No. 14-361

In the Supreme Court of the United States

SAMUEL OCASIO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether conviction of a public official for conspiracy to obtain "property from another, with his consent * * * under color of official right," in violation of the Hobbs Act, 18 U.S.C. 1951, requires proof that the defendant formed an agreement to obtain property from someone outside of the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 750 F.3d 399.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2014. A petition for rehearing was denied on May 28, 2014 (Pet. App. 45). On July 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 25, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiring to interfere with

commerce by extortion under the Hobbs Act, in violation of 18 U.S.C. 371; and three counts of interfering with commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a). Pet. App. 2-4, 46. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at 47-48. The district court also ordered him to pay $3,370.58 in restitution. *Id.* at 15-16, 48-49. The court of appeals affirmed petitioner's convictions, *id.* at 16-25, 28-29, but vacated the restitution order in part and remanded for further proceedings concerning restitution, *id.* at 28-29.

1. At all times relevant to this case, petitioner was an officer of the Baltimore Police Department (BPD). Pet. App. 2; Gov't C.A. Br. 2. From May 2009 to February 2011, petitioner was one of approximately fifty BPD officers engaged in a kickback scheme in which the officers, working at the scene of automobile accidents, persuaded accident victims to use the Majestic Auto Repair Shop in Baltimore for towing and repair services. Pet. App. 2, 5-13; Gov't C.A. Br. 4-14. In exchange, the officers accepted cash payments—of between $150 and $300 per referral—from Majestic owners Hernan Moreno and Edwin Mejia. *Ibid.*

Petitioner learned about the kickback scheme from another BPD officer, most likely Officer Leonel Rodriguez. Pet. App. 7-8 & n.7. Petitioner worked the night shift, and on several occasions he persuaded accident victims to have their damaged vehicles towed to Majestic, often after consulting with Moreno. *Id.* at 7-8; Gov't C.A. Br. 5. Petitioner usually requested payment by the next afternoon. Pet. App. 8. He collected payments in person from Moreno at Moreno's home, an ATM, or a convenience store. *Id.* at 10-12.

The kickback scheme violated BPD policy. Pet. App. 6-7; Gov't C.A. Br. 3-4. Officers were prohibited from "solicit[ing] or accept[ing] any compensation, reward, gift, or other consideration without the permission of the Police Commissioner." Pet. App. 6 (internal quotation marks omitted); Gov't C.A. Br. 3. For cars that needed towing, investigating officers were required to contact, through dispatch, pre-approved towing companies that already had a contract with the City of Baltimore. Pet. App. 6-7 & n.5; Gov't C.A. Br. 4. Majestic was not such a company. Pet. App. 7; Gov't C.A. Br. 4.

2. A grand jury in the District of Maryland indicted petitioner and ten co-defendants—eight other BPD officers, Moreno, and Mejia—in connection with the kickback scheme. Pet. App. 2. All of the BPD officer defendants pleaded guilty except for petitioner and Officer Kelvin Manrich. *Id.* at 3 & n.2. Moreno and Mejia also pleaded guilty and agreed to testify at petitioner's trial. *Ibid.*

A Superseding Indictment charged that petitioner had conspired with other BPD officers and with Moreno and Mejia to interfere with commerce by extortion under the Hobbs Act, 18 U.S.C. 1951. C.A. App. 48-59. In pertinent part, the Hobbs Act prescribes criminal punishment for "[w]hoever in any way or degree obstructs, delays, or affects commerce * * * by * * * extortion." 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." The Superseding Indictment charged petitioner with a Hobbs Act conspiracy in violation of 18 U.S.C. 371

(Count One). Pet. App. 2-4; C.A. App. 50. It also charged petitioner with three substantive counts of interfering with commerce by extortion, in violation of 18 U.S.C. 1951(a) (Counts Five, Six, and Seven). Pet. App. 2-4. The substantive counts charged petitioner with discrete extortionate acts occurring on January 10, 15, and 17, 2010. C.A. App. 57-59; Pet. App. 8-12.

Before trial, petitioner sought a jury instruction providing that the government, in order to convict him of conspiracy to violate the Hobbs Act, had to prove "that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy." Pet. App. 13-14 & n.9. Petitioner argued that he could not be guilty of conspiracy if the money was obtained only from Moreno and Mejia. *Id.* at 30-31. The district court denied petitioner's request. *Id.* at 31.

