No. 12-357

In The
Supreme Court of the United States

GIRIDHAR C. SEKHAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE CATO INSTITUTE IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTION PRESENTED

Whether the "recommendation" of an attorney, who is a salaried employee of a governmental agency, in a single instance, is intangible property that can be the subject of an extortion attempt under 18 U.S.C. § 1951(a) (the Hobbs Act) and 18 U.S.C. § 875(d).

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INTEREST OF AMICI CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Of particular relevance here, NACDL has filed amicus briefs in a number of cases that involve the vagueness and federalism concerns

[1] Under Sup. Ct. R. 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

that arise from the expansive interpretation of federal criminal statutes.

Amicus Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs. Cato's interest in this case lies in promoting the rule of lenity, an important principle that safeguards individual liberty.

SUMMARY OF ARGUMENT

1. This case illustrates a recurring pattern in federal criminal law: Congress enacts a statute directed at a perceived problem; federal prosecutors press the statute beyond the limits of its language to reach conduct that Congress never contemplated; some lower federal courts accept the increasingly expansive interpretations that prosecutors advance; and, ultimately, this Court steps in to return the statute to the limits that the text and principles of statutory interpretation require. The rule of lenity--under which the Court requires "clear and definite" statutory language before it will choose the harsher of two plausible readings--has played a critical role in establishing limits when the statutory text is ambiguous.

2. In curbing expansive readings of federal criminal statutes, the Court has turned to a second principle of statutory interpretation, in addition to the rule of lenity: that the federal government should not intrude into areas of criminal law enforcement traditionally left to the states, absent a clear statement of Congressional intent. As the Court framed the principle, "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quotation omitted).

3. Petitioner's brief demonstrates that a straightforward application of this Court's decision in *Scheidler v. NOW*, 537 U.S. 393 (2003), requires reversal. But to the extent ambiguity exists in the phrase "obtaining of property from another," the Court should again apply the rule of lenity and the requirement that Congress speak clearly before a federal criminal statute will be interpreted to shift the federal-state balance. Federal prosecutors have successfully urged upon the lower courts a reading of the Hobbs Act that stretches the statutory text beyond its core meaning, beyond what Congress intended in enacting the statute, and into an area that the states traditionally regulate.

ARGUMENT

I. THIS COURT HAS REPEATEDLY APPLIED THE RULE OF LENITY AND OTHER TOOLS OF STATUTORY INTERPRETATION TO LIMIT PROSECUTORS' EXPANSIVE APPLICATIONS OF FEDERAL CRIMINAL STATUTES.

This case presents another instance of federal prosecutors pressing a criminal statute beyond the limits of its language to reach conduct that Congress never contemplated. This Court has stepped in repeatedly in the past to curb such efforts and return criminal statutes to the limits that their text and principles of statutory interpretation require. The court of appeals' impermissibly broad reading here of the phrase "obtaining of property from another," 18 U.S.C. § 1951(b)(2), calls once more for the Court's restraining hand.

The Court often invokes the rule of lenity--under which it requires "clear and definite" statutory language before it will choose the harsher of two plausible readings, *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)--to establish limits when prosecutors urge broad readings of ambiguous text. Under the rule of lenity,

> the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. . . .

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion). The rule of lenity "is founded on two policies that have long been part of our tradition," *United States v. Bass*, 404 U.S. 336, 348 (1971): that the law should provide fair warning of the line between criminal and noncriminal conduct, and that "legislatures and not courts should define criminal activity," which rests on "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (quotation omitted); *see, e.g., United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute.").

An early example of the Court restricting an expansive application of a criminal statute is *Hammerschmidt v. United States*, 265 U.S. 182 (1924). The federal statute at issue (now codified at 18 U.S.C. § 371) makes it a crime to engage in a conspiracy "to defraud the United States in any manner

or for any purpose." Federal prosecutors argued successfully in the district court that circulating handbills openly encouraging persons to disobey the Selective Service Act violated the statute. The Sixth Circuit affirmed the convictions over a vigorous dissent. *Hammerschmidt v. United States*, 287 F. 817 (6th Cir. 1923). This Court reversed. It held that a conspiracy to "defraud" the government required "deceit, craft or trickery," or at least "means that are dishonest." 265 U.S. at 188. The Court rejected the government's position, embraced by the lower courts, that the statute made criminal "mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it." *Id*. at 189.

The Court confronted similar circumstances in *McBoyle v. United States*, 283 U.S. 25 (1931). The defendant stole an airplane and flew it across state lines. He was prosecuted and convicted under a statute that punished the knowing interstate transportation of a stolen "motor vehicle," defined to include "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." *Id*. at 26. The Tenth Circuit affirmed. *McBoyle v. United States*, 43 F.2d 273 (10th Cir. 1930).

This Court reversed. It acknowledged that the government's interpretation of the word "vehicle" was plausible, but it viewed the statutory definition of "motor vehicle" as "call[ing] up the popular picture" of "a vehicle running on land." 283 U.S. at 26. The Court concluded:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.

Id. at 27.

