NO. 12-357

In the
Supreme Court of the United States

GIRIDHAR C. SEKHAR,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The government devotes the vast majority of its brief to refuting an argument no one has made. The government strenuously demonstrates that "property" under the Hobbs Act extends to intangible property, and is not limited to tangible property. Petitioner never suggested otherwise, since "property" clearly includes transferable, obtainable intangible property like patents and options. From the undisputed premise that Hobbs Act property includes *some* intangible property, the government contends that such intangible property must necessarily include all "intangible rights with economic value." That conclusion does not remotely follow. To the contrary, as this Court made clear in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*), the Hobbs Act covers only the kind of alienable property—whether tangible or intangible—that can be obtained or transferred. It does not extend to intangible interests in autonomy or "intangible rights with economic value." While such interests can be the target of coercion, they are not property that can be extorted under the Hobbs Act.

The government cites a multitude of cases, but cannot identify a single one in which this Court has suggested that "intangible rights with economic value" constitute Hobbs Act property. For good reason. That definition is incompatible with the Court's decisions construing the Act and other analogous criminal statutes. Extortion and fraud are fundamentally property crimes, and contorting the definition of "property" to include anything of value,

including the intangible right to exercise one's profession, empowers federal prosecutors at the expense of providing clear notice of the bounds of federal crimes. Thus, consistent with the rule of lenity, a long line of this Court's decisions construe "property" narrowly and reject the notion that something as inchoate as one's right to autonomy in economic affairs constitutes "property."

The government is also thoroughly unable to reconcile its argument with the coercion/extortion distinction this Court emphasized in *Scheidler II*. Congress expressly adopted the New York property crime of extortion and expressly declined to incorporate the lesser New York non-property crime of coercion. Here, petitioner was charged under the precise New York crime that Congress declined to incorporate, but when that state-law prosecution went sideways, the federal prosecutors filed extortion charges in the absence of any obtainable or transferable property. The government ignores this uncomfortable state-court prologue and is equally silent about the federalism implications of its theory. It likewise offers no meaningful response to its theory's coverage of social protestors and labor unions. The government complains instead that reversing petitioner's conviction would undermine efforts to target organized crime. But "mobsters," just like anyone else, can engage in coercion *or* extortion, and only the latter is criminalized by the Hobbs Act. If the government wants to create a new federal crime of "honest services coercion," it must direct its argument to Congress, not this Court.

ARGUMENT

I. The Internal, Non-Binding Opinion Or Recommendation Of A Salaried Government Attorney Is Not "Property" Under The Extortion Provision Of The Hobbs Act.

Despite the government's repeated suggestions to the contrary, petitioner has never disputed that Hobbs Act "property" includes some intangible property—namely, obtainable, transferable intangible property, like patents, options, and confidential business information. But just because Hobbs Act "property" includes *some* intangible property, it by no means follows that the definition must necessarily include all "intangible rights with economic value." Br. 16. Indeed, even the government acknowledges (at 24-25) that "the term 'property' does not encompass all intangible rights." And nothing in this Court's precedents supports the notion that the relevant question is whether an intangible right has "economic value." To the contrary, the Hobbs Act covers only alienable property—whether tangible or intangible—that can be transferred or obtained. The government's novel and amorphous expansion would have far-reaching and dangerous consequences.

A. The Government's Broad Definition of Hobbs Act "Property" Is Inconsistent With the Relevant Precedents.

The government cites a wealth of caselaw and repeatedly invokes its "intangible rights with economic value" definition. *See* Br. 10, 11, 15, 16, 17,

19, 21, 23, 27, 28. But there is no correspondence between the government's caselaw and its favored definition. To the contrary, the government's broad definition finds absolutely no support in either this Court's decisions construing the Hobbs Act and other federal criminal statutes involving "property," or New York decisions predating the Hobbs Act interpreting substantially similar state extortion laws. Those decisions instead establish that Hobbs Act "property" amply covers alienable property—both tangible and intangible—such as money, notes, patents, and confidential business information, but not "intangible rights with economic value" like the "right to make a recommendation."

