No. 12-357

In the Supreme Court of the United States

GIRIDHAR C. SEKHAR, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner attempted to obtain "property" by means of extortion, in violation of 18 U.S.C. 1951(a) and 18 U.S.C. 875(d), by seeking to exercise, through threats, the right of an attorney to make a recommendation pertaining to a pension fund investment from which petitioner sought to profit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 683 F.3d 436. The opinions of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 14a-66a) and denying petitioner's motion for a judgment of acquittal (Pet. App. 67a-93a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2012. The petition for a writ of certiorari was filed on September 19, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted on one count of attempted extortion, in viola-

tion of the Hobbs Act, 18 U.S.C. 1951(a), and five counts of interstate transmission of extortionate threats, in violation of 18 U.S.C. 875(d). Pet. App. 1a, 5a. He was sentenced to 15 months of imprisonment. *Id.* at 6a. The court of appeals affirmed. *Id.* at 1a-13a.

1. This case involves conduct related to New York's Common Retirement Fund, which is the employee pension fund for the State of New York and various of its local governments. Pet. App. 2a. The State Comptroller is the sole trustee of the Fund and has final approval over all of the Fund's investments. *Ibid.* When the Comptroller approves an investment on behalf of the Fund, he issues what is known as a Commitment. *Ibid.* Fund investments in a company are sometimes contingent on the company's attracting other investors, and a formal Commitment assists the company in doing so by signaling that the company has the backing of the Fund. *Ibid.* A Commitment does not bind the Fund to invest, however, as the parties must first execute and close on a limited partnership. *Ibid.*

In October 2008, the Comptroller's Office considered investing $35 million in a fund run by a company called FA Technology Ventures. Pet. App. 2a. That investment—known as "FA Tech II"—never closed. *Ibid.* In April 2009, the Comptroller's Office prohibited investments marketed by placement agents. *Id.* at 3a. FA Technology Ventures had used a placement agent for FA Tech II. *Ibid.* In October 2009, the Comptroller's Office was considering whether to invest in two other funds—known collectively as "FA Tech III"—that were also run by FA Technology Ventures. *Id.* at 2a-3a. FA Technology Ventures did not use a placement agent for FA Tech III, but the investment was "essentially the same" as the FA Tech II investment. *Id.* at 3a. Based

on the proposed terms, FA Technology Ventures would earn nearly $7.6 million in management fees from the proposed investment over ten years and could earn more depending on the investment's performance. *Ibid.*

While the Comptroller's Office was considering whether to invest in FA Tech III, the Office's General Counsel was advised by the Office of the New York State Attorney General that it was investigating the placement agent involved in FA Tech II. Pet. App. 3a. The Attorney General's Office advised the General Counsel that the Pension Fund should avoid moving forward with the FA Tech III investment and the General Counsel recommended to his office that "it would be prudent, from a legal perspective, to avoid moving forward" with the FA Tech III investment. *Ibid.* Accordingly, on November 13, 2009, the Comptroller decided not to approve that investment. *Ibid.*

On November 17, 2009, the General Counsel of the Comptroller's Office received an anonymous e-mail to his work account requesting that he provide his personal e-mail address to receive a report of a "serious ethical issue." Pet. App. 4a. The General Counsel both advised the anonymous e-mailer to contact the Inspector General and provided a personal e-mail address. *Ibid.* The e-mailer then sent an e-mail to the General Counsel's personal e-mail address, accusing the General Counsel of "blackball[ing] a recommendation on a fund" and threatening that the e-mailer would tell the General Counsel's wife that the General Counsel was having an extramarital affair if the General Counsel did not have a "change of heart" by November 20, 2009. *Ibid.* (brackets in original). The anonymous e-mailer sent another e-mail later that night, warning the General Counsel that he had "36 hours left" in which to "make wrong the

right." *Ibid.* A similar e-mail arrived the following day, along with a draft letter to the Attorney General disclosing the alleged affair. *Ibid.*

On the advice of law enforcement agents, the General Counsel asked the e-mailer for more time. Pet. App. 4a. On Monday, November 23, the e-mailer assured the General Counsel that he would "never hear about this again" if he could "get this fixed by Wednesday," November 25. *Ibid.* On December 1, the anonymous e-mailer sent another message, this time referring to Tiger Woods and stating: "[W]ho would have thought that a woman could get that upset . . . and over what?" *Ibid.* (alterations in original).

