No. ___-_____

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID TKHILAISHVILI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Circuit erroneously held, in conflict with multiple decisions of this Court, that the government may sustain a Hobbs Act extortion charge based on evidence that the defendant "obtained" property for the benefit of a third party?

2. Whether the First Circuit erroneously held, without support in decisions of any other circuit, that transfer of intangible rights among in-state owners of a small business satisfies the "interstate commerce" nexus of a Hobbs Act extortion charge?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, David Tkhilaishvili, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the First Circuit is included in the Appendix at A2. The Opinion of the United States Court of Appeals for the First Circuit is included in the Appendix at A3 and published at 926 F.3d 1 (1st Cir. 2019).

JURISDICTION

The court of appeals affirmed the judgment of the district court on June 5, 2019. This petition is being filed within 90 days of the entry of judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STAUTES, AND RULES INVOLVED

U.S. Const. Art. 1, § 8, cl. 3.

> [The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

18 U.S.C. § 1951

> **(**a) Whoever 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 in violation

of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—
...
(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear.
. . .

STATEMENT OF THE CASE

A grand jury in the District of Massachusetts returned a four-count indictment on May 11, 2016, charging the brothers David Tkhilaishvili and James Tkhilaishvili with conspiring and attempting to affect commerce by extortion, in violation of 18 U.S.C. §§ 1951 and 2 ("Hobbs Act extortion") (Counts One and Two), and David alone with embezzlement from a health care benefit program, in violation of 18 U.S.C. § 669(a) (Counts Three and Four).

The case arose from a dispute among business partners. In 2014, David approached a social acquaintance, Victor Torosyan, about opening a suboxone clinic in Quincy, Massachusetts. David represented that he and his brother James had experience running a previous clinic but needed a significant capital infusion to get the new business off the ground. Torosyan agreed to invest $500,000 in exchange for "special consent authority" over various management matters, reflected in the contractual documents establishing the business.

After a series of delays with renovations and permitting, the clinic received a certificate of occupancy on August 6, 2015. Shortly thereafter, Torosyan testified that David and his brother began to make a series of threats, demanding that Torosyan surrender his special consent authority, transfer five percent of his ownership interest to each of two third parties, and relinquish his right to priority distribution of profits. Torosyan also testified that David misappropriated certain clinic funds totaling $3,500, underlying the two embezzlement counts.

The case proceeded to trial and the jury returned guilty verdicts to all counts on May 8, 2017. On December 17, 2017, the district court sentenced David to concurrent terms of 36 months imprisonment on each count, followed by three years of supervised release, $3,500 restitution, and a $400 special assessment. The district court sentenced James to nine-month

prison terms on Counts One and Two, to be served consecutively, followed by three years of supervised release and a $200 special assessment. Both defendants appealed.

On appeal, the First Circuit upheld the extortion counts, rejecting the defendants' argument that the government failed to meet its burden to prove that they conspired to "obtain" property by extortion since there was no evidence they intended to acquire or benefit, themselves, from the small ownership interests in the clinic they demanded that Torosyan give to third parties. *See* 926 F.3d at 10 ("[A] defendant may 'obtain' property within the meaning of the Hobbs Act by bringing about its transfer to a third party, regardless of whether the defendant received a personal benefit from the transfer."). The First Circuit also found that "the government had shown the requisite *de minimis* impact on interstate commerce through a tried and true method: demonstrating that the defendant's criminal activity 'cause[s] or create[s] the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce.'" 926 F.3d at 12.

With regard to the extortion counts, the First Circuit vacated Count Three after the government conceded the substance of David's sufficiency challenge. *See* 926 F.3d at 17. The First Circuit affirmed the verdict on Count Four and remanded the case "to consider whether and to what extent (if at all) a modification of [the] sentences on counts 1, 2, and 4 may be in order." 926 F.3d at 20.

On July 17, 2019, the district court resentenced David to "time served," restitution of $2,000, and a $300 special assessment.

REASONS FOR GRANTING THE PETITION

I. THE FIRST CIRCUIT ERRONEOUSLY HELD, IN CONFLICT WITH MULTIPLE DECISIONS OF THIS COURT, THAT THE GOVERNMENT MAY SUSTAIN A HOBBS ACT EXTORTION CHARGE BASED ON EVIDENCE THAT THE DEFENDANT "OBTAINED" PROPERTY FOR THE BENEFIT OF A THIRD PARTY.

