No. 21-6054

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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What is significant about the government's brief in opposition is what it does not and cannot cite. Although Congress passed the Hobbs Act over seventy years ago, the government has not cited a single criminal conviction or case of RICO liability predicated *solely* on a litigant's threat to file a bad faith or baseless lawsuit. That is because no court addressing this issue—other than the Ninth Circuit—has adopted the government's interpretation of the Hobbs Act. The Ninth Circuit's unprecedented decision—inconsistent with the rulings of all other federal appellate courts—dangerously expands criminal liability, creates a fractured interpretation of the extortion statute, and risks chilling and deterring legitimate threats of litigation. The decision is an outlier, and it should be reversed.

The government argues that the petition is interlocutory, there is no circuit split on the issues raised, and that a baseless threat of litigation is a wrongful means within the meaning of the Hobbs Act and this Court's decision in *Enmons.* With all respect to the government, it is incorrect on all counts.

I. THE REMAND FOR RESENTENCING DOES NOT RENDER THIS PETITION INAPPROPRIATE FOR REVIEW.

As a threshold matter, the government's proposal that this Court should decline to entertain the instant petition because it is "interlocutory" is meritless.

Brief in Opp. at 10–11. The Ninth Circuit affirmed petitioner's conviction and held that a baseless threat of litigation can form the basis for an extortion conviction, but nonetheless remanded for resentencing because the district court applied the wrong guidelines section. But resentencing on remand does not change the nature of the Ninth Circuit's ruling on the core legal issue, which is the matter this Court is asked to consider.[1]

As the Government itself has emphasized in other cases, this Court often "reviews interlocutory decisions that turn on the resolution of important legal issues." Gov't Cert. Reply Br. 5, *Azar v. Garza*, 138 S. Ct. 1790 (2018) (No. 17-654). In *Smith v. United States*, 568 U.S. 106 (2013), for example, the court of appeals affirmed the defendant's conspiracy convictions and vacated other

[1] The scope of the mandate when a conviction is affirmed and the matter is remanded for resentencing does not include further consideration of the affirmed convictions in the district court. Any such consideration must be preceded by a new procedural vehicle such as a motion under 28 U.S.C. § 2255 or a motion under Federal Rule of Criminal Procedure 33. *See*, *e.g., United States v. Hoyle*, 751 F.3d 1167, 1172 (10th Cir. 2014) (trial court jurisdiction to consider motion for new trial based not on remand for resentencing but independent jurisdictional basis under Fed. R. Crim. P. 33(b)(1)); *United States v. Ross,* 372 F.3d 1097, 1105 (9th Cir. 2004) (same); *United States v. Kennedy*, 682 F.3d 244, 254 (3d Cir. 2012) (on remand for resentencing "the District Court, finding error in its jury charge on its own initiative, ventured beyond the scope of our mandate").

convictions. *Id.* at 108–09 & n.1. The Court granted certiorari to consider the validity of the former convictions, explaining that the only "relevant" aspect of the case's procedural history was that "the Court of Appeals affirmed Smith's conspiracy convictions." *Id.* at 109. *See also Van Buren v. United States*, 141 S. Ct. 1648, 1653 (2021) (granting certiorari after the Eleventh Circuit affirmed one conviction but vacated and remanded a second conviction for a new trial).

The government, in contrast, fails to cite a single relevant criminal case in support here. The first case cited, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916), addressed an argument raised by the parties regarding whether the Court could review the issue of trademark raised in an earlier petition for certiorari, which was denied by the Court. This Court held that it could. *Hamilton-Brown Shoe Co.*, 240 U.S. at 258; *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (The Supreme Court has "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). The additional non-criminal cases cited by the government are cases where the remand by the circuit court back to the district court included the possibility that the judgment for which review on certiorari was sought could be

amended or adjusted on remand. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) (per curiam) (contempt orders issued by district court for violation of a temporary restraining order remanded for consideration, inter alia, of whether there had been a contempt); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (noting that remand of case concerning men-only military school "suggested permissible remedies other than compelling the Virginia Military Institute to abandon its current admissions policy"). *See also Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (discussing interlocutory posture when the court of appeals remanded the case to allow the district court to fashion a new remedy).