The Federal Bureau of Investigation (FBI) traced some of the e-mails to petitioner's home in Brookline, Massachusetts. Pet. App. 4a. Petitioner was a managing partner of FA Technology. *Id.* at 4a-5a. After the FBI executed a search warrant at petitioner's home, petitioner admitted to sending the anonymous e-mails and a forensic examination confirmed that petitioner's computer was the source of the e-mails. *Id.* at 5a.

2. Petitioner was indicted on one count of attempted extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a), and six counts of interstate transmission of extortionate threats, in violation of 18 U.S.C. 875(d). Under the Hobbs Act, an individual is criminally liable if he "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in interstate commerce, by robbery or extortion or attempts or conspires 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). Un-

der 18 U.S.C. 875(d), an individual is criminally liable if he, "with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee." The parties in this case agreed that the Hobbs Act's definition of "extortion" also applies to Section 875(d). Pet. App. 7a; see *United States* v. *Jackson*, 180 F.3d 55, 70 (2d Cir. 1999) ("extortion" has the same meaning in Sections 1951(a) and 875(d)).

The indictment alleged that petitioner wrongfully attempted to obtain (1) the General Counsel's recommendation to approve the Commitment, (2) the Comptroller's approval of the Commitment; and (3) the Commitment itself. Pet. App. 5a. Before trial, petitioner filed a motion to dismiss the indictment, arguing (*inter alia*) that the indictment failed to state an offense because the General Counsel's recommendation is not "property" within the meaning of Section 1951(b)(2) and that the indictment did not allege that petitioner had threatened any person who had the power to issue the Commitment. See *ibid.* The district court denied the motion, explaining that "the General Counsel's right to make professional decisions without outside pressure is an intangible property right," *id.* at 24a, and that the indictment sufficiently alleged that petitioner "interfered with the General Counsel's intangible right for the sake of his own enrichment, thus constituting both a deprivation and an attempt to acquire property under the Hobbs Act," *id.* at 25a.

After a jury trial, petitioner was convicted on the attempted extortion count and on five of the six interstate-transmission counts. Pet. App. 5a-6a. Petitioner filed a

motion for a judgment of acquittal or a new trial based on the alleged insufficiency of the evidence. *Id.* at 6a. The district court denied the motion, finding that there was sufficient evidence that petitioner intended to deprive the General Counsel of the property right to freely perform his professional duties, *id.* at 78a; that petitioner attempted to obtain control of that right for himself, *id.* at 83a; that petitioner believed that his blackmail scheme would lead to a Commitment, *id.* at 85a-86a; and that a Commitment would benefit petitioner financially, *id.* at 87a.

3. On appeal, petitioner argued that that the indictment failed to state an offense and that the evidence was insufficient to support his convictions. See Pet. App. 6a. In support of both contentions, petitioner argued that his conduct did not constitute extortion because the General Counsel's recommendation was not "property" under the Hobbs Act. *Ibid.* The court of appeals rejected petitioner's arguments. *Id.* at 6a-13a.

The court of appeals observed that the Hobbs Act defines "[t]he term 'extortion' [to] mean[] the obtaining of property from another, without his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Pet. App. 7a (quoting 18 U.S.C. 1951(b)(2)). In order to determine whether a defendant has "obtain[ed]" or attempted to obtain "property," the court explained that it must undertake a two-part inquiry, determining both "whether the defendant is (1) alleged to have carried out (or in the case of attempted extortion, attempted to carry out) the deprivation of a property right from another," and whether the defendant did so "with (2) the intent to exercise, sell, transfer, or take some other analogous action with respect to that right." *Id.* at 7a-8a. The court further not-

ed that the term "property" under the Hobbs Act "is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth." *Id.* at 8a (quoting *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970)). The court specifically noted that "[t]he right to pursue a lawful business . . . has long been recognized as a property right," *ibid.* (quoting *Tropiano*, 418 F.2d at 1076), as has been the right to "conduct a business free from threats" and "to make various decisions . . . free from outside pressure." *Ibid.* (quoting *United States* v. *Arena*, 180 F.3d 380, 394 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000), and *United States* v. *Gotti*, 459 F.3d 296, 327 (2d Cir. 2006), cert. denied, 551 U.S. 1144 (2007)).