1. The logical starting place in addressing the meaning of property in the Hobbs Act is *Scheidler II*. Although that decision addressed the meaning of the term "obtain," not "property," its definition of "obtain" and consideration of the Act's origins certainly inform what types of "property" can be "obtained" and thus fall within the Hobbs Act. The Court adopted the "familiar meaning of the word 'obtain'—to gain possession of." 537 U.S. at 403 n.8. The property must be capable of being the object of both "deprivation" and "acquisition." *Id.* at 404. It must be capable of "'a transfer or purported transfer.'" *Id.* at 408 n.13 (citing Model Penal Code § 223.3, Comment 2). All of these characteristics are consistent with a narrow definition of Hobbs Act "property" meaning something that is necessarily transferable, alienable, or assignable—whether tangible (such as money or personal goods) or intangible (such as patents, options, or confidential business information). They are also consistent with

pre-1946 New York caselaw. *See People v. Learman*, 28 N.Y.S.2d 360, 365 (App. Div. 1941) (reversing extortion conviction where object of extortion was "not transferable or assignable" and thus "not property").

These critical characteristics are inconsistent, however, with a broad definition of property that includes "intangible rights with economic value," especially a government attorney's "right to give his disinterested legal opinion," as the government now characterizes the purported "property" here. Opp. 39.[1] Petitioner could not acquire, much less possess, Bierman's ability to provide a legal opinion to the Comptroller about investments; Bierman assuredly could not "transfer" that ability to petitioner. Indeed, Bierman's legal opinions to the Comptroller had potential value only because they were *his* opinions, not someone else's—particularly a non-attorney unaffiliated with the New York state government. Petitioner certainly could not acquire Bierman's

[1] Throughout this case, the government has consistently re-characterized the "property" petitioner allegedly extorted, from Bierman's "recommendation to approve the Commitment" (in the indictment) to his "right to make a recommendation consistent with his legal judgment" (in the court of appeals) to, now, his "right to give his disinterested legal opinion." *See* Pet'r Br. 43-44. The government's shape-shifting would be unnecessary if there actually were some property at issue. *Cf. Scheidler II*, 537 U.S. at 400-01. Indeed, it is unclear whether the government's constantly evolving conception of the property at issue here even satisfies its own amorphous test.

"right to give [a] *disinterested* legal opinion," since petitioner himself was an interested party.

While *Scheidler II*'s treatment of "obtaining" forecloses the government's broad definition of "property," there was an alternative conception of "obtaining" in that case that could be squared with the government's theory here—namely, the dissent's. Justice Stevens' lone dissent construed "obtaining" to mean "'the regulation of the fate … of something.'" 537 U.S. at 416 (quoting *United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999)). But the majority relied on text, context, and the rule of lenity to reject that broader definition. *Id.* at 403 n.8.

Indeed, it is difficult to square the government's broad definition of Hobbs Act "property" with the outcome of *Scheidler II*. The government alleges that Hobbs Act property includes the "right to run a business or to pursue a job without unlawful outside interference." Br. 28-29. But in *Scheidler II*, petitioners indisputably "achieved their ultimate goal of 'shutting down'" abortion clinics and thus had "completely deprived [the clinics] of their ability to exercise" their property right "of exclusive control of their business assets." 537 U.S. at 404-05. Nonetheless, the Court found no Hobbs Act extortion. *Id.* at 405.

The government attempts to distinguish *Scheidler II* by asserting that in that case, petitioners' "ultimate objective" was merely to "'interfer[e] with or depriv[e]'" the clinics of property, "not to obtain it." Br. 39. Thus, if petitioners in that case had sought to "force the clinics to provide orthopedic services instead of abortion services" or to

"themselves provide abortion-related services to the clinics' patients," the government suggests that the conduct would have constituted extortion. *Id.* at 39-40. That distinction cannot be correct. The interest of the abortion protesters in *Scheidler II* was that the abortion clinics stop providing abortion services, and they would have been perfectly happy if the clinics had shifted to orthopedics.

