No.

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN KOZIOL

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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I. QUESTIONS PRESENTED FOR REVIEW

A. The Ninth Circuit has placed itself in conflict with several other circuits by criminalizing any baseless threat to sue as Hobbs Act extortion. This is a dangerous expansion of federal criminal liability that may have unanticipated and unfortunate consequences in other cases and in other contexts. Should certiorari should be granted to resolve this circuit split?

B. Additionally, in order to sidestep the clear circuit split, the Ninth Circuit took the unprecedented and unsupported position that interpretation of a statute when applied in the criminal context can be different from an interpretation of that same statute in the civil context. This holding conflicts with several decision of this Court, including *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Should certiorari be granted to address the Ninth Circuit's failure to follow binding precedent from this Court?

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II. OPINION BELOW

The Ninth Circuit, in a 49-page published decision, affirmed petitioner's conviction for attempted Hobbs Act extortion in violation of 18 U.S.C. § 1951(a). (Appendix A.) The court reversed and remanded petitioner's sentence. (*Id.*)

III. JURISDICTION

The Ninth Circuit affirmed petitioner's conviction on April 13, 2021, and denied his petition for rehearing on July 20, 2021. (App. A & Appendix B.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS

Title 18 U.S.C. § 1951 provides:

> (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—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(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, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce

between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

V. STATEMENT OF THE CASE

Petitioner was indicted on January 19, 2018, following multiple e-mailed threats to sue "Entertainer"[1] based on conduct that occurred during a nude massage with his wife, Jordan Sweet. The facts developed at trial revealed that Sweet did give a nude massage to Entertainer's Manager, not Entertainer, on January 10, 2016.

The massage was not to Manager's liking because he was covered with a towel, Sweet did not allow mutual touching, and there was no "happy ending." (RT May 31, 2018 AM at 57.) Afterwards, Manager sent a series of text messages expressing his displeasure with his experience. (RT May 31, 2018 AM at 58, 71.) Thereafter, Manager was contacted by an attorney representing Sweet, but the

[1] The Ninth Circuit's published decision used the pseudonyms "Manager" and "Entertainer" for the two individuals who were the subjects of the messages and threats of a lawsuit sent by petitioner. (App. A at page 4, n.1.)

attorney sought to speak with Entertainer rather than Manager. The attorney alleged that Entertainer had engaged in inappropriate behavior during the January massage. Manager also received an e-mail, which similarly referenced Entertainer. During a phone call, the issue of the identity of who received the nude massage was clarified (Manager, not Entertainer), and on January 14, 2016, the attorney sent a demand letter to Manager, who had initially used the services of Entertainer's attorney but later hired his own.

The demand letter alleged that Manager "physically and verbally assaulted and battered" Sweet and demanded $250,000 to settle the claims. The letter claimed there was a video showing Manager at the apartment on January 10. Very soon thereafter, on January 26, 2016, the attorney negotiated a confidential settlement with Manager, who denied the allegations and resolved all claims by Sweet, for $225,000. In the settlement agreement, Sweet also released Entertainer from any claims.

Over the next 15 months, petitioner engaged in his own round of settlement demands and threats of litigation based on the incident with his wife. Beginning in August of 2016, and continuing through November of 2017, petitioner called and e-

mailed Manager and then his attorneys. Petitioner's claims were based on his story that he was present during the massage in another room and was confronted and assaulted by Entertainer. He eventually submitted a photo of his injuries. At various times he was represented by counsel. He demanded $1,000,000 in damages, and stated he was prepared to promptly file his complaint if a settlement could not be reached.

Eventually, on November 10, 2017, former federal prosecutor Lynn Neils, one of Entertainer's many attorneys, contacted petitioner on behalf of Entertainer via e-mail, and warned him that his conduct violated a litany of federal and state criminal statues, including the Hobbs Act. She stated that the metadata in the injury photo indicated it was taken nearly a year after the assault. Petitioner responded that he would be moving forward with filing his complaint, but offered Entertainer a chance to settle if he had "a change of heart." This concluded the interactions between appellant and Entertainer's attorneys, but not between former federal prosecutor Neils and her former employer, the United States Attorney's Office. The indictment charging petitioner with extortion in violation of the Hobbs Act followed just over two months later.

VI. REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's published decision in this case allows criminal liability to be imposed based on sham threats of litigation, creating a circuit split that must be addressed.