The court of appeals concluded that the General Counsel of the Comptroller's Office "had a property right in rendering sound legal advice to the Comptroller, and, specifically, to recommend—free from threats—whether the Comptroller should issue a Commitment for FA Tech III." Pet. App. 8a-9a. The court rejected petitioner's argument that the General Counsel's recommendation was not a "source or element of wealth" for the General Counsel, observing that "[t]he value and worth of a lawyer's services may be said generally to depend on freedom from conflict, including a conflict created by personal blackmail." *Id.* at 9a. In any event, the court noted that a property right need not be a source of wealth to the target of the extortion as long as it has value to the extortionist. *Id.* at 9a-10a.

The court of appeals also rejected petitioner's argument that he had not pursued something of value that he could exercise, transfer, or sell. Pet. App. 11a-13a. The court concluded that petitioner not only had attempted

to deprive the General Counsel of his right to make a recommendation free from blackmail, but also had "attempted to exercise that right by forcing the General Counsel to make a recommendation determined by [petitioner]." *Id.* at 12a. The court acknowledged that a positive recommendation from the General Counsel would not have guaranteed a Commitment and that a Commitment would not have guaranteed an investment. *Ibid.* But the court explained that the benefit conferred on the extortionist need not be "direct"; it is sufficient, the court stated, if the extortionist exercises the extorted right for the purpose of obtaining the benefit. *Id.* at 12a-13a. Here, the court concluded that "the evidence showed that a positive recommendation by the General Counsel would have increased the chances that the Comptroller would issue a Commitment; that a commitment was necessary for FA Tech III to receive a Pension Fund investment; and that an investment would have resulted in management fees for FA Technology and profit for [petitioner], as a managing partner." *Id.* at 13a. Accordingly, the court held, the evidence was sufficient to show that petitioner, "in order to profit, attempted to exercise the General Counsel's property right to make recommendations." *Ibid.*

ARGUMENT

Petitioner renews his challenge (Pet. 10-31) to his Hobbs Act and Section 875(d) convictions, arguing that the General Counsel's recommendation to the Comptroller was not "property" for purposes of his attempted extortion convictions under 18 U.S.C. 1951(b)(2) and 875(d). The court of appeals correctly rejected petitioner's arguments. Review of that decision is not warranted because it does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly held that the indictment alleged a violation of the Hobbs Act and Section 875(d) and that sufficient evidence supported petitioner's convictions of those crimes.

a. The Hobbs Act makes it a crime for anyone who "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." 18 U.S.C. 1951(a). The Act defines extortion 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." 18 U.S.C. 1951(b)(2). This Court has made clear that "the extortion provision of the Hobbs Act * * * require[s] not only the deprivation but also the acquisition of property." *Scheidler* v. *NOW, Inc.*, 537 U.S. 393, 404 (2003).

For purposes of the Hobbs Act, "property" includes "something of value" that a person can "exercise, transfer, or sell." *Scheidler*, 537 U.S. at 405 (quoting *United States* v. *Nardello*, 393 U.S. 286, 290 (1969)). It thus includes not only the tangible and intangible assets of a business, but also the control over those assets. Consistent with that understanding, in the first appellate decision to consider the issue under the Hobbs Act, *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (1969), cert. denied, 397 U.S. 1021 (1970), the Second Circuit held that defendants who threatened owners of a garbage removal company with physical violence unless the owners ceased soliciting customers in certain areas extorted the owners' property "right to solicit business from anyone in any area without any territorial re-

strictions" by the defendants.[1] Every appellate court that has considered the issue since has held that "property" under the Hobbs Act includes the intangible right to control a business in any legitimate manner.[2] And this Court held in an analogous context that the exclusive right to control the use of corporate assets is itself property. *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987).

b. The court of appeals' decision is consistent with these principles. As the Second Circuit has previously held, an extortionist "obtains" his victim's intangible property rights when he "order[s the victim] to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights." *United States* v. *Gotti*, 459 F.3d 296, 324 n.9 (2d Cir. 2006), cert. denied, 551 U.S. 1144 (2007). In this case, the General Counsel's right to make a recommendation to the State Comptrol-

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[1] *Scheidler* did not consider this issue; indeed, it explicitly disavowed that it had "reject[ed] lower court decisions such as *Tropiano*" that had held that intangible business interests may constitute property under the Hobbs Act. 537 U.S. at 402 n.6.