The Court stepped in again in *Williams v. United States*, 458 U.S. 279 (1982). In *Williams*, prosecutors argued that depositing bad checks violated 18 U.S.C. § 1014, which prohibited false statements to federally insured banks and willfully overvaluing property for the purpose of influencing a bank's action. The jury convicted the defendant, and the Fifth Circuit affirmed. *United States v. Williams*, 639 F.2d 1311 (5th Cir. 1981). This Court reversed, holding that the presentation of a check was neither a "false statement" nor an overvaluation of property. *See* 458 U.S. at 284-86. The Court

observed that "when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings.'" *Id.* at 286. After reviewing the legislative history of § 1014, the Court concluded:

> Given this background--a statute that is not unambiguous in its terms and that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law--we believe that a narrow interpretation of § 1014 would be consistent with our usual approach to the construction of criminal statutes.

Id. at 290. To buttress this conclusion, the Court invoked the rule of lenity. *Id.*

The Court reined in another expansive interpretation of a federal criminal statute in *Cleveland v. United States*, 531 U.S. 12 (2000). The *Cleveland* defendant was charged with obtaining through fraud unissued, non-transferable licenses to operate video poker machines. The question was whether those licenses, in the hands of the issuing government agency, amounted to "property" for purposes of the mail fraud statute. The government insisted that they did, and the Fifth Circuit agreed. *United States*

v. Bankston, 182 F.3d 296, 309 (5th Cir. 1999). This Court reversed. It found that the state's "right to control the issuance, renewal, and revocation of video poker licenses" under state statute did not make the unissued licenses "property," even "when tied to an expected stream of revenue." 531 U.S. at 23. The Court again invoked the rule of lenity, which it found "especially appropriate" because mail fraud is a predicate offense under RICO. *Id*. at 25.

The honest services cases provide the most striking instance of this pattern of prosecutorial expansion, acquiescence by the lower courts, and limits imposed by this Court through the rule of lenity. In *McNally v. United States*, 483 U.S. 350 (1987), the Court rejected the lower courts' near-uniform interpretation of the mail and wire fraud statutes to include schemes to deprive others of the intangible right to honest services--a vague, judge-made concept with no basis in the language or history of 18 U.S.C. § 1341. The Court applied the rule of lenity and declared that "[i]f Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360.

Congress responded to *McNally* by enacting an honest services fraud provision, 18 U.S.C. § 1346, and the cycle began again: prosecutors pushed ever more expansive notions of "honest services" and the lower courts largely accepted those theories, subject to divergent and ineffectual limiting principles. In *Skilling v. United States*, 130 S. Ct. 2896 (2010), this Court confronted the argument that § 1346 was so standardless, even as construed by the lower courts,

that it should be held void for vagueness. Rather than declare the statute unconstitutional, the Court looked to its core applications, invoked the rule of lenity, and held that § 1346 extends only to schemes involving bribes and kickbacks. *See* 130 S. Ct. at 2932-33.

These decisions, spanning almost a century, share several features. In each case, Congress enacted a criminal statute directed at a discernible core of conduct. In each case, federal prosecutors sought to push the boundaries of the statute to include conduct that Congress did not contemplate. In each case, at least some lower courts acquiesced in the prosecutors' novel and expansive theories. And in each case, this Court applied the brakes, based on the statutory text, Congressional intent, and the principles that the rule of lenity embodies. As we discuss in more detail in Part III, this case once again requires the Court's firm hand to curb an impermissibly broad reading of a federal criminal statute.

II. THIS COURT HAS REQUIRED A CLEAR STATEMENT FROM CONGRESS BEFORE IT WILL INTERPRET A FEDERAL CRIMINAL STATUTE TO SHIFT THE FEDERAL-STATE BALANCE IN LAW ENFORCEMENT.

The Court has invoked a second principle of interpretation to curb expansive readings of federal criminal statutes: that the federal government should not intrude into areas of criminal law en-

forcement traditionally left to the states, absent a clear statement of Congressional intent. *See, e.g., Cleveland*, 531 U.S. at 25 ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." (quotation omitted)); *McNally*, 483 U.S. at 360 (interpreting mail fraud statute not to include honest services in part to avoid "involv[ing] the Federal Government in setting standards of disclosure and good government for local and state officials"); *Williams*, 458 U.S. at 290 (construing statute narrowly in part because the case involved "a subject matter that traditionally has been regulated by state law").

The Court squarely addressed these federalism concerns in *Rewis v. United States*, 401 U.S. 808 (1971). The statute at issue--18 U.S.C. § 1952--made it a crime to "travel[] in interstate or foreign commerce or use[] any facility in interstate or foreign commerce" with intent to "promote, manage, establish, carry on, or facilitate" illegal gambling. The defendant ran a gambling operation in Florida. He did not cross state lines, but some of his customers traveled from Georgia. The government argued that the statute applied to the defendant, despite his lack of interstate travel, because his customers crossed state lines.

The Court rejected this broad interpretation. It noted that § 1952 "was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." 401 U.S. at 811.