More broadly, neither an action/inaction distinction nor a motive (profit versus political) analysis explains the Court's decision. Property did not somehow spring into being because the coercion alleged here was directed at causing Bierman to change his opinion (action), rather than at preventing Bierman's initial negative recommendation (inaction). Indeed, if the so-called property at issue is Bierman's "right to give his *disinterested* legal opinion," then the object of the alleged coercion was to prevent Bierman from exercising that right—just as the protestors in *Scheidler II* sought to prevent the clinics from exercising their right to provide abortions and control their business assets. Likewise, if petitioner's motive had been to ensure that the state made socially responsible or "green" investments, that *non-economic* motive would not make a difference.

But the government's larger problem with *Scheidler II* is that decision's extensive discussion of the history of the Hobbs Act and Congress' considered decision to incorporate the New York crime of extortion, but not the New York crime of coercion—even though (or more accurately because) only the former requires property to be obtained.

Scheidler II's extensive discussion of the coercion/extortion distinction is no small embarrassment to this federal prosecution, which began as a New York prosecution under the very coercion statute Congress chose not to incorporate into the Hobbs Act. *See* Pet'r Br. 30-31, 36-40. And the distinction between extortion and coercion is fundamental. A threat that prevents someone from playing ball in the park is coercion; a threat that forces someone to pay money to play ball in the park (or to hand over the ball) is extortion.

The government responds with a *non sequitur*—that coercion addresses "aspects of human relations [that] are not economic in character." Br. 44. But as this Court made clear in *Scheidler II*, the dividing line between coercion and extortion is whether coercion is used to obtain property, not something as ill-defined and amorphous as whether the coercion is directed to "aspects of human relations … not economic in character." Moreover, coercion was excluded from the Hobbs Act based on the concerns of labor unions, which were decidedly interested in using coercion in connection with the economic aspects of human relations. *See* Pet'r Br. 4.[2]

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[2] The government likewise gains nothing by trying to label (at 34) making disinterested legal opinions Bierman's "'stock in trade.'" In its original meaning that phrase referred to a shopkeeper's literal stock or inventory, *i.e.*, transferable, obtainable goods. *Corn Prods. Ref. Co. v. Comm'r*, 350 U.S. 46, 51-52 (1955). And the only thing more arbitrary than the government's suggested distinction between intangible rights with or without economic value would be a distinction among

Moreover, *Scheidler II* described coercion as the use or threat of force or fear to "restrict another's freedom of action" or "restrict the actions and decisions of businesses." 537 U.S. at 405-06. Manifestly, the Court did not limit coercion to "non-economic" situations. Rather, it cited three prototypical pre-1946 New York business coercion cases that included economic motives. *Id.* The government weakly suggests that the prosecution *could* have charged those defendants with extortion, but chose not to. Br. 45. But the government cites only a post-1946 New York case charging both coercion *and* extortion, and the pre-1946 cases demonstrate that state prosecutors included extortion charges only when there was a basis for doing so—namely, the obtaining of property. *See People v. Cuddihy*, 271 N.Y.S. 2d 450, 450 (Ct. Gen. Sess. 1934) (indictment charging defendant with coercing victim "to do an act which he had a legal right to refrain from doing" *and* extorting $17.50).

More broadly, the government's view highlights the stakes in this case. Under the government's theory, virtually every act of coercion (a misdemeanor under New York law) can be transformed into Hobbs Act extortion (a felony punishable by 20 years' imprisonment). *See* Pet'r Br. 49-50. That is underscored by the government's pernicious construction of the Court's statement in *Scheidler II* that Hobbs Act property can be

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intangible rights with economic value based on their germaneness to the alleged victim's chosen profession.

"acquired" if the perpetrator can "exercise" it. 537 U.S. at 405. Seizing upon that statement, the government repeatedly suggests (at 12-13, 26, 37, 40, 43-45) that "exercising another's right" to do something constitutes the "obtaining of property." But if that were true, then every coercive action can be mutated into the obtaining of property by recharacterizing it as, first, the "obtaining" of someone's right to do something, and second, the simultaneous "exercise" of that right by dictating the act to be done. The government's two-step is limitless and irreconcilable with this Court's precedents. In *Cleveland v. United States*, 531 U.S. 12 (2000), for example, the Court held that a license is not "property" in the state's hands. But under the government's theory here, the state in *Cleveland* had a "property right" to issue licenses based on certain criteria, which the defendant "obtained" when, in submitting false information, he caused the state to issue licenses it would not have otherwise issued, thereby "exercising" the state's property right. As the unanimous *Cleveland* decision demonstrates, the term "property" has meaning, and merely interfering with another's intangible rights, regardless of motive, is not it.[3]

