No. 12-370

# In the Supreme Court of the United States

MICHAEL COPPOLA, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether petitioner obtained and conspired to obtain "property" by means of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a), by using fear to deprive union members of their right to have union officials hold money and property solely for the benefit of the union and its members, and obtaining for himself the right to dispose of such money and property for the benefit of his organized crime family.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-67a) is reported at 671 F.3d 220.

## JURISDICTION

The judgment of the court of appeals was entered on February 14, 2012. A petition for rehearing was denied on May 14, 2012 (Pet. App. 73a-74a). On August 6, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to September 21, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity

and conspiring to commit that offense, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d). He was sentenced to concurrent terms of 192 months of imprisonment, to run consecutively with a 42-month prison term on a related charge to which he had earlier pleaded guilty. The court of appeals affirmed. Pet. App. 1a-67a.

1. Petitioner was a "soldier" and later a "captain" in the Genovese organized-crime family, one of five arms of La Cosa Nostra in the New York metropolitan area. Pet. App. 2a-3a. In the 1950s, the Genovese and Gambino crime families divided control of the New York and New Jersey waterfronts among themselves. The former acquired control of the Manhattan and New Jersey waterfronts, while the latter acquired control of the Brooklyn and Staten Island waterfronts. *Id.* at 5a.

From 1974 through 2007, petitioner, together with other members and associates of the Genovese family, used intimidation and fear to exercise control over Local 1235 of the International Longshoreman's Association (ILA) and affiliated ILA locals working on the Manhattan and New Jersey docks. Pet. App. 4a. Through its control of the unions, the family dictated what businesses were permitted to work on the waterfront. It demanded monthly "tribute" payments, as well as "Christmases"—special year-end payments—from both waterfront unions and businesses. *Id.* at 5a-8a.

The Genovese family placed individuals of its own choosing in leadership positions within the ILA, thereby diverting union salary and other benefit payments to those individuals and ensuring that the union would conduct its affairs for the benefit of the family rather than union members. To take one example, the family "sent word" to ILA president John Bowers that it want-

ed him to place a man named Harold Daggett into a senior position with the union. Pet. App. 11a (brackets omitted). The family then threatened to "take [Daggett] out" if he did not do what he was told by the family. *Ibid.*

Petitioner was integrally involved in this decades-long conspiracy. An undercover officer who had posed as the owner of a trucking company, for instance, testified that petitioner had told him that petitioner would allow him to operate his waterfront business without labor disturbances in exchange for tribute payments consisting of a percentage of the company's profits. Pet. App. 6a. In 2007, while under court order to have no dealings with any officer or member of the ILA or its locals, petitioner was secretly recorded receiving assurances from the son of the president of Local 1235 that the Local would continue to pay monthly tributes and "Christmases" to the Genovese family. *Id.* at 9a. Petitioner was also recorded engaging in conversations to secure the placement of his friends and relations in union positions. *Id.* at 11a-12a.

2. Petitioner was charged with participating in the conduct of the affairs of an enterprise—*i.e.*, the Genovese organized crime family—through a pattern of racketeering activity and conspiring to commit that offense, in violation of the RICO statute, 18 U.S.C. 1962(c) and (d). The alleged racketeering activities consisted of (i) extortion and extortion conspiracy under the Hobbs Act, 18 U.S.C. 1951(a),[1] and wire fraud; (ii) murder and

[1] The Hobbs Act provides that "[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, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything

attempted murder; and (iii) conspiring to possess various false identification documents. Pet. App. 3a-4a.

The government's case under the Hobbs Act consisted of two theories. See Pet. App. 19a. First, the government alleged that petitioner had obtained and conspired to obtain the property of Local 1235 members in the tangible form of "'labor union positions, money paid as wages[,] and employee benefits and other economic benefits' that the union members would have obtained but for the conspirators' 'corrupt influence over [the] union,'" *id.* at 26a (quoting 1:08-cr-00763-JG Docket entry No. 1, paras. 16, 19 (E.D.N.Y. Oct. 29, 2008) (Indictment)) (second brackets in original), including "'tribute payments' from membership funds," *ibid.* (quoting Trial Tr. 1544). Second, the government alleged that petitioner had obtained and conspired to obtain property in the intangible form of the "right of local 1235 members to have the officers, agents, delegates, employees and other representatives of their labor organization manage the money, property and financial affairs of the organization in accordance with [Section 501(a) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 501(a)]." *Id.* at 3a (quoting Indictment paras. 16, 19). Section 501(a) specifies certain duties owed by union representatives to the union and its members, including holding union money and property solely for the benefit of the union and its members, and managing, investing, and spending the money in accordance with the union's constitution and bylaws. 29 U.S.C. 501(a). According to the government, petitioner had obtained the property of the union with the consent of union officials "induced by wrongful use of actual and

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in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. 1951(a).

threatened force, violence or fear." Pet. App. 3a-4a (quoting Indictment paras. 16, 19).