Petitioner and Officer Manrich were tried together. At trial, Moreno, Mejia, and other witnesses testified to the facts described above. Pet. App. 3, 14. At the conclusion of the government's evidence and again at the close of all the evidence, petitioner moved for a judgment of acquittal, arguing that he could not be convicted because "the proceeds from the conspiracy were extracted from" Moreno and Mejia, who were co-conspirators. *Id.* at 39; see *id.* at 14-15, 43. The district court denied the motions, reasoning in part that Majestic, not its owners, "was actually the source of the payment." *Id.* at 42. The court also declined to instruct the jury that the government had to prove "that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy." *Id.* at 14 n.9; see *id.* at 15, 31.

The jury found petitioner guilty on the conspiracy count and on all three substantive counts, and the district court sentenced him to 18 months of imprisonment. Pet. App. 46-47. He was also ordered to pay $3,370.58 in restitution. *Id.* at 48-49.

3. The court of appeals affirmed petitioner's convictions.[1] Pet. App. 1-29.

On appeal, petitioner did not contest that the trial evidence was sufficient to prove that he had committed extortion in violation of the Hobbs Act. He argued that he could not be convicted of conspiracy, however, because, in his view, "conspiring to extort property from one's own coconspirator does not contravene federal law." Pet. App. 16. For that argument, petitioner relied on the Sixth Circuit's decision in *United States* v. *Brock*, 501 F.3d 762 (2007), which held that "[t]o be covered by the [Hobbs Act], 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 of appeals disagreed with petitioner's argument. Relying on its own prior decision in *United States* v. *Spitler*, 800 F.2d 1267 (4th Cir. 1986), the court held "that a person * * * 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 pur-

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[1] The court of appeals partially vacated the district court's award of restitution and remanded for further proceedings concerning restitution. Pet. App. 25-29. On remand, the district court amended the judgment and ordered total restitution of $1,500 rather than $3,370.58. 1:11-cr-00122 Docket Entry No. 298, at 2-5 (D. Md. July 2, 2014) (Am. Judgment); C.A. App. 1387, 1472.

ported victim of the conspiratorial agreement." Pet. App. 22. "That rule," the court observed, "comports with basic conspiracy principles," inasmuch as "[o]ne who knowingly participates in a conspiracy to violate federal law can be held accountable for not only his actions, but also the actions of his coconspirators." *Ibid.*

The court of appeals also disagreed with petitioner, and with the Sixth Circuit in *Brock*, that "the Hobbs Act's 'from another' language requires that a coconspirator obtain property 'from someone outside the conspiracy.'" Pet. App. 23 (quoting *Brock*, 501 F.3d at 767). The court reasoned that "from another" simply "refers to a person or entity other than the public official." *Ibid.* In the court's view, the language of the Hobbs Act does not "foreclose[] the possibility that the 'another' can also be a coconspirator of the public official," provided that the co-conspirator "actively participates" in the conspiracy "rather than merely acquiesc[ing]" in it. *Id.* at 22-23.

Finally, the court of appeals pointed out that *Brock* was also "factually" distinguishable from petitioner's case, because Moreno and Mejia were not petitioner's only co-conspirators. Pet. App. 25 n.14. Rather, petitioner also conspired with "dozens of BPD officers" to interfere with commerce by obtaining property from another—namely, from Moreno, Mejia, and Majestic. *Ibid.*

ARGUMENT

Petitioner contends that, to prove a Hobbs Act conspiracy, the government must show that the defendant agreed to obtain property from someone outside of the conspiracy. He asks the Court to grant review to resolve a disagreement on that issue between the

Fourth and Sixth Circuits. Petitioner's claim lacks merit, and the claim of a conflict does not warrant review. The disagreement is shallow and of comparatively recent origin, and its boundaries are not fully defined. It is also doubtful that, on the facts of petitioner's case, the Sixth Circuit would have reached a different result than the Fourth Circuit did.