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[3] The government's brazen assertion (at 14) that "[n]o one disputes that petitioner's means … were extortionate," encapsulates its willful distortion of the issue here. In fact, petitioner strenuously disputes that proposition; because his alleged conduct did not involve property, it was at most coercive, not "extortionate." Tellingly, the government's support for this proposition is an extortion case targeting good, old-fashioned money, not some ill-defined intangible right. *See*

2. The government's broad definition cannot be squared with *Cleveland* or this Court's other decisions construing the term "property" in the federal mail fraud statute, 18 U.S.C. § 1341. The government recognizes that "property" in the Hobbs Act cannot be read to be broader than the same term in the mail fraud statute. Br. 24. It also concedes that "the term 'property' does not encompass all intangible rights." *Id.* at 24-25. The latter concession is far more damaging than the government acknowledges. As an initial matter, it confirms the logical fallacy of the government's main proposition: that because Hobbs Act "property" includes more than tangible goods (which petitioner does not dispute), it must necessarily extend all the way to "intangible rights with economic value."

United States v. Nardello, 393 U.S. 286, 295-96 (1969). In a similar vein, the government repeats the Second Circuit's incorrect assertion that petitioner "admitted to sending the anonymous e-mails." Br. 6. Petitioner did no such thing. The only evidence of petitioner's purported "admission" is testimony by the investigator who initially interviewed petitioner during execution of the search warrant. But during the state proceedings, an accompanying officer testified that the investigator never questioned petitioner about the emails, and the investigator testified that the accompanying officer was present during the entire interview. Only during federal proceedings months later did the investigator modify his testimony and contend that the accompanying officer was not present during the entire interview. *See* Pl.'s Omnibus Motion, Ex. 6, at 61-62, 100, 126-27, 189-90 (N.D.N.Y. Jan. 10, 2011) (Dkt. 13-6); Transcript of 4/11/2011 Proceedings at 97-99 (N.D.N.Y. May 16, 2011) (Dkt. 78).

Even more problematically, the government's concession is forced by *McNally v. United States*, 483 U.S. 350 (1987), where the Court held that the intangible right to honest services is not "property" under the mail fraud statute. *Id.* at 355, 360; *see also Skilling v. United States*, 130 S. Ct. 2896, 2927 (2010); *Cleveland*, 531 U.S. at 18-19. That holding is significant on two levels. First, and most obviously, the supposed property that formed the basis of the prosecutions in *McNally* and *Cleveland* was very similar to the supposed "property" here. In all three cases, the object of the allegedly criminal activity was the interference with the proper functioning of a state or local government. Indeed, this case could loosely be described as a government effort to create the crime of "honest services extortion" (or more accurately, "honest services coercion"). Second, when Congress subsequently amended the statute to cover honest services, *see* 18 U.S.C. § 1346, it did not do so by amending the definition of "property." Rather, it added deprivation of "honest services" as an alternative form of actionable mail fraud, which only underscores that whatever was the object of the alleged coercion here, it was not property.

Tellingly, the government has almost nothing to say about *Cleveland* except to claim that the Court held there that "the State had a regulatory interest in the licenses, not a property interest." Br. 38. But the government argued unsuccessfully in *Cleveland* that the state had a property interest, not just a regulatory interest, because of its "significant control over the issuance, renewal, suspension, and revocation of licenses," which petitioner sought to "frustrate[]." 531 U.S. at 21-23. That argument

fares no better here. If an outsider's attempt to "frustrate" the internal processes of state government, thereby depriving public officials of their intangible "right to control" state functions, is not a deprivation of "property," then neither is an attempt to interfere with the internal processes of the New York state government, thereby depriving the General Counsel of his "right to control" his recommendations.