The jury convicted petitioner on both the substantive and conspiracy RICO counts. Pet. App. 13a. It indicated on the verdict form that it had found that the government had proved the Hobbs Act and false-identification predicate acts of racketeering. *Ibid.*

3. On appeal, petitioner challenged his conviction and sentence on numerous grounds, each of which the court of appeals rejected. As relevant here, petitioner contended that the government's intangible-rights theory of Hobbs Act extortion was legally invalid. The right to the loyal services of union officials conferred on union members by Section 501(a) of the LMRDA, he argued, does not constitute "property" within the meaning of the Hobbs Act. He acknowledged that his position was foreclosed by the Second Circuit's prior decision in *United States* v. *Gotti*, 459 F.3d 296 (2d Cir. 2006), cert. denied, 551 U.S. 1144 (2007). But he argued that *Gotti* should be reconsidered in light of the subsequent decision in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), in which this Court narrowly construed a different statute criminalizing "honest services" fraud, 18 U.S.C. 1346, to avoid constitutional vaguenss concerns. 130 S. Ct. at 2928, 2931.

The court of appeals rejected petitioner's argument, explaining that *Skilling* "addressed a particular intangible right—to honest services—identified, but not defined, by § 1346" and "did not identify vagueness concerns with *all* intangible rights." Pet. App. 22a. The court determined that "nothing in *Skilling* warrants a conclusion that intangible property rights can no longer support a Hobbs Act extortion or extortion conspiracy charge." *Ibid.* Moreover, it noted, "[w]hereas § 1346

provides no textual guidance about the duties whose violation will amount to a deprivation of 'honest services,' * * * § 501(a) specifically enumerates the duties that labor representatives owe to their union and its members." *Id.* at 23a-24a (citations omitted). Hence, "in contrast to § 1346, which references * * * only a general and undefined fiduciary standard * * * , § 501(a) avoids unconstitutional ambiguity by detailing the duties owed and the persons from and to whom they are owed." *Id.* at 24a (citations omitted).

The court also observed that, to eliminate vagueness concerns, *Skilling* had cabined honest-services fraud to cases in which the breach of duty was procured by the corrupt participation of the "third party" who paid either "bribes or kickbacks" for the breach. Pet. App. 25a. "[B]ecause the principal in a Hobbs Act violation," however, "is not the party committing the fiduciary breach, but the person who procures the breach by statutorily specified wrongful means—extortion—the ambiguity concerns with § 1346 are simply not present in the Hobbs Act." *Ibid.* In other words, "[t]he extortion element of the Hobbs Act serves the same limiting function as the bribe-kickback element of § 1346, serving notice that a crime depends on a third party obtaining property through the wrongful use of threats or fear to achieve the property's surrender." *Ibid.*

Petitioner also challenged one part of the government's allegation that he had extorted tangible property, arguing that its "salary theory"—*i.e.*, that petitioner had obtained tangible property from Local 1235 union members in the form of the salaries the members paid to their corrupt union presidents—was legally invalid. Pet.

App. 26a.[2] The court of appeals declined to address that challenge on the merits, however, finding any error to be harmless in light of the intangible-rights theory: "[I]f the jury found that [petitioner] conspired to extort the salaries of Local 1235 presidents by corrupting them to act in the interests of the Genovese family rather than their membership, then the jury would necessarily have had to conclude that [petitioner] conspired to extort the union membership of its intangible LMRDA rights under § 501(a)." *Id.* at 28a.

After conducting a detailed review of the trial record, see Pet. App. 29a-39a, the court of appeals also rejected petitioner's challenge to the sufficiency of the evidence supporting the extortion predicate. With respect to the offense element of "obtain[ing] and conspir[ing] to obtain tangible or intangible property from Local 1235 members," the court of appeals found that the evidence presented to the jury demonstrated that petitioner had obtained union property that "was both tangible, insofar as [petitioner] received monies belonging to the union membership, and intangible, insofar as he deprived members of their § 501(a) right to have union presidents hold union 'money and property solely for the benefit of the organization and its members' and obtained for himself the right to dispose of such money and property for the benefit of the Genovese family." *Id.* at 29a.