[2] *Tropiano*, 418 F.2d at 1075-1076; *United States* v. *Arena*, 180 F.3d 380, 393 (2d Cir. 1999), cert. denied, 531 U.S. 811 (2000); *Libertad* v. *Welch*, 53 F.3d 428, 444 n.13 (1st Cir. 1995); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 (3d Cir.), cert. denied, 493 U.S. 901 (1989); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985), cert. denied, 475 U.S. 1024 (1986); *United States* v. *Zemek*, 634 F.2d 1159, 1174 (9th Cir. 1980), cert. denied, 450 U.S. 916, 985, and 452 U.S. 905 (1981); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979); *United States* v. *Franks*, 511 F.2d 25, 32 n.8 (6th Cir.), cert. denied, 422 U.S. 1042, 1048 (1975); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir.), cert. denied, 411 U.S. 951 (1973).

ler on the legal implications of his investment decisions qualified as property within the meaning of the Hobbs Act. As the court of appeals explained, giving legal advice is a lawyer's "'stock in trade.'" Pet. App. 8a (quoting *In re San Juan Dupont Plaza Hotel Fire*, 111 F.3d 220, 237 n.19 (1st Cir. 1997)); see also, *e.g.*, *United States* v. *Jurado*, 996 F.2d 312 (Table), No. 92-2151, 1993 WL 207444, at *2 (10th Cir. June 10, 1993) ("[A] lawyer's stock in trade is his time and advice."); *United States* v. *Bertoli*, 994 F.2d 1002, 1023 (3d Cir. 1993) (same); *United States* v. *Bloom*, 149 F.3d. 649, 657 (7th Cir. 1998) (Bauer, J., dissenting) (same). The value of a lawyer's advice to his client (and thus to the lawyer himself) depends on the lawyer's freedom to exercise his legal judgment in his client's best interest. When a lawyer is deprived of that freedom through blackmail, his advice—*i.e.*, the service he provides—becomes worthless. The General Counsel's right to make a recommendation on FA Tech III consistent with his legal judgment thus had economic value for the General Counsel and constituted property.

c. Petitioner argues (Pet. 18-19) that an individual's right to make "business decisions" free from interference does not qualify as property under the Hobbs Act unless the decisions implicate "a revenue stream."[3] Petitioner is incorrect. A lawyer's advice to his client is the product that a lawyer sells and therefore constitutes intangible property that is capable of being extorted within the meaning of the Hobbs Act. Accordingly, the courts of appeals to address the issue have uniformly

[3] Petitioner does not explain how the facts of this case do not involve business decisions implicating a revenue stream as well. The very purpose of petitioner's blackmail scheme was to obtain the Fund's investment money.

held that the right to make business decisions free from outside threats may constitute property under the Hobbs Act. See, *e.g.*, *United States* v. *Vigil*, 523 F.3d 1258 (10th Cir.), cert. denied, 555 U.S. 886 (2008); *Gotti*, 459 F.3d at 327; *United States* v. *Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *United States* v. *Lewis*, 797 F.2d 358, 364 (7th Cir. 1986), cert. denied, 479 U.S. 1093 (1987); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978); *Tropiano*, 418 F.2d at 1076.

Petitioner argues that the General Counsel's recommendation decision does not qualify as such a decision because the General Counsel's position was "a 'job' and not a business." Pet. 21. But that argument has no merit. The relationship between the Comptroller and the General Counsel was no less an attorney-client relationship than that between a private-sector lawyer and his clients. See Restatement (Third) of Law Governing Lawyers § 74 (2000) ("[T]he attorney-client privilege extends to a communication of a government agency"). And the professional livelihood of a government lawyer is no less dependent on his ability to provide disinterested legal advice than is that of a private-sector lawyer.