The government has substantially more to say about *Carpenter v. United States*, 484 U.S. 19 (1987), but that decision does not aid the government. The government argues (at 24-25) that *Carpenter* "specifically rejected" the argument that "property" in the mail fraud statute is limited to tangible goods. Indeed, and petitioner does not contend otherwise. In fact, *Carpenter* helpfully illustrates that intangible property, such as the confidential business information at issue there, can nonetheless be transferable, obtainable, and alienable. But that hardly means that "intangible rights with economic value" constitute property, particularly when *Carpenter* described the notion of a "contractual right to … honest and faithful service" as "too ethereal" to constitute "property." *Id.* at 25.[4]

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[4] The government cites (at 24-25, 35-36) passing statements in *Carpenter* that a newspaper has a property right in "making exclusive use … of the schedule and contents of" confidential business information and the right "to decide how to use it prior to disclosing it to the public." 484 U.S. at 26. But those intangible "rights" are what makes confidential business information valuable and confidential; they are not the property

3. The notion that Hobbs Act "property" includes any "intangible right with economic value" is also incompatible with this Court's decisions addressing official extortion. Official extortion involves "the obtaining of property from another … under color of official right," 18 U.S.C. § 1951(b)(2), and at common law typically occurred when a public official took "*money* that was not due to him for the performance of his official duties." *Evans v. United States*, 504 U.S. 255, 260 (1992) (emphasis added); *see also McCormick v. United States*, 500 U.S. 257, 273 (1991). The "official extortion" provision of the Hobbs Act "continues to mirror the common-law definition," *Evans*, 504 U.S. at 263-64, and while that definition comfortably encompasses transferable intangible property like patents or confidential business information, *cf. Scheidler II*, 537 U.S. at 402 (common-law official extortion included taking "'money or [a] thing of value'"), neither the Act's text nor its history suggests that Congress intended to expand the scope of "property" a public official could extort to "intangible rights with economic value."

Indeed, since "[m]any official actions certainly … implicate economic interests," acceptance of the government's broad definition would criminalize a vast array of heretofore permissible official conduct. Br. for Alabama et al. at 10, *Scheidler II* (July 12, 2002). Government officials routinely threaten enforcement proceedings or legislative action if

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itself. That is why *Scheidler II* accurately identified the "property" in *Carpenter* as only the "confidential business information," not any incidental rights. 537 U.S. at 402.

businesses continue practices that readily constitute the pursuit of "intangible rights with economic value."

4. The government accurately notes that in interpreting the scope of the Hobbs Act, this Court "has repeatedly looked to New York's pre-1946 'judicial construction of the New York statute[s]'" covering extortion. Br. 20 (quoting *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973) (brackets omitted)); *see Scheidler II*, 537 U.S. at 403-04, 405-06. Unfortunately for the government, *every* pre-1946 New York extortion case it then cites (at 21-22, 31) involved the obtaining of *money or an alienable good* from the victim; *none* involved the obtaining of an "intangible right to economic value." *See People v. Barondess*, 31 N.E. 240, 240 (N.Y. 1892) ($100); *People v. Hughes*, 32 N.E. 1105, 1105 (N.Y. 1893) ($1,000); *People ex rel. Short v. Warden*, 130 N.Y.S. 698, 699 (App. Div. 1911) (money), *aff'd*, 99 N.E. 1116 (N.Y. 1912); *People v. Sheridan*, 174 N.Y.S. 327, 328 (App. Div. 1919) ($50); *People v. Weinseimer*, 102 N.Y.S. 579, 580 (App. Div. 1907) ($1,000 and seven promissory notes), *aff'd*, 83 N.E. 1129 (N.Y. 1907).

While these decisions provided broad descriptions of the term "property," they did so not in the context of that which must be "obtained" by the perpetrator, which is covered by N.Y. Penal Law § 850 (1909), but in the context of the types of threatened "injur[ies]" to "person or property" that constitute "wrongful use of force or fear" by the perpetrator, which is covered by N.Y. Penal Law § 851 (1909). The narrow construction of "property" in § 850 and broader construction of "property" in

§ 851 is understandable, since the former must be "obtained"—and is thus properly confined to money or other transferable property—while the latter need only be the object of threatened "injury"—and thus may sensibly be construed to cover, for example, interference with one's right to operate a business. *See, e.g.*, *People v. Squillante*, 185 N.Y.S.2d 357, 361 (N.Y. Sup. Ct. 1959) (observing that "the right to contract may be property injured under Section 851 of the Penal Law … but it is difficult to consider that right property obtained under Section 850").