**ARGUMENT**

Petitioner contends (Pet. 11-32) that the court of appeals erred in affirming his RICO conviction because it misconstrued the Hobbs Act to criminalize the extortion

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[2] Petitioner did not "contend that the extortion of tribute payments from a union by an organized crime family fails to state a viable Hobbs Act offense." Pet. App. 26a.

of intangible rights of union members specified in Section 501(a) of the LMRDA. That argument lacks merit. Every court of appeals to consider the question has agreed with the Second Circuit that the Hobbs Act extortion offense includes the obtainment of union members' intangible rights under Section 501(a) through the use or threat of force, violence, or fear. Petitioner has failed to identify any conflict between the decision below and a decision of this Court or another court of appeals. Further review therefore is not warranted.

1. The Second Circuit correctly construed the Hobbs Act offense, 18 U.S.C. 1951(a), to include the extortion of intangible rights of union members set forth in Section 501(a) of the LMRDA.

a. The Hobbs Act subjects to criminal liability "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The statute 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." 18 U.S.C. 1951(b)(2).

The New York law on which Congress modeled the Hobbs Act, see *Evans* v. *United States*, 504 U.S. 255, 261 n.9, 264 (1992); accord *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973), similarly defined extortion as "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear" and further provided that "[f]ear * * * may be induced by a threat * * * [t]o do an unlawful injury to * * * property." N.Y. Penal Law §§ 850, 851 (Consol. 1909); accord Commissioners of the Code, *Penal Code of the State of New York* §§ 613, 614 (1865) (Proposed). In the

earliest decision interpreting the meaning of "property" under that statute, *People* v. *Barondess*, 31 N.E. 240, 241-242 (1892), New York's highest court explained that the statute used the word "property" in "its broad and unrestricted sense" to reach both tangible and intangible rights, including, for example, an injury to a "business" in the form of work stoppages occasioned by a strike. Although that decision involved the meaning of the term "property" under the section of the statute defining wrongful acts inducing fear, New York's highest court later made clear that there was no basis to conclude that the term "property" bore a different meaning in the statute's core extortion provision. See *People* v. *Spatarella*, 313 N.E.2d 38, 39-40 (1974).

In enacting the Hobbs Act, Congress thus legislated against a well-established background principle that property includes certain intangible rights. See also *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) ("intangible" property protected against money-or-property fraud under the mail and wire fraud statutes, 18 U.S.C. 1341, 1343). Consistent with that understanding, in the first appellate decision to consider the issue under the Hobbs Act, *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (1969), cert. denied, 397 U.S. 1021 (1970), the Second Circuit held that defendants who had threatened owners of a garbage-removal company with physical violence unless they ceased soliciting customers in certain areas had extorted the owners' property "right to solicit business from anyone in any area without any territorial restrictions." *Ibid.* The court explained that "[t]he concept of property under the Hobbs Act, as devolved from its legislative history and numerous decisions, is not limited to physical or tangible property or things * * * but includes, in a broad sense, any valuable right con-

sidered as a source or element of wealth." *Id.* at 1075 (citations omitted).

The courts of appeals have consistently adhered to that interpretation. See, *e.g.*, *Libertad* v. *Welch*, 53 F.3d 428, 444 n.13 (1st Cir. 1995); *Northest Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), cert. denied, 450 U.S. 916, 450 U.S. 985, and 452 U.S. 905 (1981); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973).

Applying that settled understanding of "property" under the Hobbs Act to the union context, the Second, Third, and Sixth Circuits have held that the intangible rights of union members under the LMRDA qualify as "property" for purposes of the Hobbs Act. See *United States* v. *Gotti*, 459 F.3d 296, 324 n.9 (2d Cir. 2006), cert. denied, 551 U.S. 1144 (2007); *United States* v. *Debs*, 949 F.2d 199, 201-202 (6th Cir. 1991), cert. denied, 504 U.S. 975 (1992); *United States* v. *Local 560 of the Int'l Bhd. of Teamsters*, 780 F.2d 267, 281, 288 & n.23 (3d Cir. 1985), cert. denied, 476 U.S. 1140 (1986). Those courts have reasoned that "the business rights of unions[] are considered property" under the Hobbs Act because they are "valuable right[s] considered as a source or element of wealth." *Debs*, 949 F.2d at 201 (quoting *Tropiano*, 418 F.2d at 1075). Moreover, extortion directed at LMRDA rights can satisfy the "obtain[ing]" element of extortion, see *Scheidler* v. *National Org. for Women*, 537 U.S. 393, 397 (2003), because those rights can be "exercise[d], transfer[red], or [sold]" by the extorter, *id.* at 405.

