No. 21-6054

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN KOZIOL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's threat in this case -- that, unless his celebrity victim paid him $1 million, petitioner would use false and fabricated evidence to file an otherwise baseless lawsuit accusing the celebrity of sexual assault and assault and battery, where petitioner knew that the allegations were untrue such that he had no lawful claim to payment -- constituted attempted extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, because it was an attempt to obtain property from another, with his consent, induced by "wrongful use of actual or threatened * * * fear," 18 U.S.C. 1951(b)(2).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (C.D. Cal.):

United States v. Koziol, No. 2:18-cr-22 (Jan. 22, 2019)

United States Court of Appeals (9th Cir.):

United States v. Koziol, No. 19-50018 (Apr. 13, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A49) is reported at 993 F.3d 1160.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2021. A petition for rehearing was denied on July 20, 2021 (Pet. App. B1). The petition for a writ of certiorari was filed on October 15, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of attempted Hobbs Act extortion, in violation of 18 U.S.C. 1951(a). Judgment 1. The district court sentenced petitioner to 70 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed petitioner's conviction, vacated his sentence, and remanded for resentencing. Pet. App. A3-A49.

1. In 2016 and 2017, petitioner attempted to extort a well-known singer-songwriter who had obtained success through his brand of uplifting, positive, and clean music, including a song about staying faithful to his wife. Pet. App. A6-A10; Gov't C.A. E.R. 268-271. The singer-songwriter -- referred to here as "Entertainer" to protect his identity, see 3/1/2018 D. Ct. Protective Order ¶ 4 -- had developed a fan base of "people of faith" attracted to his inspiring and positive message. Gov't C.A. E.R. 270, 274. Petitioner's extortion scheme rested on his threat that, unless Entertainer paid petitioner $1 million, petitioner would make public -- by filing a lawsuit -- his false allegations that Entertainer had sexually assaulted a woman and committed assault and battery. Pet. App. A7-A9. Entertainer testified that the allegations were "terrifying" and, though false, could have "serious consequences" by damaging his career, particularly because his "whole career is autobiographical" and the allegations portrayed

him as a hypocrite in violation of his avowed moral code, public image, and public views on relationships and the treatment of women. Gov't C.A. E.R. 281-284.

a. Petitioner's scheme had its origin in a successful January 2016 attempt to extract a $225,000 payment from Entertainer's manager (Manager). Pet. App. A4-A5. On January 10, after Manager had responded to an advertisement for an erotic massage, Manager met the masseuse -- petitioner's wife -- at her apartment. Ibid. While the masseuse provided him an erotic massage, Manager asked if "mutual touching" was permissible, the masseuse said no and soon thereafter asked Manager to leave, at which point he left upset. Id. at A5; see Gov't C.A. E.R. 157-160. Manager subsequently texted the masseuse expressing his displeasure. Pet. App. A5. She responded by stating she would "do some digging" using his cell phone number. Gov't C.A. E.R. 173. At that time, a Google search using that number would have produced Manager's company website, associated social media accounts, and the websites of his clients listing him as their manager. Id. at 153.

Two days later, Manager received a voicemail message for Entertainer from an attorney, who asserted that "inappropriate behavior" occurred during a massage and offered to "resolve [the matter] privately." Gov't C.A. E.R. 162. It soon became clear that the call was about the massage that Manager, not Entertainer, had commissioned from petitioner's wife. Id. at 162-166. The attorney thereafter sent Manager a letter alleging that Manager

had "physically and verbally assaulted and battered" the masseuse; offering to permit Manager "to extricate himself from this matter without exposure" for a $250,000 payment; and threatening to "promptly file and serve a lawsuit and notify the media" if Manager did not respond within one day. Pet. App. A5. Although he denied the allegations, Manager made a "business decision" to pay $225,000 in a confidential settlement with petitioner's wife to avoid the cost of, and reputational damage from, the threatened lawsuit. Gov't C.A. E.R. 177. Because the initial suggestion of misconduct had referenced Entertainer, Manager included a release of all claims against Entertainer in the settlement. Id. at 180, 641 ¶ 6.

b. About eight months later, in August 2016, petitioner left a voicemail message for Manager, identifying himself as the masseuse's husband. Pet. App. A6. Manager's attorney returned the call and, in subsequent conversations, petitioner asserted a new claim -- not resolved in the settlement -- that petitioner had been present during the January 2016 massage and that Manager had verbally and physically assaulted petitioner. Ibid. Manager's attorney conveyed to petitioner that she did not believe him, adding that Manager had been "extorted once" and was "not going to be extorted a second time." Gov't C.A. E.R. 58-59.