The government's inability to identify a single pre-1946 New York decision involving—much less upholding—extortion convictions where the property obtained was an "intangible right with economic value," or anything close to it, speaks volumes about the infirmity of utilizing that definition for purposes of Hobbs Act "property." Petitioner, by contrast, has identified pre-1946 New York decisions *reversing* convictions where the "property" obtained was an "intangible right with economic value." *See* Pet'r Br. 38-39 (citing *Learman*, 28 N.Y.S.2d 360, and *People v. Ashworth*, 222 N.Y.S. 24 (App. Div. 1927)). The government offers no response to these decisions. Where a perpetrator "obtained" "intangible rights with economic value," New York courts uniformly considered such conduct coercion, not extortion. *See* Pet'r Br. 37-38; *Scheidler II*, 537 U.S. at 405-06; p. 9, *supra*. Conflating the two, as the government does throughout its brief, was reversible error.

The government likewise cannot cite any cases under the New York Field Code where anything like an "intangible right with economic value" was the

object of a property crime like extortion. Petitioner, by contrast, has identified numerous Field Code cases involving only money or transferable items. *See* Pet'r Br. 39. The government asserts that these cases are inapposite because they appear under the "larceny" provision of the Field Code, which allegedly covered only "personal property." Br. 45 n.9. But as *Scheidler II* explains, the Field Code's extortion provision was almost identical to that in the Hobbs Act, and "included 'the criminal acquisition of … property,'" not merely "personal property." 537 U.S. at 403 (ellipsis in *Scheidler II*). The Field Code's extortion provision then directed the reader to the note accompanying the larceny provision, where representative cases for *all* provisions involving the "criminal acquisition of property" were listed. Thus the cases described in that note bear directly on a proper understanding of the "property" that had to be "obtained" to constitute extortion under the Field Code and, later, the Hobbs Act.[5]

5. The government relies on dictionary definitions of "property" or this Court's decisions addressing the meaning of that term under the Due

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[5] The government's reliance on post-1969 New York extortion caselaw (at 22) is unavailing since each of those decisions—construing a revised penal code enacted in 1965—obviously "could not have been a case on which Congress relied" in enacting the Hobbs Act in 1946. *Evans v. United States*, 504 U.S. 255, 267 n.18 (1992). The same is true for the government's New York decisions not involving extortion. *See Bianco v. Eisen*, 75 N.Y.S.2d 914 (N.Y. Sup. Ct. 1944); *Canfield v. Moreschi*, 40 N.Y.S.2d 757 (N.Y. Sup. Ct. 1943); *Dusing v. Nuzzo*, 29 N.Y.S.2d 882 (N.Y. Sup. Ct. 1941).

Process Clause of the Constitution or the Clayton Act. Br. 16-19. But as the foregoing precedents establish, "property" under the Hobbs Act (and analogous criminal statutes) is simply not the same as any "right" or "interest" in property. That is especially so when the property must be that which can be "obtained," and not just the object of injury (as in the Clayton Act) or interference (as in due process). Nonetheless, this Court rejected the notion that "the activity of doing business" is "property" protected by due process. *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (emphasis omitted). The government's reliance on Clayton Act cases is particularly inapposite since the statute addresses injury "to property, *or to a property right*." 29 U.S.C. § 52 (emphasis added). The Hobbs Act, by contrast, mentions only "property." *See* Pet'r Br. 35-36. The government dismisses the distinction between property and property rights as "illogical parsing," Br. 36, but the Clayton Act demonstrates that Congress knows the difference.

