wiretap order rendered the order facially insufficient and required suppression of evidence derived from the wiretap. No further review is warranted.

a. The court of appeals' decision is correct. This Court has made clear that "suppression is not mandated for every violation of Title III." *United States* v. *Chavez*, 416 U.S. 562, 575 (1974). "To the contrary, suppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *United States* v. *Donovan*, 429 U.S. 413, 433-434 (1977) (quoting *United States* v. *Giordano*, 416 U.S. 505, 527 (1974)).

In *Chavez*, the Court held that suppression was not required even though the wiretap application and order "did not correctly identify the individual authorizing the application, as 18 U.S.C. § 2518(1)(a) and (4)(d) require," 416 U.S. at 570, because the Attorney General had in fact authorized the application. *Id.* at 571-573. The Court contrasted its holding with that in *Giordano*, where it held that wiretap evidence must be suppressed because the application was "in fact, not authorized by one of the statutorily designated officials." 416 U.S. at 508; see *Chavez*, 416 U.S. at 571. Unlike the requirement that only certain officials "responsive to the political process" authorize wiretap applications, *Giordano*, 416 U.S. at 520, which was a "critical precondition" to any judicial order, *id.* at 516, the requirements that the authorizing official be identified in the wiretap applica-

tion and order merely serve a "reporting function," *Chavez*, 416 U.S. at 579, and were not intended "to occupy a central, or even functional, role in guarding against unwarranted use" of wiretaps. *Id.* at 578.

Although the wiretap order in *Chavez* identified, albeit incorrectly, a qualified official as the person who authorized the application, 416 U.S. at 573-574, the Court's reasoning suggests that where a statutorily designated official has in fact authorized a wiretap application, failure to comply with "reporting procedures," *id.* at 573, that do not play a "substantive role * * * in the regulatory system" does not warrant suppression of the wiretap evidence. *Id.* at 578-579. Here, the district court found that AUSA Sierleja "actually received authorization from a specially-designated Justice Department official" before submitting the wiretap application, Pet. App. 65a, 77a, and the district court judge was apprised of that authorization before he issued the wiretap order, *id.* at 65a, 78a. See *id.* at 21a (affirming district court's factual findings). The court of appeals thus correctly concluded that the failure of the application and order to identify the authorizing official did not undermine the "essential safeguards of Title III," *id.* at 22a, and that suppression of the evidence was unwarranted, *id.* at 23a.

b. In accord with the decision of the court of appeals in this case, other circuits have held that not every facial insufficiency of a wiretap order requires suppression of evidence obtained pursuant to that order. See *United States* v. *Radcliff,* 331 F.3d 1153, 1162 (10th Cir.) ("[Section] 2518(10)(a)(ii) does not require suppression if the facial insufficiency of the wiretap order is no more than a technical defect.") (quoting *United States* v. *Moore*, 41 F.3d 370, 374 (8th Cir. 1994), cert. denied, 514 U.S. 1121

(1995), and citing cases from the Third, Fifth, Sixth, Seventh, and Ninth Circuits), cert. denied, 540 U.S. 973 (2003). Thus, courts have concluded that suppression is not warranted when a wiretap order either mistakenly identifies a Justice Department official who could not legally authorize the wiretap, or— as in this case— identifies no official at all, so long as a statutorily designated official actually gave the authorization. See *United States* v. *Callum*, 410 F.3d 571, 576 (9th Cir.) (failure to identify any approving official in wiretap order is "a minor insufficiency for which suppression is not the appropriate remedy"), cert. denied, 546 U.S. 929 (2005); *Radcliff*, 331 F.3d at 1163 ("facial insufficiency" of wiretap orders in failing to identify specific individuals who approved application was a "technical defect that did not disrupt the purposes of the wiretap statute or cause any prejudice" to the defendant); *United States* v. *Fudge*, 325 F.3d 910, 918 (7th Cir. 2003) (same); *United States* v. *Lawson*, 545 F.2d 557, 562-563 (7th Cir. 1975) (facial insufficiency of application indicating approval by official not statutorily authorized to approve wiretaps was "too technical to require suppression" where Attorney General actually approved application), cert. denied, 424 U.S. 927 (1976); *United States* v. *Swann*, 526 F.2d 147, 149 (9th Cir. 1975) (per curiam) (same); *United States* v. *Acon*, 513 F.2d 513, 516-519 (3d Cir. 1975) (same).

Petitioner contends (Pet. 4, 9-15), however, that the decision in this case conflicts with the Ninth Circuit's decision in *United States* v. *Staffeldt*, 451 F.3d 578 (2006). In *Staffeldt*, the Ninth Circuit held that suppression was required where the wiretap application identified the authorizing official by reference to an attached letter that authorized a wiretap application in an unrelated case from a different district, and the district court

issued the wiretap order with the same unrelated authorization letter attached. *Id.* at 579-581. The court recognized that "[n]ot every facial insufficiency in an application requires a court to suppress the wiretap evidence." *Id.* at 584 (quoting *Acon*, 513 F.3d at 517). It nevertheless concluded that suppression was warranted on the particular facts of that case because the application "fail[ed] to show that it was authorized at all by the Justice Department: All that a judge can tell from reviewing it is that an application to wiretap another person was approved." *Ibid.* The court distinguished its earlier decisions in *Swann* and *Callum* on the ground that those cases involved only "the *identity* of the authorizing official, not * * * the fact of authorization itself." *Id.* at 585.