This Court should grant this petition because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a). The Ninth Circuit's decision is in direct conflict with decisions of at least four other circuits.

There is no question that petitioner made threats to Entertainer about filing a lawsuit against him if he did not settle his false claims against him. Thus, these threats were properly treated as "sham" threats. Petitioner argued that such sham threats were categorically excluded from the reach of the Hobbs Act,18 U.S.C. § 1951, for attempted extortion. The Ninth Circuit rejected the argument.

But the "sham" nature of the threats was not a sufficient basis for the Ninth Circuit to ignore the fact that the threat in this case was merely to *file a lawsuit*. The immunity for individuals petitioning the government, which can include using the courts, and the recognized "sham" exception, are derived from *Eastern Railroad*

Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965). *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991). The Ninth Circuit concluded "there is no statutory, constitutional, or policy basis to support Koziol's argument that threats of sham litigation are categorically excluded from criminal liability under the Hobbs Act." (App. A at 11.)

In so doing, the Ninth Circuit short-circuited the necessary analysis. The only thing proof of a sham does is deprive petitioner of *Noerr-Pennington* immunity. It does not answer the question—already decided by multiple other circuits—of whether the threat to file a lawsuit, no matter how baseless, can *ever* violate the Hobbs Act.

In making that determination, the question is whether the threat comes within the scope of the means/ends test for "wrongfulness" as defined by this Court in *United States v. Enmons*, 410 U.S. 396 (1973). A sham threat to sue can never be wrongful under § 1951 because it can never be a wrongful *means* to threaten to use the courts to resolve a dispute. *Enmons*, 410 U.S. at 400 (holding that the Hobbs Act does not apply to the use of even wrongful force to obtain

"legitimate" labor ends, and that the violator's actions must be "wrongful" with respect to both the means and ends to constitute extortion.). Contrary to the Ninth Circuit's holding in this case, other circuits have refused to impose Hobbs Act liability for baseless threats of litigation. *See, e.g., United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002) (holding threats to sue a public entity cannot constitute Hobbs Act extortion, even where supported by false testimony and fabricated evidence; although the threat to file a baseless, bad faith lawsuit can satisfy the "wrongful objective" portion of the test for "wrongfulness" under the Hobbs Act, it cannot satisfy the "wrongful means" portion.); *I.S. Joseph Co. v. J. Lauritzen A/S*, 751 F.2d 265, 267 (8th Cir. 1984) (holding threats of groundless litigation cannot constitute extortion under the Hobbs Act); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994) (holding threats to enforce even a fraudulent contract not extortion under RICO); and *Deck v. Engineered Laminate*s, 349 F.3d 1253, 1258 (10th Cir. 2003).

State courts have come to the same conclusion as the Eleventh, Eighth, Sixth, and Tenth Circuits.

> [T]he overwhelming majority of jurisdictions addressing the unlawful act requirement in the federal analogue conclude that "[a] threat to litigate, by itself, is not necessarily 'wrongful' within [this context]. After all, under our system, parties are encouraged to resort to courts for the redress of wrongs and the enforcement of rights." *United States v. Pendergraft*, 297 F.3d 1198, 1206 (11th Cir. 2002); *see Deck v. Engineered Laminates*, 349 F.3d 1253, 1257–58 (10th Cir. 2003); *Rendelman v. State*, 175 Md. App. 422, 927 A.2d 468, 481 (2007), aff'd, 404 Md. 500, 947 A.2d 546 (2008); *see also Zueger v. Goss*, 2014 COA 61, ¶ 42, 343 P.3d 1028, 1038 (Colo. App. 2014) ("Settlement implies a compromise; it does not establish conduct against one's will.").

People v. Knox, 467 P.3d 1218, 1227–28 (Colo. App. 2019), *cert. denied*, 2020 WL 4345742 (Colo. June 27, 2020). *See also*, *State v. Rendelman*, 947 A.2d 546, 557–58 (Md. 2008).

The weight of authority is that even a baseless, sham threat of litigation cannot be the basis for a Hobbs Act attempted extortion charge because the threat to sue is not a wrongful means. The Ninth Circuit erred in its description of the Eleventh Circuit's decision in *United States v. Pendergraft*, 297 F.3d at 12054 as an "outlier." (App. A at 26.) It is the Ninth Circuit that is the outlier on this issue, and the Circuit split should be addressed.