The First Circuit's holding that "a defendant may 'obtain' property within the meaning of the Hobbs Act by bringing about its transfer to a third party" 926 F.3d at 10, is contrary to multiple decisions of this Court.

The Hobbs Act "punishes 'extortion,' one of the oldest crimes in our legal tradition." *Sekhar v. United States*, 570 U.S. 729, 733 (2013). Extortion requires "the obtaining of items of value, typically cash, from the victim." *Id*. It does "not cover mere coercion to act or refrain from acting." *Id*. (internal citations omitted).

"At common law, extortion was a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office." *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 402 (2003). "While the Hobbs Act expanded the scope of common-law extortion to include private individuals, the statutory language retained the requirement that property must be 'obtained.'" *Id*. at 403.

In *Scheidler*, a civil RICO action alleging a pattern of extortion of women and abortion clinics by an anti-abortion group, this Court held that the group "interfered with, disrupted, and in some instances completely deprived" women, doctors, nurses, and others "of their ability to exercise their property rights." 537 U.S. at 404. The group did not, however, acquire any property; it did not receive "'something of value' from respondents that they could exercise,

transfer, or sell." 533 U.S. at 405. As a result, *Scheidler* held that no extortion had been committed within the meaning of the Hobbs Act.

In *Sekhar*, a partner of a firm managing an investment fund sent anonymous emails to the New York State Comptroller's general counsel, threatening to expose the lawyer's extramarital affair if the lawyer did not recommend that the Comptroller invest in the defendant's fund. A jury convicted Sekhar of attempted extortion, identifying the property he attempted to extort as the general counsel's recommendation to the Comptroller. *See Sekhar*, 570 U.S. at 731. The Court held that the recommendation was not obtainable property under the Hobbs Act because it was not "something of value . . . that can be exercised, transferred, or sold." *Id*. at 736.

To determine whether the purported property at issue in *Sekhar* and *Scheidler* was "obtainable" for purposes of the Hobbs Act, this Court carefully considered and explained what it means to "obtain" property. *See Sekhar*, 570 U.S. at 736 ("*Scheidler* rested its decision, as we do, on the term 'obtaining.'"). "Obtaining property requires 'not only the deprivation but also the acquisition of property.'" *Sekhar*, 570 U.S. at 734 (quoting *Scheidler*, 537 U.S. at 404 (2003)). "That is, it requires that the victim 'part with' his property, and that the extortionist 'gain possession' of it." *Id*. (emphasis added) (internal citation omitted; quoting Scheidler, 537 U.S. at 403, and citing a dictionary definition of "obtain"); *see also Scheidler*, 537 U.S. at 403 ("in an extortion prosecution, the issue that must be decided is whether the accused 'received [money] from the complainant.'") (quoting *People v. Weinseimer*, 117 App. Div. 603, 616 (1907)) (brackets in original).

The requirement that the defendant acquire possession of extorted property flows naturally from the common meaning of the verb "obtain": "[t]o bring into one's possession; to procure, esp. through effort." Black's Law Dictionary 1247 (10th ed. 2014). Even if there were

ambiguity, the rule of lenity would compel this Court to reject the government's more expansive interpretation. *See Scheidler*, 537 U.S. at 403 n.8 ("Surely if the rule of lenity, which we have held applicable to the Hobbs Act, means anything, it means that the familiar meaning of the word 'obtain' — to gain possession of — should be preferred."). As this Court recently reaffirmed in another context, "[n]either the dictionary definition nor the common usage of the word "obtain" supports the conclusion that an individual "obtains' property that was acquired by someone else." *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) (construing forfeiture statue). Yet precisely that rejected conclusion is necessary to uphold the extortion verdicts and First Circuit decision here.

Distilled to their essence, *Scheidler* and *Sekhar* analyzed the difference between extortion and coercion, and concluded that the defendants in those cases may have engaged in coercion — using threats to dictate or restrict the actions of others — but not Hobbs Act extortion. See *Scheidler*, 537 U.S. at 405-408; *Sekhar*, 133 S. Ct. at 2725-26. The same distinction applies with equal force here and is fatal to the defendants' extortion convictions.

In short, the indictment charged, and the evidence at trial viewed in the light most favorable to the verdict showed, that David and James made threats in order to coerce Torosyan to transfer a small part of his ownership interest in the clinic to third parties. Since David and James did not use threats in order to obtain possession of that property for themselves, they did not commit the crimes of conspiring or attempting to commit extortion.