Petitioner errs in relying (Pet. 19) on this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). In that case, the Court held that a "generalized right to be secure in one's business interests," free from a competitor's false advertising about his own product, is not "property" within the meaning of the Fourteenth Amendment because it does not encompass "the right to exclude others." *Id.* at 672-673. But the same cannot be said of an attorney's right to exercise judgment free of unlawful influence such as blackmail. The General Counsel alone had the right to make his recommenda-

tion to the Comptroller—a right that necessarily "excluded" others such as petitioner from improperly interfering with that decision. In any case, the Court in *College Savings Bank* did not even purport to address (much less reject) whether the intangible right of a lawyer to provide his client with legal advice free from threats by an outside party qualifies as "property" under the Hobbs Act.

d. Petitioner also contends (Pet. 26-31) that the court of appeals erred in concluding that the General Counsel's right to make a recommendation qualified as property because its economic value to petitioner was merely "speculative." Petitioner contends that the value of the General Counsel's recommendation, standing alone, does not have value because it did not guarantee the issuance of a Commitment, which itself would not guarantee an actual investment by the Pension Fund in FA Tech III. See Pet. 26-30. While a favorable recommendation might or might not have resulted in an actual investment in petitioner's fund, the object of petitioner's blackmail scheme was to secure the General Counsel's recommendation. By attempting to force the General Counsel to exercise his right to make a recommendation in a particular way, petitioner attempted simultaneously to deprive the General Counsel of a property right and to exercise the right for himself. That is a violation of the Hobbs Act.

An attempt offense such as petitioner's, moreover, depends on the mental state of the wrongdoer. See *United States* v. *Williams*, 553 U.S. 285, 300 (2008) (factual impossibility not a defense to crime of attempt); *United States* v. *Engle*, 676 F.3d 405, 420 (4th Cir.) (same), cert. denied, No. 11-10590, 2012 WL 1985452 (Oct. 1, 2012); *United States* v. *Ivezaj*, 568 F.3d 88, 95

(2d Cir. 2009) ("only the defendants' state of mind is relevant"), cert. denied, 130 S. Ct. 1749, 1751 (2010). Accordingly, in order to prove that control over the General Counsel's recommendation had economic value for petitioner, it was enough for the government to show that petitioner *believed* that such control would yield an investment, even if that result was not in fact guaranteed. Here, the district court correctly found that the evidence was sufficient for the jury to conclude that petitioner "believed at the time * * * that the General Counsel's negative recommendation was the reason the Commitment was not going forward," Pet. App. 85a, and that, "if the General Counsel changed his recommendation to approve the Commitment, it would set into motion a series of events by which the [Fund's] assets would be invested through FA Technologies as had been done in the past," *id.* at 86a. That fact-specific determination does not warrant the Court's review.

e. Petitioner also argues that the court of appeals erroneously "sanctioned the District Court's constructive amendment of the indictment by converting the property that was the subject of the charge from the 'General Counsel's recommendation to approve the Commitment' into the General Counsel's 'right to make a recommendation.'" Pet. 12; see Pet. 17. That is incorrect. The indictment specifically alleged that petitioner "attempt[ed] to obtain * * * the General Counsel's recommendation to approve the Commitment, with the General Counsel's consent, induced by threatening to disclose the General Counsel's alleged extramarital affair." C.A. App. 23. Obtaining the General Counsel's recommendation through blackmail necessarily entailed the General Counsel's right to make a recommendation —the former naturally encompasses the latter. See

United States v. *LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002) ("An indictment must be read to include facts which are necessarily implied by the specific allegations made.").

f. Petitioner also relies on this Court's decision in *Cleveland* v. *United States*, 531 U.S. 12 (2000), arguing (Pet. 23-26) that the court of appeals erred in holding that the Hobbs Act does not require that "a property right * * * be a source of wealth to the target of the extortion." Pet. App. 9a. In *Cleveland*, the Court held that the State of Louisiana's ability to grant a video poker license was not "property" within the meaning of the federal mail fraud statute because the State's interest in that ability was a regulatory interest, not a property interest. 531 U.S. at 20-26. *Cleveland* does not assist petitioner. Petitioner focuses on the court of appeals' statement, in the alternative, that "a property right need not be a source of wealth to the target of the extortion." Pet. App. 9a. But that statement cannot warrant this Court's review because the court of appeals' primary holding, just one sentence earlier in the opinion, was that the General Counsel's right to make legal recommendations free from threats "can be seen as a 'source or element of wealth' for the General Counsel." *Ibid.* That holding rests on the basic principle that a lawyer's professional worth rests on his ability to render independent advice. And that holding is sufficient to support the judgment. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court * * * reviews judgments, not statement in opinions."). In any event, the General Counsel's right to make legal recommendations based on his own independent legal judgment is not at all akin to the State's regulatory right over video poker at issue in *Cleveland*. The General Counsel's right to

render independent legal advice—his "stock in trade" (Pet. App. 8a)—is a source of personal wealth, not a regulatory power of the government over citizens, as in *Cleveland*.

