No. 14-361

IN THE
Supreme Court of the United States

SAMUEL OCASIO,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR FORMER UNITED STATES ATTORNEYS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are all former United States Attorneys.[1] Each has substantial experience with federal criminal prosecutions and each deeply values the essential role of federal prosecutors in the American system of justice. *Amici* recognize that the respect they received as representatives of the Department of Justice was the legacy of those who preceded them. Federal prosecutors earned the public's confidence by tirelessly—yet measuredly—

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution. Petitioner's letter consenting to the filing of *amicus* briefs, and respondent's letter consenting to the filing of this brief, are on file with the Clerk's office.

upholding the rule of law in the pursuit of justice. Equally, however, the integrity of federal prosecutions today is essential to safeguarding the independence and public esteem of tomorrow's federal prosecutors.

For this reason, *amici* share a common interest in the present case, which provides an opportunity to ensure that the public clearly recognizes that the extraordinarily powerful federal system of criminal justice operates strictly within the limits of the law. By reversing the judgment below, such a holding here may appear at first glance to slightly limit some tools that federal prosecutors might wield in individual cases. But, to the contrary, that holding would *strengthen* federal prosecutors' enduring and historic institutional role by demonstrating that any conviction they win results from an unquestionably just application of the laws of Congress.

Amici are the following former United States Attorneys:

- James S. Brady (Western District of Michigan)
- Roscoe C. Howard, Jr. (District of Columbia)
- Gregory G. Lockhart (Southern District of Ohio)
- Matthew D. Orwig (Eastern District of Texas)
- John C. Richter (Western District of Oklahoma)[2]
- Joseph P. Russoniello (Northern District of California)
- Kevin V. Ryan (Northern District of California)
- Larry D. Thompson (Northern District of Georgia, and former Deputy Attorney General)
- Stanley A. Twardy, Jr. (District of Connecticut)

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[2] Mr. Richter is currently a partner at King & Spalding, which is counsel for petitioner. Mr. Richter did not participate in the preparation of petitioner's brief and appears as *amicus* in his individual capacity and not as a representative of his firm.

SUMMARY OF ARGUMENT

Federal prosecutors play an integral and venerable role in the American system of justice and law enforcement. As directed by statute, federal prosecutors are responsible for ensuring that our Nation's criminal laws are faithfully executed. To discharge that massive obligation, prosecutors rightly enjoy broad discretion and independence; this follows from the confidence reposed in the relatively few men and women who devote themselves to this calling. The courts are generally—and, again, rightly—reluctant to interfere with prosecutorial decisionmaking.

But this system is predicated on the assumption that prosecutors themselves unflinchingly honor whatever limitations *do* govern them, and that the courts likewise insist upon adherence to those limits. It is widely recognized that federal prosecutors (and the Department itself) typically possess sufficient self-discipline to avoid pushing the envelope just to make desired results easier in particular cases. This recognition greatly *strengthens* the efficacy of the Department of Justice and significantly enhances the prestige of federal prosecutors, whose decisions benefit from presumptions of accuracy and integrity. No short-term or issue-specific short-cut is worth risking that widespread public confidence, which is an essential ingredient necessary to maintain the rule of law.

Near the top of the list, therefore, prosecutors must enforce statutes only within the bounds that Congress has authorized; this is indispensable for proving the legitimacy of the resulting prosecutions. Stretching beyond statutory bounds constitutes prosecutorial overreach. While tempting in the moment, and indeed laudable in the desire to penalize conduct that truly deserves censure, prosecutions that exceed congressional authorization can generate unintended consequences in the law itself—it is difficult to put the genie back in the bottle,

even when his services are no longer desired. Worse, such prosecutions can undermine the Department's credibility. This, in turn, can damage the cherished independence of federal prosecutors, because the perception or reality of overreach will trigger judicial intervention and engender public doubt.

Overreach by federal prosecutors can also lead to the criminalization of conduct traditionally dealt with by the States. Such overreach not only creates tension in the federal-state balance in the prosecution of crimes, but can lead to the trivialization of prosecutions commenced by the United States Attorneys.

Petitioner Ocasio's conviction for conspiracy to commit extortion under the Hobbs Act is an example of prosecutorial overreach that illustrates the concerns highlighted by *amici*. Ocasio's conspiracy conviction lacks credibility because he was convicted under a theory that he formed an agreement with the very persons *from whom he extracted bribery payments*. This theory not only contravenes the statute's plain text, but is completely at odds with the commonsense understanding of what a conspiracy entails—that is, conspirators do not conspire to take *from themselves*.

Likewise, the construction of the Hobbs Act at issue here would unjustifiably expand federal law and encroach upon existing and adequate state criminal laws that already prohibit their private citizens from bribing public officials. Invocation of the Hobbs Act to curb mere bribery payments—as reprehensible as such conduct surely is—undercuts the congressional objective of holding those entrusted with a public trust to a special level of account. The Court should accordingly reverse the judgment below.