Petitioner then switched his target to Entertainer. In December 2016, petitioner's attorney wrote a letter (Pet. C.A. E.R. 150-154) to several attorneys with the new allegation that Enter-

tainer (not Manager) had "physically assault[ed] and batter[ed]" petitioner during a January 2016 massage session when petitioner had attempted to protect his wife from Entertainer's "unwanted physical advances." Pet. App. A6. The letter stated that petitioner would file a lawsuit asserting those false allegations unless Entertainer responded. Ibid. Manager's attorneys responded by letter, highlighting petitioner's prior allegation against Manager, denouncing the new allegations as "complete and utter fabrication," and threatening legal action if petitioner persisted in seeking a further payment. Id. at A7. Petitioner's attorney did not respond. Ibid.

Ten months later, in October 2017, petitioner himself e-mailed Manager asking that Entertainer or Entertainer's attorney contact him to discuss a "very serious confidential matter." Gov't C.A. E.R. 650-651. After Entertainer's attorney responded, petitioner personally sent the attorney a lengthy e-mail falsely alleging that, in January 2016, Entertainer had obtained an erotic massage from petitioner's nude wife during which Entertainer repeatedly touched her breasts and grabbed her vagina; Entertainer verbally assaulted her when she told him to leave; and Entertainer then punched petitioner in the face when petitioner arrived from another room, rendering him unconscious. Pet. C.A. E.R. 162-163. Petitioner also e-mailed a photograph purporting to show petitioner with a black eye, which he claimed was "a pic from the assault," Gov't C.A. E.R. 225, 601, and claimed to have a video showing

Entertainer entering and exiting the apartment. Pet. App. A7-A8. Petitioner's e-mail concluded by stating that, unless Entertainer paid $1 million by November 1, 2017, petitioner would file a lawsuit against Entertainer with supporting documents. Id. at A8.

In his ensuing communications with Entertainer's counsel, petitioner repeatedly threatened Entertainer with the baseless lawsuit, repeatedly demanded prompt payment, extended his deadline by one week, and again threatened that he would file suit unless Entertainer paid $1 million by November 8, emphasizing that his offer would "NOT BE RENEWED." Pet. App. A8-A9. When petitioner's deadline arrived, Entertainer's counsel rejected petitioner's demand as "ridiculous." Id. at A9. Petitioner then offered a chance to reconsider "ASAP" and, in response, one of Entertainer's other attorneys informed petitioner that his conduct violated multiple criminal statutes, including the Hobbs Act. Ibid. Counsel also informed petitioner that the metadata in the photograph file that petitioner had previously e-mailed showed that the photograph had been taken nearly a year after January 2016, "proving that [petitioner was] utterly lying about the facts." Ibid. Undeterred, petitioner threatened that he would "immediately" file his lawsuit, but offered Entertainer a final chance to settle. Id. at A9-A10. Entertainer did not pay petitioner, and petitioner never filed suit. Id. at A10.

2. A federal grand jury indicted petitioner on one count of attempted Hobbs Act extortion involving "the wrongful use of fear."

Indictment 1-2. The Hobbs Act makes it a criminal offense to "in any way or degree obstruct[], delay[], or affect[] commerce * * * by * * * extortion." 18 U.S.C. 1951(a). The Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2).