2. Petitioner's argument (Pet. 14-18) that the court of appeals' decision conflicts with this Court's decision in *Scheidler*, *supra*, lacks merit. The Court in *Scheidler* considered whether a group of protesters violated the Hobbs Act by engaging in a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity that included acts of alleged extortion. See 537 U.S. at 397-398. Although the Court found "no dispute * * * that [the protesters had] interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights," *id.* at 404, the Court concluded that the protestors' conduct did not qualify as extortion under the Hobbs Act because the protesters did not "obtain" the clinic's property, *id.* at 409. Here, in contrast, if petitioner had succeeded in his extortion attempt, he would have obtained the very property he sought—the General Counsel's favorable recommendation. The decision in *Scheidler* therefore does not conflict with the Second Circuit's decision here.

Petitioner focuses (Pet. 19) on the *Scheidler* Court's distinction between extortion and coercion, 537 U.S. at 405-406, arguing that his conduct qualified only as coercion, which is not prohibited by the Hobbs Act. The Court in *Scheidler* defined coercion as "the use of force or threat of force to restrict another's freedom of action," without necessarily obtaining property. *Id.* at 405. The Court also noted that "coercion and extortion certainly overlap to the extent that extortion necessarily involves the use of coercive conduct to obtain property."

Id. at 407-408. Unlike *Scheidler* and the other cases on which petitioner relies (see Pet. 19 (citing *People* v. *Ginsberg*, 188 N.E. 62 (N.Y. 1933); *People* v. *Scotti*, 195 N.E. 162 (N.Y. 1934); *People* v. *Kaplan*, 269 N.Y.S. 161 (N.Y. App. Div. 1934)), this case involves the additional ingredient that separates extortion from coercion—*i.e.*, the pursuit or receipt of the victim's property rights. *Id.* at 405.

3. Finally, petitioner errs in contending (Pet. 13, 29-30) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *United States* v. *McFall*, 558 F.3d 951 (2009). The defendant in that case was a lobbyist who was convicted of attempted extortion under the Hobbs Act for attempting to use his political influence to prevent a competitor of his client from bidding on a contract. *Id.* at 953-955. The court of appeals held that the evidence failed to establish a violation of the Hobbs Act because merely "decreasing a competitor's chance of winning a contract, standing alone, does not amount to *obtaining* a transferrable asset for oneself (or one's client)." *Id.* at 957. The court distinguished the Second Circuit's decision in *Tropiano*, explaining that, "[e]ven assuming that the intangible right to bid on a [contract] constitutes property for Hobbs Act purposes, the government must establish that [the defendant] attempted to acquire that property right such that he alone could sell, transfer, or exercise it." *Ibid.* The Ninth Circuit found that the defendant had not done so in that case; rather, the defendant merely "sought to increase [his client's] odds of prevailing in its own bid by restricting the activities of a competitor—conduct that cannot amount to obtaining under *Scheidler*." *Id.* at 958.

Petitioner's case is materially different from *McFall*. As the court of appeals correctly concluded, petitioner

did attempt to exercise for himself the General Counsel's right to make a recommendation about whether to invest in petitioner's fund "by forcing the General Counsel to make a recommendation determined by [petitioner]." Pet. App. 12a. He, accordingly, did seek to "obtain" that right. The Ninth Circuit's holding in *McFall* that property is not "obtained" when a competitor seeks to drive his rival from the field (and will not exercise that rival's right to submit a bid) thus provides no reason to believe that petitioner's appeal would have resulted in a different outcome if it had been brought in the Ninth Circuit. In the absence of a conflict, this Court's intervention to review the application of extortion principles to the unique facts of this case is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2012