The Court found significant that the broad interpretation the government advocated "would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." *Id.* at 812. The silence of the legislative history on these issues, the Court concluded, "strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State." *Id.*

The Court reiterated this point the next Term. In *United States v. Bass*, 404 U.S. 336 (1971), the Court had to decide whether a statute that prohibited certain classes of persons from "receiv[ing], possess[ing], or transport[ing] in commerce or affecting commerce . . . any firearm" required proof in a "possession" case of an interstate commerce nexus. *See id.* at 339. After analyzing the text and legislative history of the statute, the Court found it ambiguous. *See id.* at 347. The Court rejected the government's broad interpretation based on "two wise principles this Court has long followed." *Id.* First, it turned to the rule of lenity, which requires that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Id.* at 348.

Second, the Court relied on the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 349. It observed that

"Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." The Court declared that "[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Id.* "Absent a clearer statement of intention from Congress than is present here," the Court concluded, it would not interpret the statute to reach "the 'mere possession' of firearms." *Id.* at 350.

As we discuss in the next part, this case--like *Bass*--involves "conduct readily denounced as criminal by the States." The Hobbs Act provision at issue should thus be narrowly interpreted.

III. THIS CASE IMPLICATES THE CONCERNS THAT HAVE CAUSED THIS COURT TO INTERPRET FEDERAL CRIMINAL STATUTES NARROWLY.

Petitioner's brief demonstrates that a straightforward application of this Court's decision in *Scheidler v. NOW*, 537 U.S. 393 (2003), requires reversal. But to the extent ambiguity exists in the phrase "obtaining of property from another," the Court should again apply the rule of lenity and the requirement that Congress speak clearly before a federal criminal statute will be interpreted to shift the federal-state balance. *See, e.g., United States v. Enmons*, 410 U.S. 396, 411 (1973) (invoking rule of lenity and "clear statement" rule in support of nar-

row reading of the Hobbs Act). The court of appeals' reading stretches the statutory text beyond its core meaning, beyond what Congress intended in enacting the Hobbs Act, and into an area that the states already "denounce[] as criminal" through the offense of coercion.[2]

As petitioner's brief explains, the text and history of the Hobbs Act require a narrow interpretation of the "obtaining . . . property" language. The statutory text, especially as interpreted in *Scheidler*, cannot plausibly be read to encompass an effort to influence a non-binding recommendation by a salaried attorney for a state agency. However deplorable petitioner's alleged conduct may have been, it did not have as its goal the "obtaining" of "property" from the attorney. The petitioner did not seek to "acquire" the attorney's recommendation, nor was the recommendation something that petitioner (had he somehow "acquired" it) could "exercise, transfer, or sell." *Scheidler*, 537 U.S. at 405.

The history of the Hobbs Act confirms that Congress chose to exclude from the statute's scope alleged conduct of the kind at issue here. Congress patterned the Hobbs Act on a New York statute that prohibited extortion. A separate New York statute prohibited coercion. Congress chose to include the extortion provision in the federal statute but to omit the coercion provision. The difference between

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[2] *See, e.g.,* Ala. Code § 13A-6-25; Colo. Rev. Stat. § 18-3-207(1); N.Y. Penal Law §§ 135.60, 135.65; Ohio Rev. Stat. § 2905.12; Or. Rev. Stat. § 163.275; Tenn. Code Ann. § 39-14-112(a)(2); Rev. Code Wash. § 9A.36.070.

extortion and coercion is that extortion requires an effort to "obtain[] . . . property," while coercion prohibits the use of threats to "restrict another's freedom of action." *Scheidler*, 537 U.S. at 405. As the Court observed in *Scheidler*, "Congress' decision to include extortion as a violation of the Hobbs Act and omit coercion is significant assistance to our interpretation of the breadth of the extortion provision." *Id*. at 406. Here, that decision shows that Congress meant to exclude from the statute's scope threats designed--like petitioner's alleged threat--to influence another's actions without obtaining property from him.

The statutory text and history suffice to interpret the statute as petitioner urges. But "[e]ven if the language and history of the Act were less clear . . . the Act could not properly be expanded as the Government suggests--for two related reasons." *Enmons*, 410 U.S. at 411. First, the "fair warning" principle that Justice Holmes invoked in *McBoyle* and that finds expression in the rule of lenity is strongly implicated here. Had petitioner consulted the text of the Hobbs Act, as interpreted by this Court in *Scheidler*, he would not have had warning--"fair" or otherwise--that his alleged effort to influence the state lawyer's non-binding recommendation would violate the statute.

Second, Congress did not "convey[] its purpose clearly" (or, indeed, at all) to "define as a federal crime" conduct that is *already* "denounced as criminal" by the states, including New York. *Enmons*, 410 U.S. at 411 (quoting *Bass*, 404 U.S. at 349).

Indeed, the state had begun prosecuting petitioner for coercion and could have pursued that process to conclusion in the state courts but chose not to.

For these reasons, the Court should--as it has in decisions from *Hammerschmidt* to *Skilling*--interpret the criminal statute at issue narrowly, to include only conduct that "'plainly and unmistakably'" falls within its scope. *Bass*, 404 U.S. at 348 (quoting *Gradwell*, 243 U.S. at 485).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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