6. The government argues (at 47) that the rule of lenity is inapplicable because the "competing reasons" for the alternative definitions of Hobbs Act "property" are not in "equipoise." In a sense, this is true: the relevant precedents clearly repudiate the government's wide-ranging definition. But if there were any doubt, the rule of lenity firmly militates against the government's broad construction, as it has in other recent government efforts to interpret "property." While the rule of lenity may be frequently invoked by defendants, it has been frequently applied by this Court when it comes to the

very term at issue here. *See Cleveland*, 531 U.S. at 25; *McNally*, 483 U.S. at 359-60; *see also Skilling*, 130 S. Ct. at 2932-33. The Court has also applied the rule in construing the Hobbs Act, violations of which are RICO predicates. *See Scheidler II*, 537 U.S. at 409; *id.* at 411-12 (Ginsburg, J., concurring); *Enmons*, 410 U.S. at 411; *see also* Br. of NACDL 4-10. None of this is an accident. Mail fraud and Hobbs Act extortion are two of the most frequently utilized arrows in the federal prosecutor's quiver, and the scope of the term "property" is critical to determining whether those statutes are meaningfully cabined property crimes or all-purpose crimes that can be invoked whenever a federal prosecutor identifies unsavory conduct that implicates the intangible interest in honest services or an arguably even more capacious "intangible right with economic value."

B. The Government Cannot Meaningfully Rebut the Far-Reaching and Harmful Consequences of Its Broad Definition of Hobbs Act "Property."

1. The government has no meaningful answer to petitioner's demonstration that affirming his conviction would run roughshod over core federalism principles that this Court has consistently upheld in similar situations. *See* Pet'r Br. 45-51. Remarkably, the government does not *once* acknowledge the substantial state proceedings that occurred in this case before the prosecution went pear-shaped and was lateraled to the federal prosecutors. *See id.* at 8-11. The government's only response is to mischaracterize petitioner's federalism arguments as based solely on a complaint that "the crime he

committed was a state crime" and to cite *United States v. Culbert*, 435 U.S. 371 (1978), and *Stirone v. United States*, 361 U.S. 212 (1960), for the proposition that Congress in enacting the Hobbs Act fully exercised its constitutional power to displace state crimes. Br. 46-47. But as the Court explained in rejecting a substantially similar argument by the *Scheidler II* respondents (based on the same cases the government cites), "there is no contention by petitioner[] here" that Congress lacks the authority to prohibit his alleged conduct. 537 U.S. at 408. Rather, his argument is that his alleged acts do "not amount to the crime of extortion as set forth in the Act." *Id.* at 408-09. And this Court does not lightly infer that Congress intends to upset the traditional federal-state balance.

The government also ignores that this case—like *McNally* and *Cleveland*—involves efforts to interfere with the smooth functioning of state and local government. While Congress may well have the power to criminalize such misconduct, it is hard to imagine a more appropriate subject for state—rather than federal—law enforcement. There is no reason to think state and local prosecutors will have insufficient incentives to prosecute such efforts, and no reason to infer that Congress meant to empower federal prosecutors to override or skew state and local prosecutorial decisionmaking.

2. The government also has no response to the fact that its theory would expose social protestors and labor unions to the threat of Hobbs Act liability. *See* Pet'r Br. 51-52. The government incorrectly suggests that petitioner "liken[s] himself" to social

protestors throughout history. Br. 42. But the problem is not that petitioner has likened himself to anyone; it is that the government's broad theory of property fails to distinguish between petitioner's alleged object and those of countless social protestors, labor unions, or even lobbyists. Whether a prohibitionist destroying kegs of beer to force a barkeep to sell sarsaparilla instead of alcohol, or an African-American sitting at a whites-only counter to force a restaurant to serve minorities, these protestors have one thing in common: no less than the abortion protestors in *Scheidler II*, they are employing "use of actual or threatened force, violence, or fear," 18 U.S.C. § 1951(b)(2), including trespass, vandalism, and fear of economic impact, to compel a business to alter its conduct in a way that complies with the protestors' demands. That is precisely the definition of "obtaining of property" that the government advances; indeed, it is precisely how the government describes petitioner's alleged conduct. Accordingly—and the government never actually denies it—Hobbs Act liability would extend to these and similar protestors under the government's approach.