When persons like petitioner extort LMRDA rights, they often seek "to exercise those rights themselves, by telling various delegates whom to vote for in certain leadership positions, and by controlling various elected officials' performance of their union duties * * * in a way that would profit them financially." *Gotti*, 459 F.3d at 325.

That interpretation promotes the underlying objectives of the Hobbs Act. As this Court explained in *Evans* v. *United States*, 504 U.S. 255 (1992), when it enacted the statute in 1946, "Congress * * * was concerned primarily with distinguishing between 'legitimate' labor activity and labor 'racketeering,' so as to prohibit the latter while permitting the former." *Id.* at 262-263 (citing 91 Cong. Rec. 11,899-11,922 (1945)). The Hobbs Act "was intended to encompass the conduct held to be beyond the reach of the [Anti-Racketeering] Act by [the Court's prior] decision in [*United States* v. *Local 807 of International Brotherhood of Teamsters*, 315 U.S. 521 (1942) (*Local 807*)]." *Evans*, 504 U.S. at 262. That conduct included "professional rackets * * * [that] assumed the guise of labor unions," and "labor organizations of good repute and honest purpose * * * misdirected [to] become agencies of blackmail." *Local 807*, 315 U.S. at 530-531.

The court of appeals thus correctly concluded that "LMRDA rights can constitute extortable property under the Hobbs Act." *Gotti*, 459 F.3d at 325.

2. Petitioner has failed to identify any decision of this Court or another court of appeals holding that intangible rights of union members under the LMRDA do not qualify as "property" under the Hobbs Act or otherwise conflicting with the reasoning or holding of the decision below. The cases that petitioner does cite stand

for propositions that are entirely consistent with the court of appeals' construction of the statute.

a. Petitioner first claims (Pet. 12-23) that the decision below conflicts with cases holding that extortion under the Hobbs Act requires the defendant to "obtain" the property in question, not merely to deprive the victim of the property. No conflict exists, however, because the court of appeals expressly acknowledged that the extortion predicate offense required the jury to find that petitioner had obtained the LMRDA rights and correctly found that the evidence was sufficient to meet that element.

i. Petitioner erroneously contends (Pet. 12-20) that the court of appeals' decision conflicts with this Court's decision in *Scheidler, supra*. In that case, the Court considered whether a group of protesters had violated the Hobbs Act by engaging in a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity that included acts of alleged extortion, even though the protesters had not actually obtained any property for themselves. See 537 U.S. at 397-398. Although the Court found "no dispute * * * that [the protesters had] interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights," *id.* at 404, the Court held that the protestors' conduct did not qualify as extortion under the Hobbs Act because the protesters did not "obtain" the clinic's property, *id*. at 409.

In the decision below, the court of appeals correctly recognized that *Scheidler* held "that the use of threats or fear to interfere with or disrupt a person's exercise of property rights is not enough to establish a Hobbs Act violation"; rather, "[a] defendant must 'obtain' the property for himself." Pet. App. 27a. It proceeded to apply

that standard to the facts of the case and concluded that petitioner's conduct constituted extortion within the meaning of the statute. As the court of appeals explained, not only did petitioner "deprive[] members [of Local 1235] of their § 501(a) right to have union presidents hold union 'money and property solely for the benefit of the organization and its members,'" but he "*obtained for himself* the right to dispose of such money and property for the benefit of the Genovese family." *Id.* at 29a (emphasis added). Petitioner does not challenge that factbound conclusion before this Court.

Thus, although petitioner invokes *Scheidler*'s distinction between extortion and coercion, the court of appeals unquestionably found that the jury was presented with sufficient evidence of the additional ingredient that separates extortion from coercion—*i.e.*, the pursuit or receipt of the victim's property rights. See *Scheidler*, 537 U.S. at 405; see also *id.* at 407-408 ("[C]oercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property."); Pet. App. 29a. As the Second Circuit explained in *Gotti*, an extortionist obtains his victim's intangible property rights when he "order[s] [the victim] to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights." 459 F.3d at 324 n.9.