The conviction in this case is final and ripe for discretionary review in this Court.

II. THE THREAT TO FILE A LAWSUIT IS NOT A "WRONGFUL" MEANS TO OBTAIN PROPERTY, AND THE NINTH CIRCUIT'S CONTRARY DECISION BELOW CREATES A SERIOUS CIRCUIT CONFLICT.

A threat to file a lawsuit, even if it is frivolous or based on falsified evidence, is not extortion under the Hobbs Act. The bedrock case for the analysis is this Court's decision in *United States v. Enmons*, 410 U.S. 396 (1973). *Enmons* clarified that the term "wrongful" in the statute encompassed both *means* and *ends*. *Id.* at 400. That is, for someone to be liable under the extortion statute, both the conduct itself and the fruit of that conduct must be "wrongful."[2] With *Enmons*'s distinction in mind, courts have not hesitated to hold that a threat to file a lawsuit, activity protected under the Petition Clause of the First Amendment, cannot be a wrongful *means*. *See, e.g.*, *United States v. Pendergraft*, 297 F.3d 1198, 1205 (11th Cir. 2002) (citing *Enmons*); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994) (same). The same conclusion should apply here.

[2] In *Enmons*, the Court held that criminal liability did not attach to those who, despite employing wrongful means (i.e., the threat of violence), sought legitimate ends. *Id.* at 401–02.

The government provides no persuasive reason to disregard *Enmons*'s means-end distinction or explain how a threat to litigate constitutes a wrongful "means." It relies on *United States v. Tobin*, 155 F.3d 636, 640–41 (3d Cir. 1998) (Alito, J.), *cert. denied*, 525 U.S. 1171 (1999), including the parenthetical "holding that 'threaten[ing] unrelated lawsuits alleging sexual harassment' constitutes the wrongful use of fear." Brief in Opp. at 12. But the *Tobin* decision did not address the issue presented here regarding wrongful means.

In *Tobin*, the defendant raised the denial of a "claim of right" jury instruction, arguing that her campaign of harassment, which included an onslaught of harassing phone calls and the threats of unrelated litigation, was not criminal because she had a legitimate claim to a thing of value. *Tobin*, 155 F.3d at 640. In other words, the defendant argued that her sought-after *ends* entitled her to a "claim of right" jury instruction, but she made no argument about whether her *means* were lawful. *See id.* In denying her claim, the court looked at the totality of the defendant's conduct, including her conduct outside any litigation context, and held that she was not entitled to a "claim of right" instruction where her actions exceeded her claimed interest in the alleged contract. *Id.* at 640–41. Indeed, rather than refuting Petitioner's arguments, *Tobin* itself makes Petitioner's point when it

explains how her conduct was not limited and contrasting what defendant did with what she did not do: "Tobin did not threaten to pursue legal action to enforce the oral contract that she claimed existed." *Id.* at 640. But that is exactly what Petitioner here did: he threatened a lawsuit based on conduct he claimed occurred. Indeed, *Tobin* supports petitioner's argument more than it refutes it.

The law has also developed since *Tobin* to further support petitioner's argument. Many of the courts called upon to consider whether threats of meritless litigation constitute predicate acts for civil RICO claims "have recharacterized the extortion charges as actions for malicious prosecution" and rejected the notion that malicious prosecution is racketeering activity. *See United States v. Pendergraft*, 297 F.3d 1205, discussing cases. The *Pendergraft* court reasoned that even bad-faith threats of litigation supported by fabricated evidence do not constitute *wrongful* threats under the Act. Where a party threatens litigation in bad faith, it is up to "the courts, and their time-tested procedures" to reliably resolve the matter, "separating validity from invalidity, honesty from dishonesty." *Id.* at 1206. Based on similar reasoning, in the context of a civil RICO claim, the Tenth Circuit agreed with *Pendergraft* that the adjective "wrongful" in the Hobbs Act was not intended to apply to allegations of bad-faith litigation, even if "it would be fair, at least in

other contexts," to characterize the alleged conduct as "wrongful." *See Deck v. Engineered Laminates,* 349 F.3d 1253, 1258 (10th Cir. 2003).