Although the United States disagrees with the Ninth Circuit's decision in *Staffeldt*, the decision below does not implicate any conflict with the Ninth Circuit. As noted above (pp. 9-10, *supra*), the Ninth Circuit in *Callum* held that suppression was not warranted when (as here) the facial insufficiency in the order is that it "list[s] no official at all." 410 F.3d at 576. And, as the court below concluded (Pet. App. 22a n.3), *Staffeldt* is "readily distinguishable" here: "Judge Oliver had notice that a qualified 'specially designated' official had approved the application before his perusal and approval of the order." *Id.* at 22a; see *id.* at 77a-78a. Thus, the courts below concluded that "the omission of that information from the application and order could not have affected the decision to grant the wiretap." *Id.* at 22a n.3; see *id.* at 78a-80a.[1]

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[1] Contrary to petitioner's suggestion (Pet. 14-15), the court of appeals did not conclude that AUSA Sierleja's statement to the district

2. Petitioner also contends (Pet. 5-6, 17-34) that this Court should grant review to resolve a conflict in the circuits as to the proof required to convict a private individual of conspiring with or aiding and abetting a public official in committing extortion "under color of official right," in violation of the Hobbs Act. Resolution of any conflict would not benefit petitioner, however, because he agrees with the standard adopted by the court of appeals. Further review is not warranted.

In *United States* v. *Brock*, 501 F.3d 762 (2007), the Sixth Circuit held that private citizens who pay bribes to public officials—whether they are "perpetrators, acquiescors, [or] victims" in the bribery scheme—may not be convicted under the Hobbs Act of conspiring to extort their "own property," with "their own consent." *Id.* at 768-771. In so holding, however, the court reaffirmed that private individuals may be prosecuted for "violating the Hobbs Act when they conspire with public officials or aid and abet them in an extortion scheme," so long as the "'property from another' and 'with his consent' requirements" are satisfied. *Id.* at 768-769 (citing *United States* v. *Collins*, 78 F.3d 1021, 1032 (6th Cir.), cert. denied, 519 U.S. 872 (1996), and *United States* v. *Kelley*, 461 F.3d 817, 826 (6th Cir. 2006)).

As petitioner notes (Pet. 18-30), other courts of appeals have concluded that a private citizen may be prosecuted under the Hobbs Act for bribing a public official if the "payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim" of an extor-

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court was "sufficient to fix the facial insufficiencies" in the wiretap application and order. The only question before the court was whether the government's "admitted noncompliance" with the identification provisions warranted suppression of the wiretap evidence. Pet. App. 15a, 22a-23a.

tion scheme. *United States* v. *Spitler*, 800 F.2d 1267, 1278 (4th Cir. 1986); see, *e.g.*, *United States* v. *Cornier-Ortiz*, 361 F.3d 29, 40 (1st Cir. 2004) (affirming Hobbs Act conviction of private citizen who "did more than merely acquiesce" in extortion scheme); *United States* v. *Tillem*, 906 F.2d 814, 823-824 (2d Cir. 1990) (reversing Hobbs Act conviction where government failed to prove that defendant "promoted the conspiracy and had a stake in its outcome"). While the Sixth Circuit in *Brock* rejected a "dichotomy" between "perpetrators" and "victims" of extortion schemes, 501 F.3d at 770-771, it also noted that "the primary debate" in decisions from other circuits "did not concern the 'property from another' requirement" that the court interpreted in *Brock*. *Id.* at 770-771. No other court of appeals has yet considered the Sixth Circuit's holding in *Brock*. Thus, even if the disagreement otherwise warranted this Court's attention, review would be premature.

In any event, this case would be a poor vehicle for that review because petitioner already has received the benefit of the Sixth Circuit's narrow reading of the Hobbs Act. The court of appeals applied its rule from *Brock* to reverse three of petitioner's Hobbs Act convictions. See Pet. App. 34a-50a; *id.* at 52a (government "did not meet [its] burden" under *Brock* with respect to three of the counts on which petitioner was convicted). That is precisely the rule that petitioner now contends is "correct." Pet. 30; see Pet. 34 (*Brock* "states the most workable and statutorily supported rule"). Petitioner—who was undoubtedly a "perpetrator," rather than a "victim," of the extortion schemes involving Onunwor and McGilbra—would not have fared better under the

decisions he cites from other circuits.[2] Accordingly, this case does not present an appropriate vehicle for resolving any conflict among the circuits.

Petitioner disagrees (Pet. 30, 32) with the court of appeals' application of *Brock* to his case, but that fact-bound issue does not warrant this Court's review. As the court of appeals concluded (Pet. App. 39a-47a), there was ample evidence that petitioner aided and abetted public officials' extortion schemes by funneling bribes from third parties. In any event, any tension between the Sixth Circuit's decision in this case and its earlier decision in *Brock* would be a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

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[2] Petitioner contends (Pet. 30-32) that his conduct was "factually indistinguishable" from that in *Tillem*, in which the Second Circuit reversed the Hobbs Act conviction of a defendant who "operated as a conduit through which" public officials extorted money from businesses. 906 F.2d at 823. The Second Circuit emphasized, however, that there was no evidence that the defendant in *Tillem* participated in the extortion scheme and "had a stake in its outcome." *Ibid.* In contrast, as the court of appeals concluded with respect to the convictions it affirmed, petitioner was actively involved here. See Pet. App. 34a-47a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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