ARGUMENT

I. PROSECUTORS ENJOY BROAD DISCRETION BUT MAY NOT ENFORCE CRIMINAL STATUTES BEYOND THE LIMITS CONGRESS IMPOSES

Prosecutorial discretion is a vital component of the federal criminal justice system. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). "The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws." *Ibid.* (quoting *Wayte* v. *United States*, 470 U.S. 598, 607 (1985)); see also *United States* v. *Goodwin*, 457 U.S. 368, 380 n.11 (1982). Prosecutors enjoy this wide "latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *Armstrong*, 517 U.S. at 464 (quoting U.S. Const. art. II, § 3); see also 28 U.S.C. §§ 516, 547 (outlining duties of federal prosecutors).

A "presumption of regularity supports" the discretionary decisions made by prosecutors. *United States* v. *Chem. Found., Inc.*, 272 U.S. 1, 14 (1926). "[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their duties." *Armstrong*, 517 U.S. at 464 (quoting *Chem. Found.*, 272 U.S. at 14-15). Thus, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978).

Judicial deference to prosecutors "stems from a concern not to unnecessarily impair the performance of a core executive constitutional function." *Armstrong*, 517 U.S. at 465. This Court has observed that "[e]xamining

the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte*, 470 U.S. at 607. Practical considerations also play a role in the deference that courts afford prosecutors. Courts are less "competent to undertake" an analysis of certain factors like "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Ibid.*

A prosecutor's discretion, however, is not wholly unbridled. Of particular importance here, prosecutors are subject to statutory constraints. Indeed, legislative boundaries are fundamental, for federal prosecutions are purely a creature of statute. See *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). A prosecutor's enforcement of a criminal statute that stretches beyond the plain meaning of its text obfuscates the intent of Congress and undermines the balance of powers between the legislative and executive branches of government. When that happens, the judiciary—the branch of government vested with interpreting the law, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—is uniquely situated to curb prosecutorial overreach. That judicial role not only protects the separation of powers and ensures the integrity of prosecutions brought by the federal government, but also functions as a guardian of liberty. See *Armstrong*, 517 U.S. at 464 (the Constitution empowers the courts to intervene and "exercise judicial power over a[n otherwise] 'special province' of the Executive") (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985)).

II. This Prosecution Exceeds Statutory Authority

In this case, the prosecution's strained and unnatural reading of the Hobbs Act—adopted by the Fourth Circuit—is the very type of prosecutorial overreach that *amici* view as detrimental to the role of federal prosecution within our constitutional system. Petitioner Ocasio, a former Baltimore police officer, was charged with and convicted of extortion and conspiracy to commit extortion under the Hobbs Act based upon his agreement with the owners of an auto repair shop to steer damaged vehicles to their garage in exchange for cash payments. While Ocasio's convictions on the substantive extortion counts are not directly at issue, his conviction *for conspiracy* contravenes basic tenets of statutory interpretation.

The Hobbs Act proscribes conduct that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. § 1951. Any attempt or conspiracy to engage in such conduct also violates the Hobbs Act. See *ibid.* As relevant here, "extortion" is defined as "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." *Id.* § 1951(b)(2).

Interpretation of "property *from another*" lies at the heart of this case. The Government postulates that a conspiracy to obtain property "from another" can encompass an agreement between two parties to exchange property *between themselves*. This is illogical. Acceptance of this reading of the Hobbs Act would eviscerate the "from another" requirement that Congress purposely embedded within the statute; it would treat the term as surplusage, as its omission would not alter the substantive reach of the statute, as understood by the court below. This Court should conclude that Congress could not have intended such a result. "Judges should

hesitate to treat statutory terms in any setting as surplusage, and resistance should be heightened when the words describe an element of a criminal offense." *Jones* v. *United States*, 529 U.S. 848, 857 (2000) (internal citations, quotation marks, brackets, and ellipsis omitted).

The normal understanding of "property from another" should be adopted even if there were some plausible textual basis for the Fourth Circuit's embrace of the Government's reading. After all, this Court has expressly extended the "rule of lenity" to the Hobbs Act. See *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393, 408-409 (2003). "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 409 (internal quotation marks omitted). Correspondingly, the judiciary must decline when prosecutors seek judicial enlargement of the Hobbs Act's reach, for "significant expansion of the law's coverage must come from Congress, and not from the courts." *Ibid.*