1. The decision below is correct. The Hobbs Act prescribes punishment for "[w]hoever" interferes with commerce by the "obtaining of property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2). The statute does not state that the defendant must agree to obtain property from someone outside of the conspiracy. See Pet. App. 23. Nor do its terms imply such a limitation. "Whoever" refers to the defendant official (or a person punishable as a principal under 18 U.S.C. 2). Property from "another" refers to property not belonging to that official. See *Merriam-Webster's Collegiate Dictionary* 48 (10th ed. 1993) (defining "another" to mean, *inter alia*, "different or distinct from the one first considered"). And the phrase "with his consent" refers to the consent of someone other than the public official. To convict a public official of conspiracy to commit Hobbs Act extortion, in violation of 18 U.S.C. 371, therefore, the government must prove (a) that the defendant formed an agreement intended to obtain property from another with the other's consent, and (b) that one of the co-conspirators performed "any act to effect the object of the conspiracy." *Ibid.* Petitioner satisfied both parts of that test by agreeing to receive and by receiving bribes from

Moreno, even apart from his agreement with other BPD officers.[2]

Petitioner's reading also produces textual anomalies. Petitioner does not contest in this Court that he committed substantive Hobbs Act violations by accepting payments from Moreno. Pet. App. 46; C.A. App. 57-59. But if a bribe-payer such as Moreno can be "another" under Section 1951(b)(2) 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 under 18 U.S.C. 371. Nor is it clear why Moreno's consent should suffice to prove the substantive offense but not a conspiracy charge based on that offense. Section 1951(a) 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.

Finally, the rule petitioner proposes would produce arbitrary and incongruous results. If petitioner had been charged of conspiring *solely* with his fellow BPD officers, then petitioner could not contest that both elements—"property from another" and "with his consent"—would be satisfied. Yet petitioner argues that a broader conspiracy charge that *also* includes Moreno as a willing participant is beyond the statute's reach. The statute's text should not be read to produce such bizarre results.

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[2] Petitioner errs by looking at the extortion offense from the perspective of all the conspirators, rather than the defendant. See Pet. 14 ("[T]heir agreement does not concern 'another' at all—only themselves."); *ibid.* ("[I]n no sense have they 'conspired' to obtain anyone's 'consent.'").

Petitioner's suggestion (Pet. 12, 16) that the Fourth Circuit's standard is vague because it draws a line between "mere acquiescence" and "active participation" by a bribe-payer is unfounded. The court of appeals made clear (Pet. App. 22-24) that this inquiry determines whether a defendant is simply complying with an official demand—or is instead becoming a conspirator by knowingly participating in the criminal agreement. That is not a vague distinction, but is essential to the formation of a conspiracy. See *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) ("The essence of conspiracy is 'the combination of minds in an unlawful purpose.'" (quoting *United States* v. *Hirsch*, 100 U.S. 33, 34 (1879)). The possibility that "close cases can be envisioned" does not "render[the] statute vague." *United States* v. *Williams*, 553 U.S. 285, 305 (2008). "Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Id.* at 306.

2. Petitioner is correct that the Fourth and Sixth Circuits disagree about whether, in at least some Hobbs Act conspiracy cases, the government must prove that the defendant agreed to obtain property from someone outside of the conspiracy. But given that the conflict is limited to two circuits and remains unclear in its scope, this Court's intervention is not warranted. In any event, the disagreement is not direct, because the Sixth Circuit did not confront a case like this one in which the defendant was a public official who received a bribe, rather than the bribe-payer. And this case would be a particularly poor vehicle for resolving any conflict because the record

supports the conclusion that petitioner conspired with his fellow BPD officers, not solely with Moreno.

a. In *United States* v. *Brock*, 501 F.3d 762 (6th Cir. 2007), the defendants were convicted of conspiracy to commit extortion based on evidence that they bribed a supervisory clerk at the county courthouse to delete bond forfeiture hearings from the court's calendar. *Id.* at 765. Because the defendants had used their own money to pay the bribes, it was undisputed that "the [defendants] did not commit a substantive act of extortion" because "[t]hey did not 'obtain . . . property from another' person." *Id.* at 767 (some brackets omitted) (quoting 18 U.S.C. 1951(b)(2)). The question was whether, as "the payor[s] of a bribe to a state official," they could nevertheless be found guilty of "conspir[ing] with that official to extort property" from themselves. *Id.* at 764.

The Sixth Circuit held that they could not. First, the court stated that the defendants and the county clerk "did not agree, and could not have agreed, to obtain property from 'another' when no other person was involved." 501 F.3d at 767. Second, the court stated that the property could not have been obtained "with the other's *consent*," because "[h]ow do (or why would) people conspire to obtain their own consent?" *Ibid.* Third, the court noted that the Hobbs Act is meant to punish "public officials who *accept* a bribe when there is a quid pro quo for the payment," not "private individuals who *offer* a bribe to public officials." *Id.* at 768. Thus, "[h]aving 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." *Ibid.* Finally, the court concluded that the rule of lenity and

principles of federalism favored a narrower interpretation of the statute. *Id.* at 768-769.