The trial evidence demonstrated that petitioner's story was fabricated and that he knew that he had no right to obtain money from Entertainer. Pet. App. A29. The evidence showed, inter alia, that Entertainer was not present at the massage (which petitioner's counsel conceded, Gov't C.A. E.R. 481); that petitioner had first accused Manager of assault and later targeted Entertainer with the same claim only after failing to extract a second payment from Manager; that petitioner manufactured evidence purportedly supporting his contentions by recycling text messages from Manager and attributing them to Entertainer; that petitioner falsified documentation of his purported injuries by using a photograph taken long after the purported assault (which petitioner's counsel conceded, id. at 477); and that petitioner, in a recorded call from jail (id. at 126, 392-393), asked an acquaintance to tell petitioner's wife "not to talk to anybody, and [to] make sure she's not talking over the phone" because she could "really f[***] me in anything she says," id. at 600. See Pet. App. A28-A33; Gov't C.A.

Br. 10-11, 17-18, 51-55. The jury found petitioner guilty. Verdict 1-2.

The district court denied petitioner's motion for a judgment of acquittal. Pet. C.A. E.R. 37-49. The court explained that the evidence was sufficient to show beyond a reasonable doubt that "[petitioner] made a threat to bring a lawsuit, asserting claims he knew to be completely false, for an improper purpose; namely, inducing the victim to make a very substantial monetary payment to [petitioner] by reason of the victim's fear of harm to his reputation and livelihood." Id. at 46-47. The court thus determined that petitioner's demands were "sham litigation threats" -- and were "not constitutionally protected conduct" -- and therefore constituted Hobbs Act extortion. Id. at 47-48.

3. The court of appeals affirmed petitioner's conviction, but vacated his sentence and remanded for resentencing. Pet. App. A1-A49. The court rejected petitioner's contention that "the threat of litigation" can never "constitute 'wrongful' conduct under the Hobbs Act," finding "no statutory, constitutional, or policy basis to support [petitioner's] argument that threats of sham litigation are categorically excluded from [such] criminal liability," id. at A10-A11. See id. at A10-A28.

The court of appeals explained that "obtaining property is 'wrongful' under the Hobbs Act if 'the alleged extortionist has no lawful claim to that property.'" Pet. App. A12 (quoting United States v. Enmons, 410 U.S. 396, 400 (1973)). And the court

determined that petitioner's "threats of sham litigation, which [he] made to obtain property to which [he] kn[ew] he ha[d] no lawful claim," were "'wrongful.'" Id. at A16 & n.10, A28. The court observed that the evidence showed that petitioner "knew his allegations [against Entertainer] were baseless and that he had no right to obtain any money from [Entertainer]." Id. at A29; see id. at A28-A33.

The court of appeals rejected petitioner's contention that his conduct was immune from criminal liability under the "Noerr-Pennington doctrine," Pet. App. A17. See id. at A16-A20. The court accepted that doctrine as reflecting "a rule of statutory construction that requires courts to construe statutes to avoid burdening conduct that implicates the protections of the Petition Clause of the First Amendment," but found the doctrine inapplicable because it does not "'protect[] sham petitions'" and "'statutes need not be construed to permit them.'" Id. at A17 (citation omitted).

In so doing, the court of appeals rejected petitioner's view, based on decisions from other courts of appeals, that threats of sham litigation can never constitute "wrongful" conduct under the Hobbs Act. Pet. App. A20, A22-A27. The court explained that those decisions "do not support the broad proposition that threats of sham litigation should be categorically excluded from criminal liability" and that they therefore are "distinguishable" and "not persuasive" in this context. Id. at A20.

ARGUMENT

Petitioner contends (Pet. 6-10) that a threat to file a lawsuit can never constitute extortion involving the "wrongful" use of fear under the Hobbs Act, 18 U.S.C. 1951(b)(2), "no matter how baseless" it might be, Pet. 7. The court of appeals correctly rejected that contention; its interlocutory decision does not conflict with any decision of this Court; and no circuit conflict warrants further review. Certiorari should therefore be denied.

1. As a threshold matter, the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); see Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (a case remanded to district court "is not yet ripe for review by this Court"); see also Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari). The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. 46a-49a. Once petitioner is resentenced, he may reassert his current contentions -- together with any other appropriate contentions that may arise on remand -- in a single certiorari petition after final judgment. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam). Petitioner provides no sound basis for departing from the Court's normal

practice of denying petitions by criminal defendants challenging interlocutory determinations that, like the decision in this case, may be reviewed after final judgment.