In trying to distance itself from *Pendergraft*, the government notes that the defendant sued a county government, rather than an individual. Brief in Opp. At 17–18. Although the court did add some weight to that fact, this was by no means necessary to its decision. The court noted, "While the case before us involves a threat to sue a government, we are troubled by *any* use of this federal criminal statute to punish civil litigants." *Pendergraft*, 297 F.3d at 1207. Unsurprisingly, the Eleventh Circuit subsequently applied *Pendergraft* to lawsuits against non-government entities in *Raney v. Allstate Insurance Company*, 370 F.3d 1086, 1087–88 (11th Cir. 2004) (per curiam) (holding that abortion providers and insurance companies' alleged conspiracy to extort money through filing of malicious lawsuits against a private individual could not serve as predicate act under civil RICO).

Further, the government provides no principled basis to ignore the multitude of federal appellate courts that have held in the civil RICO context that bad-faith litigation threats do not constitute extortion. The Sixth Circuit's decision in *Vemco, Inc. v. Camardella*, for instance, is hardly distinguishable. There, the court addressed whether a company committed extortion when it sent out billing notices

pursuant to an allegedly fraudulent contract and threatened litigation if the recipient failed to fulfill the demands. 23 F.3d 129, 134 (6th Cir. 1994). The company's litigation threats, in other words, were bogus. Still, the court declined to interpret the extortion statute to apply to such threats, relying, in part, on this Court's decision in *Enmons*. The court held: "A threat of litigation if a party fails to fulfill even a fraudulent contract . . . does not constitute extortion." *Id.* at 134 (citing *Enmons*, 410 U.S. at 400). The company's conduct is indistinguishable from what petitioner was convicted of doing here: he demanded money pursuant to a false claim and threatened litigation if Entertainer failed to fulfill the demand.

Similarly, the Tenth Circuit declined in *Deck v. Engineered Laminates* to interpret the extortion statute broadly to cover bad-faith litigation, even when a "plaintiff resorts to fraudulent evidence." 349 F.3d at 1257. Instead, it relied principally on *Pendergraft*—and not only the Ninth Circuit's decision in *First Pacific Bancorp, Inc. v. Bro*, 847 F.2d 542 (1988), as the government suggests—to hold that "meritless litigation is not extortion." *Deck*, 349 F.3d at 1257 (citing *Pendergraft*, 297 F.3d at 1208). Nothing in *Deck*'s reasoning suggested that outcome turned on whether the parties "ha[d] . . . [a preexisting] relationship

with" one another, as the government tries to urge here. Brief in Opp. at 21; *see Deck*, 349 F.3d at 1257–58.

Last, the Eighth Circuit's decision in *I.S. Joseph Co., Inc. v. J. Lauretzen A/S*, 751 F.2d 265 (8th Cir. 1984), is in accord with petitioner's argument. There, the plaintiff brought a civil RICO claim against various shipowners, complaining that the shipowners had made "utterly groundless" litigation threats to "terroriz[e] and intimidat[e]" the plaintiff in meeting the shipowners' demands. *Id.* at 266. The court "assume[d] . . . that the threat was groundless and made in bad faith." *Id.* at 267. Although such conduct might be "tortious under state law," the court reasoned, it "decline[d] to expand the federal extortion statute to make it a crime." *Id.* at 267. In reaching this holding, the court focused its analysis on the term "fear," rather than the term "wrongful," but the outcome and policy concerns underlying the court's decision are the same here: "[I]f we were to hold that two threats to file a civil action . . . constituted a 'pattern of racketeering activity,' citizens and foreigners alike might feel that their right of access to the courts of this country had been severely chilled." *Id.* at 267. "If a suit is groundless or filed in bad faith, the law of torts may provide a remedy. Resort to a federal criminal statute is unnecessary." *Id.* at 267–68.

Contrary to the government's assertions, there is a significant circuit conflict on this issue.