II. THE FIRST CIRCUIT ERRONEOUSLY HELD, WITHOUT SUPPORT IN DECISIONS OF ANY OTHER CIRCUIT, THAT TRANSFER OF INTANGIBLE RIGHTS AMONG OWNERS OF A SMALL BUSINESS SATISFIES THE "INTERSTATE COMMERCE" NEXUS OF A HOBBS ACT EXTORTION CHARGE.

The government presented no evidence below that the transfer of a small ownership interest in a Massachusetts company from Torosyan to other individuals could have any effect on interstate commerce. The only prior federal court decision of which Mr. Tkhilaishvili is aware to have addressed the issue directly expressly held that "it is doubtful the transfer or sale of personal ownership . . . of stock in a corporation engaged in interstate commerce is itself an effect on interstate commerce." *United States v. Kaye*, 593 F. Supp. 193, 198 (N.D. Ill. 1984).

The First Circuit nevertheless upheld the verdict here on the basis of an "asset depletion theory" which no court of which Mr. Tkhilaishvili is aware, in any circuit, has ever applied in like circumstances.

In *United States v. Devin*, 918 F. 2d 280 (1st Cir. 1990), the seminal "asset depletion" case in the First Circuit, a corrupt police officer extorted cash payments for decades from the owner of a parking garage business. Even though the owner made the payments from "personal funds," the court held that the jury could infer such payments "would ultimately deplete the corporate coffers, whether through direct corporate payment or reimbursement of the corporate officer." *Id*. at 293. *Devin*, in turn, relied on *United States v. Headman*, 630 F.2d 1184 (7th Cir. 1980), where corporate funds were funneled through several individuals to pay bribes. "Extortionate payments were made either directly or indirectly with company funds which could otherwise have been used to purchase interstate building materials." *Id*. at 1193. While the payment of corporate funds through individuals in these cases "attenuates the causal chain somewhat" connecting the extortionist, the victim, and the company operating in commerce,

Devin, 918 F. 2d at 293, the cash-to-commerce link remains direct, immediate, and essential. The *Headman* court explained:

> The focus of the 'depletion of assets' theory is the payment itself. If that money is derived from a source which otherwise could be devoted to the purchase of interstate materials, the law presumes a potential effect on commerce sufficient to satisfy that element of the offense.

630 F.2d at 1192 (emphasis added). Neither the First Circuit nor the government identified a single "depletion of assets" case where the object of the extortion was anything other than money. Since the defendants here sought to extort only non-cash intangible property, the reliance on "asset depletion" to satisfy the commerce nexus necessarily fails.

Many "asset depletion" cases involved completed Hobbs Act robberies (not extortionate threats), which directly and immediately resulted in business closures. *See, e..g., United States v. Jimenez-Torres*, 435 F.3d 3 (1st Cir. 2006) (home invasion, robbery, and murder of gas station owner resulted in closure of business); *United States v. Molina*, 407 F.3d 511 (1st Cir. 2005) (robbery, murder, and kidnapping on company's premises caused company to close the next day); *United States v. Nguyen*, 155 F.3d 1219 (10th Cir. 1998) (restaurant immediately closed for 22 days and later went out of business after robbery and murder on premises). The completed acts of violence in these robbery cases unquestionably affected commerce. In an extortion prosecution, by contrast, it is the putative effect of obtaining the property at issue that determines the commerce nexus, not the hypothetical impact of unfulfilled threats of violence or economic harm. The court in *Kaye* explained:

> [T]he government's argument about the threat to burn down [the victim's] business building if he did not pay – a threat that surely would have impacted interstate commerce if implemented – also does not bear [on the commerce] analysis in terms of what the indictment charges . . . [T]he reference to burning the building went to the element of threatened fear of economic harm, but not at all to the attempted effect or actual effect on commerce by the payment charged in the indictment.

593 F. Supp. at 199. The government's proof here did not come close to establishing that transfer of intangible property interests would cause immediate business harm to the clinic akin to the harm in *Jimenez-Torres*, *Vega Molina*, and *Nguyen*.

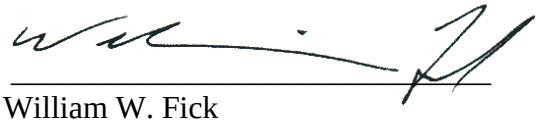
In short, the First Circuit's decision stretching "asset depletion" to cover non-monetary assets would strip the "interstate commerce" element of what few teeth is has left. This Court should grant *certiorari* to preserve that constitutional requirement.

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully Submitted,

DAVID TKHILAISHVILI
by his attorney,



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