B. The Ninth Circuit's curious ruling that a single statute can be interpreted differently when applied in a criminal versus civil context is in conflict with multiple decisions of this Court.

This Court should grant this petition because "a United States court of appeals has . . . decided an important . . . federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

As discussed in Section A, *supra*, appellant referenced multiple decisions by courts in other circuits in support of his argument that sham litigation threats can never be a wrongful means under the Hobbs Act. Faced with these compelling out-of-circuit authorities, the court distinguished them on the basis that each of those cases involved "civil," rather than criminal, RICO. (App. A at 22-23.)

Beginning at page 23 of the opinion, the court discussed the multiple out-of-circuit cases which have held that a sham threat to sue can never be wrongful under the Hobbs Act. This discussion concludes:

> These cases turn on the *scope of civil liability* under RICO and related policy concerns, but they do not address the issue presented in this case: whether threats of sham litigation can establish *criminal liability* under the Hobbs Act. Furthermore, the policy concerns asserted in these cases are not implicated when a defendant, who has no relationship with his alleged extortion victim, including any prior or pending litigation, threatens sham litigation to obtain property to which he knows he has no lawful claim. *See Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1334 (9th Cir. 1986) ("This kind of litigation deserves all the chilling effect the law allows."). Therefore, we reject Koziol's argument that these civil RICO cases from other circuits establish that threats of sham litigation can never constitute extortion under the Hobbs Act.

(Op. at 24, emphasis added.)

But there is no difference in the interpretation of RICO in the civil and criminal contexts. The court's assertion that there is a difference is not supported with a citation to any authority. This is not surprising because this Court has made it clear that when a statute with both civil and criminal application is interpreted, it is interpreted consistently no matter what the arena. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (explaining that a single statute with civil and criminal applications receives a single interpretation); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality opinion); *Sessions v. Dimaya*, ___ U.S. ___, 138 S. Ct. 1204 (2018) ("[T]his Court has held (it could hardly have done otherwise) that 'we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.'" (*citing Leocal*, 543 U.S., at 12, n.8, 125 S.Ct. 377)).

As long ago as *United States v. Turkette*, 452 U.S. 576 (1981), this Court consistently applied the same construction to the RICO statute whether it arose in the civil or criminal context. *Turkette* stated that the inapplicability to a particular illegitimate enterprise of one or more of the civil remedies contained in RICO does not lead to the conclusion that existence of such civil remedies limits the scope of

the criminal provisions of RICO. *Turkette*, 452 U.S. 585 (1981); *see also FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954) (rejecting notion that "the same substantive language has one meaning if criminal prosecutions are brought . . . and quite a different meaning" in civil action by private party).

The singular interpretation of statutory terms whether the statute is being applied in the civil or criminal context creates clarity and uniformity of application. *See Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 730 (6th Cir. 2013) (Sutton, J., concurring) ("[A] statute is not a chameleon. Its meaning does not change from case to case.")

If a statute is interpreted consistently in the civil and criminal contexts, then the rule of lenity applies in both situations. The rule of lenity "demand[s] resolution of ambiguities in criminal statutes in favor of the defendant . . . ." *Hughey v. United States*, 495 U.S. 411, 422 (1990) (citation omitted). The rule extends to statutes that set criminal punishments as well as statutes that carry criminal penalties if violated. *See id.* (applying the rule of lenity to a restitution provision of the Victim and Witness Protection Act); *United States v. Thompson/Center Arms Co.*, 504 U.S. at 517–518, 518 n.10 (employing the rule of

lenity to interpret "a tax statute ... in a civil setting" because the statute "has criminal applications"); *Leocal v. Ashcroft*, 543 U.S. at 11 n.8.

Certiorari should be granted to correct the Ninth Circuit's published holding rejecting the position of multiple other circuits that a sham threat to sue can never be wrongful within the meaning of the Hobbs Act.

VII. CONCLUSION

The Ninth Circuit's published decision in this case blatantly ignores multiple decisions of this Court to create a circuit split on the question of whether a sham threat of litigation can be a wrongful means under the Hobbs Act. The Ninth Circuit was able to ignore those authorities on the erroneous basis that a *civil* case interpreting the RICO statute is not applicable in a *criminal* case which presents the same question of statutory interpretation. This Court should grant the petition to address these issues and clarify whether a sham threat of litigation is criminal under the Hobbs Act.

Respectfully submitted,

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DATED: October 15, 2021

s/ Gail Ivens
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