III. THE NINTH CIRCUIT'S OPINION ERRONEOUSLY DIFFERENTIATED BETWEEN CIVIL AND CRIMINAL RICO.

The Ninth Circuit, like the government, ignored the great weight of authority discussed in the petition and above, on the ground that those cases involved "policy concerns" not present here, such as ensuring access to the courts, promoting finality, and avoiding collateral litigation. *See United States v. Koziol*, 993 F.3d 1160, 1174 (9th Cir. 2021) ("[A]ll these cases involve civil RICO claims and parties involved in business disputes who had been or were at that time involved in litigation apart from the civil RICO suit."). But a statute is not a chameleon whose meaning changes when the aggrieved party is a criminal prosecutor rather than a civil plaintiff, or when the dispute involves commercial rather than non-commercial matters. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004). A statute's interpretation should stay the same, no matter the context. *Id.* Any other approach, besides being

legally unsupportable, leaves litigants or potential litigates with no meaningful guideposts for when a threat of litigation might invite criminal charges.[3]

Instead, the Ninth Circuit reasoned that Petitioner's case was more like other criminal cases, such as *Tobin*, distinguished above; an unpublished Eleventh Circuit opinion, *United States v. Cuya*, 724 F. App'x 720, 724 (11th Cir. 2018) (unpublished) (per curiam); and *United States v. Sturm*, 870 F.2d 769, 774 (1st Cir. 1989). None of these cases are like Petitioner's, however.

Cuya, for instance, involved conduct that went well beyond bad-faith litigation threats: the defendants operated a call center and directed employees to call thousands of Spanish-speaking customers, misrepresent their identities as agents in a legal department of a private or government organization, and tell them they owed money for products they had not actually ordered. 724 F. App'x at 723–24. The employees then threatened them that nonpayment would result in a court appearance, being reported to credit bureaus, incurring fines, detentions, and property seizures. *Id.* at 724. Although the court did not carefully parse the different pieces of the threats made by the employees, there was far more than a

[3] It might also tempt litigators with close ties in local prosecuting offices to leverage those connections against weaker or lesser-resourced adversaries.

threat to take the matter to court.[4] Plus, as an unpublished decision, *Cuya* could hardly overrule *Pendergraft* (or the Eleventh Circuit's decision in *Raney*, which followed *Pendergraft*).

Likewise, the First Circuit's decision in *Sturm*, also relied upon by the Ninth Circuit, had nothing to do with bogus litigation threats. Although *Sturm* set a floor for what an extortion conviction requires (i.e., the defendant's knowledge that he was not legally entitled to the claimed property), the decision does not suggest that a bogus litigation threat is sufficient to constitute extortion. In reaching its holding, the court offered in dictum a hypothetical threat of litigation by A against B and stated that "[i]t would be unjust to convict A of extortion unless she knew that she had no claim to the property that she allegedly sought to extort." 870 F.2d at 774.

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[4] *Cuya* references the case of *United States v. Lee,* 427 F.3d 881, 890 (11th Cir. 2005) for the proposition that "*Pendergraft* grants no immunity to those who make threats of these kinds 'clothed in legalese.' *Lee*, 427 F.3d at 891." *Cuya*, 724 F. App'x at 724. The holding in *Lee* concerns a mail fraud conviction, which requires an intent to deceive rather than wrongful means. The *Lee* court distinguished *Pendergraft* on this basis. *Lee*, 427 F.3d at 890 ("[T]here was no intent to deceive in the *Pendergraft* legal mailings.").

This passing hypothetical cannot be read as a tea leaf for how the First Circuit would decide the case here. If anything, the court's later decisions in *Gabovitch v. Shear*, 70 F.3d 1252 (table), 1995 WL 697319, at *2 (1st Cir. 1995) (per curiam) (concluding that "proffering false affidavits and testimony to [a] state court" does not constitute a predicate act of extortion or mail fraud), and *Dias v. Bogins*, 134 F.3d 361 (table), 1998 WL 13089, at * 1 (1st Cir. 1998) (per curiam) ("[A]lthough a threat to sue, if groundless and made in bad faith, may be tortious under state law, it is not extortion under federal law"), hold exactly the opposite of what the Ninth Circuit claimed *Sturm* stood for.

Therefore, the Ninth Circuit's decision in *Koziol* stands alone in imposing criminal liability under the Hobbs Act for the act of threatening to file a baseless lawsuit, rendering the interpretation of the statute impermissibly different in the criminal rather than civil context.

IV. CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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DATED: March 1, 2022

s/ Gail Ivens
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