As the court below recognized, its decision is inconsistent with *Brock*'s statement that the Hobbs Act "requires that a coconspirator obtain property 'from someone outside the conspiracy.'" Pet. App. 23 (quoting 501 F.3d at 767). But *Brock* derived its holding from concerns that are largely inapplicable to this case, because petitioner is a public official who accepted bribes from a private citizen. Petitioner, unlike the defendants in *Brock*, could unquestionably be held liable for the substantive crime of extortion—*i.e.*, he was capable of "obtain[ing] property from another" and also capable of doing so "with the other's *consent*." 501 F.3d at 767; see *id.* at 768 ("[T]he definition of extortion 'under color of official right' correctly extends to public officials who *accept* a bribe."). For the same reason, the Sixth Circuit's concern about "transform[ing] the Act into a prohibition on paying bribes to public officials," *ibid.*, is not implicated here.

Brock did more broadly state that conspiracy liability for a Hobbs Act extortion offense requires "an agreement to obtain property from someone outside the conspiracy." 501 F.3d at 767. But the Sixth Circuit might modify or narrow that rule if confronted with a case such as this, in which the defendant is a public official accused of accepting bribes from others.[3] As petitioner acknowledges (Pet. 17), no other

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[3] The Sixth Circuit has applied *Brock* to a Hobbs Act conspiracy in at least one other case. See *United States* v. *Gray*, 521 F.3d 514, 532-540 (2008), cert. denied, 557 U.S. 919 (2009). That case, like *Brock*—and unlike this case—involved defendants who were accused of paying bribes *to* public officials. See *id.* at 535 ("[P]ay-

court of appeals has directly considered the issue. It would therefore be premature to grant review before the Sixth Circuit has clarified its position on whether a public official may be convicted of conspiring to obtain property from other members of the conspiracy.

b. The facts of this case also make it a poor vehicle for addressing the disagreement that petitioner identifies. As the court below observed, petitioner's argument "is factually flawed, in that it relies on an evidentiary premise—that his only coconspirators were Moreno and Mejia—that is entirely at odds with the record." Pet. App. 25 n.14. In fact, "the evidence established a wide-ranging conspiracy involving dozens of BPD officers." *Ibid.*; see *id.* at 5 ("approximately fifty [BPD] officers").

For instance, the evidence indicates that petitioner learned of the kickback scheme from another BPD officer, most likely Officer Rodriguez. Pet. App. 7-8 & n.7. On January 17, 2010, after petitioner persuaded an accident victim to have his vehicle towed by Majestic, Moreno arrived at the scene of the accident with Officer Rodriguez. "Despite knowing each other, Rodriguez and Ocasio acted as strangers." *Id.* at 8 n.7. This and other evidence "entitled [the jury] to find * * * [other] BPD officers to be Ocasio's coconspirator." *Id.* at 25 n.14.

Petitioner suggests (Pet. 9) that the indictment did not "advance[] that theory," but he is incorrect. The conspiracy count alleged that petitioner "agree[d] * * * with other Baltimore Police Department Officers" to "unlawfully obtain[,] under color of official

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ments were made directly by defendants to public officials to gain favor and to improve their lot as consultants.").

right, money and other property from Moreno, Mejia, and Majestic, with their consent." C.A. App. 50; see *id.* at 51 ("It was a purpose of the conspiracy for Moreno and Mejia to enrich over 50 BPD Officers, including the defendants."); see also *id.* at 53 (incorporating the January 17 incident as an overt act). The fact that the indictment also alleged that Moreno and Mejia were conspirators (Pet. 18-19) does not prevent the indictment from charging a factually lesser-included BPD-only conspiracy. Cf. *United States* v. *Miller*, 471 U.S. 130, 135, 145 (1985) (indictment validly includes a fraudulent scheme that is "much narrower than, though included within, the scheme that the grand jury had alleged," and a defendant may be convicted on such a narrower scheme). And, although the government did not emphasize the point in its closing argument or in its appellate brief, the court of appeals could "affirm on any basis fairly supported by the record." *Doe* v. *Kidd*, 501 F.3d 348, 360 (4th Cir. 2007) (citation and internal quotation marks omitted), cert. denied, 552 U.S. 1243 (2008).

Given the nature of the charge and the factual record that established a broad public-official conspiracy to obtain bribes from Moreno, Mejia, and Majestic under color of official right, the Sixth Circuit could have readily reached the same result, irrespective of its view on the question presented. Accordingly, further review based on petitioner's claim of a conflict is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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