2. In any event, the court of appeals' decision is correct and warrants no further review.

a. As relevant here, the Hobbs Act makes it a criminal offense to commit "extortion" affecting commerce or to "attempt[] or conspire[] so to do." 18 U.S.C. 1951(a). The Act defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). In United States v. Enmons, 410 U.S. 396 (1973), this Court made clear that where "the alleged extortionist has no lawful claim to the property," his "obtaining of the property would itself be 'wrongful.'" Id. at 400. And here, the court of appeals correctly recognized that petitioner's "threats (baseless threats of sham litigation using falsified evidence and deceit) were 'wrongful' under the Hobbs Act because he sought to obtain money to which he knew he had no lawful claim." Pet. App. A16.

Courts have acknowledged that "[f]ear of economic loss" is "a part of many legitimate business transactions" and that its use is "not necessarily 'wrongful'" in those contexts. United States v. Burhoe, 871 F.3d 1, 9 (1st Cir. 2017) (citation omitted); see, e.g., United States v. Clemente, 640 F.2d 1069, 1077 (2d Cir.), cert. denied, 454 U.S. 820 (1981). But they have also recognized,

like the court of appeals here, that the use of such fear is rendered "wrongful" under the Hobbs Act when it does not reflect mere hard bargaining over disputed matters but instead involves the exploitation of fear to obtain property to which the defendant has no lawful claim. Burhoe, 871 F.3d at 9; Clemente, 640 F.2d at 1077; see also, e.g., Rennell v. Rowe, 635 F.3d 1008, 1012 (7th Cir. 2011); United States v. Vigil, 523 F.3d 1258, 1262-1263 (10th Cir.), cert. denied, 555 U.S. 886 (2008); Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 523-524 (3d Cir. 1998); United States v. Wilford, 710 F.2d 439, 445 (8th Cir. 1983), cert. denied, 464 U.S. 1039 (1984). In this case, because petitioner knew he had no lawful claim to Entertainer's money, his efforts to obtain that money through threats to file a sham lawsuit based on knowingly false allegations that instilled fear of significant harm to Entertainer's career involved the "wrongful" use of fear to obtain property, 18 U.S.C. 1951(b)(2), and thus attempted extortion under the Hobbs Act. See United States v. Tobin, 155 F.3d 636, 640-641 (3d Cir. 1998) (Alito, J.) (holding that "threat-en[ing] unrelated lawsuits alleging sexual harassment" constitutes the wrongful use of fear), cert. denied, 525 U.S. 1171 (1999).

b. Petitioner acknowledges (Pet. 6) that his threats to file a lawsuit asserting "his false claims" against Entertainer "were properly treated as 'sham' threats." But he nevertheless contends (Pet. 6-7) that a threat to file a lawsuit, "no matter how baseless" can never be "wrongful" conduct constituting

extortion under the Hobbs Act. That contention lacks merit for two reasons.

First, it cannot be squared with this Court's recognition in Enmons that conduct used to obtain another's property to which "the alleged extortionist has no lawful claim" is "wrongful" under the Hobbs Act. 410 U.S. at 400. Petitioner offers no textual basis to exempt threats (like his) of knowingly baseless litigation, and no such basis exists. The Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." Stirone v. United States, 361 U.S. 212, 215 (1960); United States v. Culbert, 435 U.S. 371, 374, 380 (1978). That broad language includes the threats of sham litigation in this case.

Second, although the First Amendment may in certain contexts insulate conduct from prosecution, no safe harbor for constitutionally protected activity exists here, where petitioner threatened an objectively baseless lawsuit while knowing that he had no lawful claim. As the court of appeals recognized (Pet. App. A17-A20), this Court developed the Noerr-Pennington doctrine "to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances." Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 556 (2014); see United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S.

127 (1961) (Noerr). The doctrine, which the Court initially applied in the antitrust context, reflects the Court's reluctance to "impute to Congress an intent to invade" that "right," Noerr, 365 U.S. at 138, and accordingly may immunize from liability the use of "courts to advocate * * * causes and points of view," California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972). See Octane Fitness, 572 U.S. at 555-556. Such First Amendment concerns, however, are absent when an individual has no lawful basis for bringing a lawsuit.

"Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) (citations omitted). The Noerr-Pennington doctrine accordingly offers no protection for "'sham' litigation," Octane Fitness, 572 U.S. at 556 (citation omitted), involving an "objectively baseless" lawsuit (for which "no reasonable litigant could realistically expect success on the merits") that is advanced by a would-be litigant with an improper "subjective motivation" for filing suit, Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60-61 (1993).

Petitioner's threats involved such a sham lawsuit because his threatened action was objectively baseless and petitioner subjectively knew as much but nevertheless threatened to file it in an attempt to induce his victim, out of fear of economic harm, to

give petitioner property to which he had no lawful claim. Petitioner acknowledges (Pet. 6) that his threatened lawsuit was a "sham" but argues (Pet. 7) that "[t]he only thing proof of a sham does is deprive petitioner of Noerr-Pennington immunity," and does not resolve whether his attempted means of obtaining property and his desired ends were "wrongful" under the Hobbs Act. That argument is misplaced. His threats of a sham lawsuit based on allegations that he knew to be false, made in order to persuade his victim to relinquish property out of economic fear, not only sought a wrongful end -- obtaining property to which he had no lawful claim -- but also involved wrongful means -- the threat of litigation that he knew was a sham -- to obtain that end.

c. Petitioner separately contends (Pet. 10-14) that the court of appeals erred by purporting to interpret the Hobbs Act differently when applied in criminal, rather than civil, contexts. That is incorrect.

In discussing out-of-circuit decisions cited by petitioner, which analyzed whether particular conduct constituted predicate extortion offenses under RICO, the court of appeals stated that those decisions involved "civil RICO claims and parties involved in business disputes who had been or were at the time involved in litigation apart from the civil RICO suit" and observed that "significant differences [exist] between th[o]se cases, dealing with civil RICO claims, and the criminal charges at issue in this case." Pet. App. A23; see id. at A22-A24. Those differences

flowed from the business-dispute contexts addressed by the decisions and the associated "policy concerns" guiding their analysis, which the court of appeals explained were "not implicated" here, where "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." Id. at A24. The court accordingly determined that the civil RICO decisions upon which petitioner relied simply do "not address the [sham-litigation] issue presented in this case" and do not "establish that threats of sham litigation can never constitute extortion under the Hobbs Act." Ibid.

The court of appeals did not, as petitioner suggests (Pet. 12) disregard this Court's teaching that a statute that applies in "both civil and criminal application[s]" has the same meaning in both contexts. To the contrary, the court of appeals repeatedly cited its prior decisions addressing civil RICO claims to support its interpretation of "wrongful" in the Hobbs Act. See, e.g., Pet. App. A11-A12 & nn.4, 6, A17-A18, A27 (discussing and citing civil RICO decisions in Sosa v. DIRECTV, Inc., 437 F.3d 923, 931-934, 939-940 (9th Cir. 2006), and Levitt v. Yelp! Inc., 765 F.3d 1123, 1130-1132 (9th Cir. 2014)). And nothing in the court's analysis of those decisions interpreting the Hobbs Act as incorporated into civil RICO claims suggests that the court believed it could have properly adopted a different interpretation of the same statutory language in this criminal prosecution. See ibid.

3. Petitioner contends (Pet. 8-9) that courts of appeals are divided over whether threats of litigation may constitute extortion under the Hobbs Act. But this case does not implicate any clear circuit conflict that would warrant further review.

a. Petitioner identifies only one decision -- United States v. Pendergraft, 297 F.3d 1198 (11th Cir. 2002) -- in which a court of appeals considered, in the context of a criminal prosecution, whether a defendant's threats to file a lawsuit violated the Hobbs Act. In that case, Pendergraft, a physician, had initially filed a legitimate injunctive action against a county government seeking to compel the county to permit him to hire off-duty law-enforcement officers to protect his abortion clinic. Id. at 1200-1201. Pendergraft's attorney, however, later threatened to file an amended complaint to add damages claims alleging that a county official had threatened violence at the clinic, in violation of the Freedom of Access to Clinic Entrances Act. Id. at 1201-1202. That allegation, and the supporting affidavits that Pendergraft and his co-defendant later filed, were false. Id. at 1200-1202.