Relying solely on *Enmons*, the government contends (at 41-42) that its position would not expose labor unions to Hobbs Act liability. But the text of the Hobbs Act reveals no "labor law exception." And the Court in *Enmons* focused solely on the higher *wages* the union sought to win for its members; it did not suggest that the violence, vandalism, or, most pertinently, interference with the business's operations that occurred during the strike amounted to an "obtaining of property." By asserting that

attempts to "exercise" control of business assets constitute an "obtaining of property," however, the government's approach plainly suggests that the Hobbs Act would extend to such scenarios. That would be a remarkable outcome given that Congress expressly removed "coercion" from the Act after lobbying by organized labor. *See* Pet'r Br. 4.

3. Citing a supposedly "uniform[]" line of holdings, the government argues that the courts of appeals have "routinely found criminal extortion" where the "property" at issue was an "intangible right with economic value." Br. 23 & n.5, 29-31, 42-43. Relatedly, the government claims that reversing petitioner's conviction "would frustrate one of the core objectives of the act, *viz.* to fight racketeering." *Id.* at 32-33. These contentions are meritless.

The government's purportedly unbroken line of appellate authority is hardly that. Some are abortion protest cases that do not survive *Scheidler II*. *See Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995); *Ne. Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989). Others have been questioned by post-*Scheidler II* decisions. *See United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980), *called into doubt by United States v. McFall*, 558 F.3d 951, 957-58 & n.7 (9th Cir. 2009) (reversing extortion conviction notwithstanding *Zemek* and questioning whether, after *Scheidler II*, "an extortionist [could] ever 'obtain'" the "'right to solicit business free from wrongful coercion'"). Still others involved the acquisition of money. *See United States v. Stephens*, 964 F.2d 424 (5th Cir. 1992); *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986). And a number are

mistaken Second Circuit decisions and their progeny. *See United States v. Cain*, 671 F.3d 271 (2d Cir. 2012); *United States v. Coppola*, 671 F.3d 220 (2d Cir. 2012); *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006); *United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1999); *United States v. Tropiano*, 418 F.2d 1069 (2d Cir. 1969); *see also United States v. Vigil*, 523 F.3d 1258, 1264 (10th Cir. 2008); *United States v. Thompson*, 647 F.3d 180, 187 (5th Cir. 2011).[6]

This Court has not hesitated to correct an erroneous interpretation of the law even when a circuit has embraced the error repeatedly and other circuits have followed suit. *See, e.g.*, *McNally*, 483 U.S. at 355-56; *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601-02 (2001). Indeed, the fact that an error is oft-repeated in the lower courts is a reason to grant a petition, but not a reason to affirm.

The government's appeal to preserving a purported "core objective[]" of the Hobbs Act fares no better. As the government concedes, Br. 32, the "limited effect" of the Hobbs Act "was to shut off the possibility opened up" by *United States v. Teamsters*, 315 U.S. 521 (1942), which had suggested that unions could "exact *payments* from employers" for

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[6] *Tropiano*, the fount of all later federal decisions, does not withstand scrutiny. Rather than address the Act's text or pre-1946 New York decisions, it principally relied on the same broad reading of *Stirone* that *Scheidler II* rejected and inapposite descriptions of "property" in due process cases. *See* 418 F.2d at 1075-76.

superfluous services. *Enmons*, 410 U.S. at 403 (emphasis added); *id.* at 408 (noting that "Congress was intent on undoing the restrictive impact" of *Teamsters*). Thus the objective of Congress in replacing the Anti-Racketeering Act with the Hobbs Act was to criminalize the obtaining of *money* in circumstances this Court had treated as non-actionable. It was not to criminalize coercion—conduct Congress had included in the prior Anti-Racketeering Act but intentionally excluded from the Hobbs Act.

In all events, there is no "mob exception" to the Hobbs Act. The mob is certainly capable of using both coercion and extortion to achieve its objectives, but only the latter is prohibited by the Hobbs Act. If the government needs an additional substantive crime to target organized crime, it should direct its argument to Congress, not this Court. If Congress is so inclined, it can legislate in a manner that targets specific mob activity without sweeping in conduct, like that alleged here, that is far removed from mob activity and would amount to this Court recognizing a new federal crime of honest services coercion.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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