*Scheidler* sheds no light on the question that is actually presented in the petition: whether "fiduciary obligations of loyalty and disclosure owed by union officials constitute property that can be 'obtained' within the meaning of the Hobbs Act." Pet. i. As petitioner concedes, see Pet. 15, *Scheidler* explicitly declined either to delineate the "outer boundaries" of Hobbs Act liability

for obtaining intangible rights, 537 U.S. at 402, or to "reject[]" lower court decisions "such as [*Tropiano*]" that had held that intangible rights may constitute property under the Hobbs Act, *id.* at 402 n.6. *Scheidler* therefore presents no ground for further review.[3]

Petitioner also contends (Pet. 18-19) that the fact that *Scheidler* abrogated the Second Circuit's decision in *United States* v. *Arena*, 180 F.3d 380 (1999), cert. denied, 531 U.S. 811 (2000), is "singularly [ ] significant." But as *Scheidler* noted, 537 U.S. at 403 n.8, *Arena* was incorrectly decided because it adopted an understanding of the "obtaining" element of extortion that was too broad. In *Arena*, similar to *Scheidler*, the defendants had engaged in "an overall strategy to cause abortion providers * * * to give up their property rights to engage in the business of providing abortion services for fear of future attacks." *Id.* at 393. The Second Circuit

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[3] Petitioner asserts (Pet. 23-24) that this Court granted certiorari in *Scheidler* in part to decide the "property issue" presented in this case, but ultimately found no need to address it. *Scheidler* framed the question presented as "whether petitioners committed extortion within the meaning of the Hobbs Act." 537 U.S. at 397. While that question was broad enough to encompass the issue of whether the abortion clinics' "right of exclusive control of their business assets," *id.* at 405, constituted property for Hobbs Act purposes, it does not necessarily follow that the Court granted certiorari to decide that issue as opposed to the issue the Court actually decided—whether the petitioners had obtained or attempted to obtain the right at issue. In any event, the question whether the right of exclusive control of business assets qualifies as property under the Act is different from the question whether the statutory rights of union members qualify as property. The Court could not have granted review in *Scheidler* to address that question, and it has denied a petition for certiorari on that question since *Scheidler*. See *Ciccone* v. *United States*, 551 U.S. 1144 (2007).

held that this conduct fell within the reach of the Hobbs Act because "even when an extortionist has not taken possession of the property that the victim has relinquished, she has nonetheless 'obtain[ed]' that property if she has used violence to force her victim to abandon it." *Id.* at 394 (brackets in original). In so holding, the court adopted a definition of "obtain" that included "the regulation of the fate . . . of something." *Ibid.* (citation omitted). Because of that error, the Second Circuit in *Arena* did not determine whether the defendants had "exercise[d] [the deprived] rights themselves," *Gotti*, 459 F.3d at 325. See *Arena*, 180 F.3d at 394 ("In the present case, 'obtaining' was established because the evidence was ample to permit the jury to infer that Arena and Wentworth, in perpetrating the butyric acid attacks on the offices of Planned Parenthood and Yoffa, attempted to induce them to abandon their abortion businesses.").

ii. Petitioner likewise errs in contending (Pet. 12, 21-22) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *United States* v. *McFall*, 558 F.3d 951 (2009). The defendant in that case was a lobbyist who was convicted of attempted extortion under the Hobbs Act for attempting to use his political influence to prevent a competitor of his client from bidding on a contract. *Id.* at 953-955. Applying *Scheidler*, the Ninth Circuit held that the evidence had failed to establish a violation of the Hobbs Act because merely "decreasing a competitor's chance of winning a contract, standing alone, does not amount to *obtaining* a transferrable asset for oneself (or one's client)." *Id.* at 957.

Like *Scheidler*, *McFall* did not purport to rest on a construction of the word "property" in the Hobbs Act. The court assumed for the sake of argument that "the

right to submit a bid is property within the meaning of the Hobbs Act," but held that the defendant "did not, and indeed could not, attempt to exercise [the competitor's] right to submit a bid." 558 F.3d at 957-958. At most, it explained, he could restrict the competitor's ability to exercise that right and therefore increase his client's "odds of prevailing on its *own* bid." *Id.* at 958 (emphasis added). The Ninth Circuit not only made clear that its analysis was consistent with Second Circuit decisions holding that intangible rights constitute property within the meaning of the Hobbs Act, see *id.* at 957 (citing *Gotti*, 459 F.3d at 323, and *Tropiano*, 418 F.2d at 1076), but read *Scheidler* to "approv[e] of [the Second Circuit's] broad definition of extortable property," *id.* at 957 n.7. *McFall* thus does not conflict with the decision below.