The Eleventh Circuit reversed the defendants' convictions for attempted Hobbs Act extortion. Pendergraft, 297 F.3d at 1205-1208. The court reasoned that the case involved an "[a]typical threat to litigate" because the relevant "threat [was] to litigate against a county government," which the court viewed as more acutely implicating the First Amendment's right to "petition the[] government for the redress of grievances." Id. at 1207. The court

indicated that it was "troubled" by the prosect of Hobbs Act "prosecutions" or "civil RICO" claims resulting from other types of threatened litigation. Ibid. But the court ultimately emphasized that its "holding [wa]s a narrow one," namely, that the defendants' "threat to file litigation against [the] County, even if made in bad faith and supported by false affidavits, was not 'wrongful' within the meaning of the Hobbs Act." Id. at 1208; see id. at 1207 ("[T]he case before us involves a threat to sue a government.").

As the decision below observed (Pet. App. A24-A26), the "narrow" decision in Pendergraft leaves it is unclear whether the Eleventh Circuit, if presented with a Hobbs Act prosecution like the one here, would disagree with the court of appeals' disposition in this case. Although the Eleventh Circuit has since applied Pendergraft's "threatened litigation" analysis to civil RICO claims based on the use of "actual litigation" involving private parties, Raney v. Allstate Ins. Co., 370 F.3d 1086, 1088 (11th Cir. 2004) (per curiam), it has not expressly held that its carve-out encompasses all possible types of sham litigation. And more recently, the Eleventh Circuit has indicated that Pendergraft does not, in fact, preclude a Hobbs Act prosecution where sham litigation is threatened against a nongovernment entity. In upholding a Hobbs Act conviction based on "threats of bogus lawsuits, detentions, and seizures of property" with nongovernmental victims, the court determined such threats "were plainly wrongful and extor-

tionate" and explained that "Pendergraft grants no immunity to those who make threats of these kinds 'clothed in legalese.'" United States v. Cuya, 724 Fed. Appx. 720, 724 (11th Cir. 2018) (per curiam) (citation omitted). Although unpublished, that decision illustrates that the Eleventh Circuit understands Pendergraft to be limited in ways that would potentially render it inapplicable to the facts here.

b. Petitioner cites (Pet. 8-9) decisions from the Sixth, Eighth, and Tenth Circuits involving civil RICO claims that considered whether threats of litigation qualify as predicate extortion offenses. But as the court of appeals observed, those decisions address materially different contexts involving "business disputes" between parties with preexisting relationships; involve actual litigation over the underlying disputes; consider "policy concerns" inapposite here; and thus "do not address the issue presented in this case," where the government proved beyond a reasonable doubt that petitioner threatened sham litigation involving wholly fabricated allegations against a complete stranger. See Pet. App. A23-A24.

The underlying business dispute in Vemco, Inc. v. Camardella, 23 F.3d 129, 134 (6th Cir.), cert. denied, 513 U.S. 1017 (1994), arose from an allegedly fraudulently induced $15 million contract to build a paint-finishing system for manufacturing use, and various disagreements that arose during the contract's execution, which resulted in litigation between the parties to the contract.

Id. at 131-132. In the ensuing civil RICO action, the Sixth Circuit stated that a "threat of litigation if a party fails to fulfill even a fraudulent contract * * * does not constitute extortion." Id. at 134. But any suggestion that misrepresentations in contract formation cannot in themselves transform contract-based claims into sham litigation for purposes of the Hobbs Act would not be implicated on the facts of this case.