Unlike the Fourth Circuit, the Sixth Circuit has properly applied these principles. When faced with facts similar to those presented here, and confronting the same textual question, the Sixth Circuit declined to adopt the prosecution's argument that a payment agreement among alleged conspirators satisfied the "property from another" requirement of the Hobbs Act. See *United States* v. *Brock*, 501 F.3d 762, 767 (6th Cir. 2007) (Sutton, J.). The court correctly held that a conspiracy to commit extortion under the Hobbs Act necessarily requires proof of an agreement "to obtain property from someone *outside* the conspiracy," *i.e.*, property from another. See *ibid.* (emphasis added). This Court should adopt the Sixth Circuit's straightforward interpretation of the Hobbs Act and conclude that a conspiracy to commit extortion involving a public official may only be sustained

where the public official forms an agreement to procure property from someone outside the conspiracy. This common-sense approach would effectuate the plain meaning of the Hobbs Act and ensure the Government's authority under the statute remains within the bounds authorized by Congress.

Expansion of the Hobbs Act beyond its text has broader implications than sustaining the prosecution of Ocasio for conspiring with the very "victims" from whom he received extortive payments. The prosecution's interpretation of the Hobbs Act, if countenanced, would bring every act of bribery of a public official within a Hobbs Act conspiracy as two parties agreeing to exchange property between themselves. This would encompass both the public official accepting the bribe (as in the prosecution here) and the private citizen paying the bribe (as in *Brock*). Congress did not intend for *federal* prosecutors to have such automatically broad jurisdiction.

Congress enacted the Hobbs Act "to prohibit public officials from obtaining property from others by extortion." *Brock*, 501 F.3d at 768. The decision by Congress not to include bribery within the Hobbs Act reach was purposeful. State bribery laws adequately address the unlawful payment of public officials by private actors, rendering the Government and the Fourth Circuit's interpretation of the Hobbs Act below unnecessary. "No one doubts that the States have criminal laws prohibiting their citizens from bribing public officials." *Id.* at 769. Furthermore, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States* v. *Bass*, 404 U.S. 336, 349 (1971).

This Court has observed that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones*, 529 U.S. at 858 (citation

and internal quotation marks omitted). Here, had Congress sought to forbid bribery under the Hobbs Act, it would have explicitly done so. As the Sixth Circuit noted in *Brock*, Congress has statutorily proscribed the giving or offering of bribes in other contexts. See 501 F.3d at 768 (citing, *e.g.*, 18 U.S.C. § 201(b)(1) ("making it an offense to 'give[ ], offer[ ], or promise[ ] anything of value to any [federal] official'"); *id.* § 210 ("making it an offense to 'pay[ ] or offer[ ] or promise[ ] any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person'")). No such similar language exists within the Hobbs Act. But absent such clear language, the Government's position turns, in the most charitable reading, on an ambiguity in the statute, which simply triggers application of the "rule of lenity." See *supra* at 8 (citing *Scheidler*, 537 U.S. at 408-409).

There are sound policy reasons why Congress authorized federal prosecutors to prosecute corrupt state officials who accept bribes under the Hobbs Act as extortionists but not, at least without more, the private individuals who pay those bribes. State prosecutors may not be as well-equipped to independently investigate and pursue the criminal activity of other state actors, leaving private citizens more susceptible to extortion and without legal recourse to protect their rights. But that reasoning applies less, if at all, to the prosecution of private citizens. State prosecutors routinely and without incident engage in the impartial investigation and prosecution of private individuals for bribery and other offenses.

The commingling of public-official extortion and private-citizen bribery under the Hobbs Act not only undeservedly alters the federal-state balance in the prosecution of crimes, but it diminishes the import of the Hobbs Act itself. The announcement of a Hobbs Act indictment

or conviction by a federal prosecutor should mean something. The Hobbs Act should not be called upon every time a private individual engages in the mere act of bribery, but should be reserved for those prosecutions where a public official engages in the harmful and serious crime of extortion.

III. Prosecutorial Overreach Tarnishes Prosecutors' Credibility And Undermines Their Independence

The prosecutorial overreach in this case is not entirely isolated. This Court recently overturned the convictions of two defendants based upon the over-aggressive applications of statutes by federal prosecutors. See *Yates* v. *United States*, 135 S. Ct. 1074 (2015); *Bond* v. *United States*, 134 S. Ct. 2077 (2014). Those cases are important and instructive in the present context. They caution against the emboldened prosecutor willing to invoke a statute beyond the authority vested by Congress.

In *Yates*, federal authorities determined that a commercial fisherman had concealed his unlawful harvesting of undersized fish. See 135 S. Ct. at 1079-1080. This conduct resulted in an indictment charging Yates with "destroying, concealing, and covering up undersized fish to impede a federal investigation in violation of" a provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C § 1519. See *Yates*, 135 S. Ct. at 1080.