Petitioner nevertheless claims (Pet. 20-21) that the Second Circuit's decisions in *United States* v. *Cain*, 671 F.3d 271, cert. denied, 132 S. Ct. 1872 (2012), and *United States* v. *Sekhar*, 683 F.3d 436 (2012), petition for cert. pending, No. 12-357 (filed Sept. 19, 2012), are in "tension" with *McFall*. "Tension" with other Second Circuit decisions could not justify further review in *this* case. And in any event, no such "tension" exists, much less a conflict calling for further review.

In each of those cases, consistent with the reasoning of both *Scheidler* and *McFall*, the Second Circuit concluded that the defendants had engaged in acts of extortion specifically to obtain intangible business rights in the hands of competitors. See *Cain*, 671 F.3d at 283 ("Cain used his reputation for violence and explicit threats to pressure Gollus to sell him his business for far less than Gollus believed it was worth."); *Sekhar*, 683 F.3d at 442 ("Sekhar attempted to deprive the General

Counsel of his right to make a recommendation consistent with his legal judgment and attempted to exercise that right by forcing the General Counsel to make a recommendation determined by Sekhar.") (emphasis omitted). Contrary to the Ninth Circuit's view of the offense conduct in *McFall*, the defendants in those cases actually sought to obtain an intangible right held by the victim.[4]

b. Petitioner's reliance (Pet. 26-32) on this Court's decisions considering the applicability of the federal mail and wire fraud statutes, 18 U.S.C. 1341 and 1343, to "honest services" fraud is also misplaced. Those cases interpreted different statutory provisions, with different language, purposes, and background contexts.

i. In *McNally* v. *United States*, 483 U.S. 350 (1987), the Court construed the version of Section 1341 in effect at the time, which "criminalized schemes or artifices 'to defraud' or 'for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *Id.* at 358. The Court held that Section 1341 did not authorize conviction for depriving the citizenry of its right to honest and impartial government—*i.e.*, the "misuse of [public] office for private gain"—in the absence of any deprivation of "money or property" from public coffers. *Id.* at 355, 360. *McNally* did not purport, however, to limit Section 1341 to tangible property. As the Court explained in *Carpenter* v. *United States*, 484 U.S. 19 (1987), *McNally* "did not limit the scope of § 1341 to tangible as distinguished from intangible property rights." *Id.* at 25.

Petitioner argues that the reasoning of *McNally* suggests that "union democratic rights" do not qualify as

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[4] *Cain* noted that it disagreed with *McFall* only "[t]o the extent" that its reasoning was inconsistent. 671 F.3d at 283 n.4.

property under the Hobbs Act. See Pet. 26-27. But the concerns that undergirded the Court's analysis in *McNally*, which focused on the legislative history of Section 1341 and federalism considerations, are not applicable to the Hobbs Act. *McNally* found that Section 1341 was enacted to criminalize the use of the mails to swindle the public, and thus construed the statute narrowly in line with that purpose. 483 U.S. at 358-360. The Court further observed that to construe Section 1341 to encompass the challenged conduct would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." *Id.* at 360.

The Hobbs Act, in contrast, was enacted specifically to address labor racketeering, see p. 11, *supra*, and "extortion with respect to § 501(a) rights fits within the core misconduct that is labor racketeering." Pet. App. 25a. It would be anomalous if quintessential acts of labor racketeering, such as those committed by petitioner, were held to fall outside of the statute's reach. "*McNally*'s federalism rationale," moreover, "has no analogue in the union arena." *Debs*, 949 F.2d at 201. Construing the Hobbs Act to encompass the protection of LMRDA rights would not entangle the federal courts in setting standards for state officials or encroach on an area of traditional state regulatory predominance; union conduct has long been subject to pervasive federal regulation. Nor would it require federal courts to fashion standards for union officials because the LMRDA already sets forth with particularity the rights of union members. See *United States* v. *International Bhd. of Teamsters*, 708 F. Supp. 1388, 1399 (S.D.N.Y. 1989) ("[C]haracterizing those rights created by the federal labor statutes as 'property' does not involve the federal

government in setting arbitrary standards for conduct in the way that the same characterization of the ethereal and changeable notions of 'good government' or 'honest and faithful services' would."). It is thus unsurprising that the courts of appeals have had little trouble concluding that the Hobbs Act extends to a wide variety of intangible rights, including the Section 501(a) rights, and why none has read *McNally* to narrow the scope of the Hobbs Act. See pp. 10-11, *supra*.