The Eighth Circuit's decision in I.S. Joseph Co. v. J. Lauritzen A/S, 751 F.2d 265 (1984), involved agreements signed by a company's subsidiary to lease vessels from multiple shipowners. Id. at 266. After the subsidiary became insolvent, various shipowners demanded that the company pay its subsidiary's debt or inject fresh capital, and they threatened to sue both the company and its bank if it did not. Ibid. The company refused the demand, the shipowners sued, and the bank obtained summary judgment on the shipowner's claims, which the trial court determined were neither "frivolous [n]or asserted in bad faith." Id. at 266 & n.2 (citation omitted). The company later filed a civil RICO action alleging an injury to its relationship with its bank and asserting that the shipowners' threat of litigation constituted extortion. Id. at 266-267. The Eighth Circuit concluded that the threat was not extortion, reasoning that it did not "constitute[] the infliction of 'fear' for purposes of the extortion statute." Id. at 267. But petitioner does not argue in this Court that the "fear" component of a Hobbs Act prosecution was missing in this case;

nothing in I.S. Joseph Co. addresses whether threats of a sham lawsuit would be "wrongful" under the Hobbs Act; and nothing in that decision indicates that the Eighth Circuit would reach a different result from the court below on the particular facts here.

Finally, in Deck v. Engineered Laminates, 349 F.3d 1253 (2003), the Tenth Circuit addressed a business dispute between Deck, who had gone into business in competition with his former employer, and his former employer. Id. at 1256. The parties litigated claims arising from that competition and reached a settlement, after which Deck filed a civil RICO action alleging abusive litigation conduct in that earlier litigation that purportedly constituted extortion. Ibid. While the court noted that "it would be fair, at least in other contexts, to characterize as 'wrongful' the filing of a groundless lawsuit," the court stated that it was joining other courts "in holding that meritless litigation is not extortion," reasoning that "the adjective 'wrongful' in the extortion statute was not intended to apply to litigation." Id. at 1258. But one of those courts was the Ninth Circuit (First Pac. Bancorp, Inc. v. Bro, 847 F.2d 542 (1988)), which has since made clear in the decision below that a threat of litigation can be "wrongful" under the Hobbs Act "when a defendant, who has no relationship with" the victim "threatens sham litigation to obtain property to which he knows he has no lawful claim." Pet. App. A24; see id. at A20-A22 (discussing First Pacific Bancorp). A similar clarification that such circumstances do not involve mere

"meritless litigation" and do not implicate the concerns about "litigation" as such -- like the possibility of "subject[ing] almost any unsuccessful lawsuit to a colorable extortion * * * claim," Deck, 349 F.3d at 1258 -- is not implicated here.*

* Petitioner cites (Pet. 9) two state court decisions -- only one of which qualifies as "a decision by a state court of last resort," Sup. Ct. R. 10(a) -- that interpret distinct state extortion statutes. See People v. Knox, 467 P.3d 1218, 1227-1228 (Colo. App. 2019); State v. Rendelman, 947 A.2d 546, 551-551 (Md. 2008). Those decisions interpreting different statutes could not produce a relevant conflict with court of appeals' interpretation of the Hobbs Act in this case.

The amicus curiae relies (Amicus Cert. Br. 15, 17) on additional decisions from the First, Second, and Fifth Circuits, but none reflects a relevant division of authority. The Second and Fifth Circuit decisions do not interpret the Hobbs Act's extortion provisions. See Kim v. Kimm, 884 F.3d 98, 103 (2d Cir. 2018) (addressing only mail-fraud, wire-fraud, and obstruction-of-justice predicate offenses in RICO action); Snow Ingredients, Inc. v. SnoWizard, Inc., 833 F.3d 512, 524 (5th Cir. 2016) (addressing obstruction-of-justice and witness-tampering predicate offenses). And because the First Circuit decision is unpublished, it does not create binding precedent that might give rise a circuit conflict warranting review. See Gabovitch v. Shear, 70 F.3d 1252, 1995 WL 697319, at *2 (1st Cir. 1995) (Tbl.) (per curiam), cert. denied, 516 U.S. 1175 (1996). Indeed, the First Circuit has elsewhere indicated that an individual's "threat of litigation" to obtain property would be "wrongful" under the Hobbs Act if "she knew she had no claim to the property that she allegedly sought to extort." United States v. Sturm, 870 F.2d 769, 773-774 (1st Cir. 1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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