Congress enacted § 1519 "to protect investors and restore trust in financial markets following the collapse of Enron Corporation." *Id.* at 1079. Despite the undisputed legislative purpose of the statute, the Government construed the term "tangible object" in § 1519 to encompass the fish thrown overboard by the crew member. The prosecution espoused the theory that § 1519 constituted "a general ban on the spoliation of evidence, covering all physical items that might be relevant to any matter un-

der federal investigation." *Id.* at 1081.

The Court rejected the Government's "unrestrained reading" of the term "tangible object," concluding that Congress clearly intended § 1519 "to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing." *Id.* at 1081. In reversing the conviction under § 1519, the Court employed "traditional tools of statutory interpretation" and held that it was "highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping." *Id.* at 1087.

If anything, however, *Yates* was a closer case than this one. There was, after all, some force to the Government's textual argument in *Yates*. See, *e.g.*, *id.* at 1090-1101 (Kagan, J., dissenting). If that comparatively stronger argument was ultimately rejected, the Government's far weaker construction here cannot survive.

Bond illustrates another example of prosecutorial overreach. In that case, Bond was convicted of a violation of the Chemical Weapons Convention Implementation Act, which "forbids any person knowingly 'to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.'" 134 S. Ct. at 2085 (quoting 18 U.S.C. § 229(a)(1)). Congress passed § 229(a) in 1998 to implement a treaty that the President, upon the advice and consent of the Senate, had ratified in the prior year. See *id.* at 2083. The stated goal of the treaty, which like § 229(a) proscribed the use or possession of any chemical weapon, was for the eventual "'elimination of all types of weapons of *mass destruction*.'" *Ibid.* (quoting S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317) (emphasis added).

The conviction under § 229(a) in *Bond* stemmed from

Bond's placement of certain harmful (and potentially lethal) chemicals at the home and on the car of her husband's paramour, who sustained a minor burn to her thumb. See 134 S. Ct. at 2085. The prosecution, at trial and on appeal, maintained that Bond's conduct fell squarely within the ambit of § 229(a), insisting, *inter alia*, that the chemicals she dispersed were "toxic chemicals," as defined by the statute.

This Court understandably expressed grave concern with the prosecution's expansive interpretation of § 229(a), which "would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults." *Id.* at 2091-2092. The Government's reading of the statute, the Court observed, would have the effect of "'dramatically intrud[ing] upon traditional state criminal jurisdiction." *Id.* at 2088 (quoting *Bass*, 404 U.S. at 350) (alteration added). Absent a clear intent from Congress "that the law should have such reach," the Court noted it would not interpret § 229(a) in a way that would encroach upon the enforcement of "local criminal activity" left "primarily to the States." *Id.* at 2083. In examining § 229(a) and ultimately reversing the conviction, this Court found no evidence that Congress intended for the statute to reach purely local crimes that did not implicate global chemical warfare. See *id.* at 2093-2094.

The outcomes in *Yates* and *Bond* exemplify the concerns raised by *amici* now. As here, the prosecutions in *Yates* and *Bond* produced highly questionable results, which flowed from an unjustifiable stretching of statutory authority. Yates should have never been prosecuted for the unlawful harvesting of fish under a provision of the Sarbanes-Oxley Act. Bond's simple act of assault within a love triangle should not have been prosecuted under a statute designed to punish the possession and

proliferation of weapons of mass destruction.[3] And nor should Ocasio—already charged with multiple substantive counts of extortion—have been prosecuted for conspiracy to commit extortion under a theory that he and his co-conspirators formed an agreement to take money from themselves. Each case, individually and collectively, undermines the integrity that the Attorney General, the United States Attorneys, and the men and women of the Department of Justice strive to achieve in the vast bulk of their important and honorable work. While the relative rarity of overreach is worth celebrating, that does not make it any less important to quickly identify and eliminate overreach when it does occur.

The prosecutorial overreach present in these cases risks compromising the presumption of regularity that normally supports federal prosecutions. See *Chem. Found.*, 272 U.S. at 14-15. And it threatens the independence that federal prosecutors have long enjoyed. Judicial deference to prosecutorial decisionmaking depends on courts *not needing* to second-guess and scrutinize the charging decisions of federal prosecutors.

Reversal of the judgment below, therefore, would signal an important message to federal prosecutors and to the public. It will reinforce what federal prosecutors already generally know—that their faithful execution of our Nation's laws must be within the bounds Congress authorizes. Reversal will not only prevent erosion of that principle, but will also contribute to the public's justifiable confidence that prosecutions brought by the Department of Justice merit deep respect—not only because federal prosecutors themselves are committed to the rule of law, as they are, but because the federal judiciary is

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[3] As noted earlier, the prosecution of the petitioner for assault in *Bond*, like here, also unduly encroached upon "conduct readily denounced as criminal by the States." *Bass*, 404 U.S. at 349.

also vigilant to protect the functioning of the criminal-justice system.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted.

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