ii. Petitioner also errs in arguing (Pet. 28-32) that the decision below conflicts with *Skilling* v. *United States*, 130 S. Ct. 2896 (2010). *Skilling* construed the statute enacted in response to *McNally*, 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" for purposes of the mail and wire fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services." To avoid the concern that the phrase "honest services" was unconstitutionally vague, *Skilling* held that Section 1346 proscribes only schemes involving bribery or kickbacks, not all fiduciary self-dealing. See 130 S. Ct. at 2928-2934.

Nothing in this Court's analysis in *Skilling* remotely suggests that intangible rights generally—much less the specific LMRDA rights enumerated in Section 501(a)—do not qualify as "property" under the Hobbs Act. *Skilling* did not express vagueness concerns with intangible rights generally, but rather only with the statutory phrase "honest services." The Court was concerned that if honest-services fraud were held to extend beyond bribery and kickbacks to "undisclosed self-dealing by a public official or private employee," courts might lack "standards of sufficient definiteness and specificity to overcome due process concerns," and therefore "[i]f Congress desires to go further * * * it must speak

more clearly than it has." 130 S. Ct. at 2933 & n.44 (citations omitted).

With respect to LMRDA rights, however, Congress *has* identified with sufficient clarity the duties that labor representatives owe to their union. As the court of appeals explained, those duties include "hold[ing] its money and property solely for the benefit of the organization and its members"; "manag[ing], invest[ing], and expend[ing] the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder"; "refrain[ing] from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with [a representative's] duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization"; and "account[ing] to the organization for any profit received by [the representative] in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization." Pet. App. 20a (quoting 29 U.S.C. 501(a)).[5] It therefore cannot reasonably be maintained that Section 501(a) raises the vagueness concern that prompted this Court to adopt a narrow construction of the phrase "honest services" in *Skilling*.

Moreover, unlike Section 1346, the offense punishable under the Hobbs Act cannot be construed to proscribe

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[5] Petitioner argues (Pet. 30-31) that the district court's jury instructions did not set forth the duties enumerated in Section 501(a). But, as petitioner acknowledges, the court specifically informed the jury that LMRDA "requires the union's officers and other representatives to manage the money, property, and financial affairs of the union local solely for the benefit of the union and its members and not on behalf of any other party whose interests conflict with those of the union or its members." Pet. 31 (quoting instruction). That instruction correctly conveyed the pertinent provisions of Section 501(a).

mere self-dealing. As the court below explained, "because the principal in a Hobbs Act violation is not the party committing the fiduciary breach, but the person who procures the breach by statutorily specified unlawful means—extortion—the ambiguity concerns with § 1346 are simply not present in the Hobbs Act." Pet. App. 25a. The extortion element of the Hobbs Act "serves the same limiting function as the bribe-kickback element of § 1346, serving notice that a crime depends on a third party obtaining property through the wrongful use of threats or fear." *Ibid.* *Skilling* thus provides no basis to circumscribe the reach of the Hobbs Act.[6]

c. Finally, petitioner errs in relying (Pet. 24-25) on this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). In that case, the Court held that "business in the sense of the activity of doing business, or the activity of making a profit" is not "property" within the meaning of the Fourteenth Amendment because it does not encompass "the right to exclude others." *Id.* at 673, 675 (emphasis omitted). The Court in *College Savings Bank* did not even purport to address, much less reject, the proposition that the intangible rights of union members under the LMRDA qualify as "property" within the meaning of the Hobbs Act.

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[6] As part of its tangible-property theory, the government contended that petitioner had obtained tangible property from Local 1235 union members in the form of the salaries they paid to their corrupt presidents. See p. 4, *supra*. Petitioner argues in passing (Pet. 27-28) that other courts have "rejected the concept that the salary of someone who would be paid regardless becomes property where the salary holder has a conflict of interest." The court of appeals, however, declined to address this claim on the merits, concluding that any error in the government's "salary theory" would be harmless. Pet. App. 28a. Petitioner does not take issue with that case-specific finding.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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