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Criminal Law—Extortion or Public Policy, Where Do We Draw the Line?: First Circuit Finds Hobbs Act Extortion May Apply to the Actions of Two Boston City Hall Officials—United States v. Brissette, 919 F.3d 670 (1st Cir. 2019)

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CRIMINAL LAW—EXTORTION OR PUBLIC POLICY, WHERE DO WE DRAW THE LINE?: FIRST CIRCUIT FINDS HOBBS ACT EXTORTION MAY APPLY TO THE ACTIONS OF TWO BOSTON CITY HALL OFFICIALS—*UNITED STATES V. BRISSETTE*, 919 F.3D 670 (1ST CIR. 2019)

The federal crime of extortion can have a substantial negative effect on interstate and foreign commerce due to its aggregate impact on the economy.[1] The Hobbs Act, enacted to regulate extortion and robbery, defines extortion as "the obtaining of property from another, with. . . consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[2] In *United States v. Brissette,*[3] the First Cir-

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[1] *See* Hobbs Act, 18 U.S.C.S. § 1951 (1948) (making it federal crime to obstruct, delay, or affect commerce via robbery or extortion).

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
> (b) As used in this section—
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> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
> > (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

Id.; *see also* U.S. Dep't of Just., Criminal Resource Manual § 2403 (2011), https://www.justice.gov/archives/jm/criminal-resource-manual-2403-hobbs-act-extortion-force-violence-or-fear (providing list of questions to determine violation of Hobbs Act Extortion).

[2] *See* Hobbs Act, 18 U.S.C.S. § 1951 (b)(2) (defining extortion); *see also* U.S. Dep't of Just., *supra* note 1 (explaining application of Hobbs Act). The Hobbs Act extortion offense "reaches both the obtaining of property 'under color of official right' by public officials and the obtaining of property by private actors." U.S. Dep't of Just., *supra* note 1.

cuit Court of Appeals grappled with defining and applying the elements of extortion under the Hobbs Act.[4] The First Circuit ultimately determined that the "obtaining of property" element of the extortion provision may be satisfied even when no personal benefit is incurred.[5]

In 2016, two City of Boston ("the City") public officials, Kenneth Brissette ("Brissette") and Timothy Sullivan ("Sullivan"), were indicted for extortion and conspiracy to commit extortion in violation of the Hobbs Act.[6] Brissette served as the Director of the Office of Tourism, Sports and Entertainment for the City and Sullivan served as the Mayor's Chief of Staff for Intergovernmental Relations and the Senior Advisor for External Relations.[7] In their respective roles, Brissette and Sullivan worked closely with Crash Line Productions ("Crash Line"), a live music production company that had a licensing agreement with the City to host "Boston Calling," a biannual music festival hosted on City Hall Plaza. [8]

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[3] 919 F.3d 670 (1st Cir. 2019).

[4] *See id.* at 673-74 (stating government must prove two primary elements of Hobbs Act: "wrongfulness" and "obtaining of property").

[5] *See id.* at 685-86 (concluding no personal benefit required for "obtaining of property" element of extortion).

[6] *See id.* at 672-73 (explaining Brissette and Sullivan were indicted under "wrongfulness" prong of Hobbs Act extortion). A grand jury handed up the indictment which charged Brissette with Hobbs Act extortion on May 27, 2016. *Id.* On June 28, 2016, the grand jury handed up a superseding indictment which added a charge of extortion against Sullivan and charged both men with conspiracy to commit extortion. *Id.* Brissette and Sullivan were charged "under the 'induced by wrongful use of . . . fear' prong of Hobbs Act extortion—specifically, within the 'wrongful use of fear of economic harm.'" *Id.* (quoting Hobbs Act, 18 U.S.C. § 1951(b)(2)).

[7] *See id.* at 672-73 (describing Brissette's title and responsibilities). Brissette's office was responsible for issuing and securing permits for any entities using public space to host events in Boston. *See id.*; *see also* Andrew Ryan, *Kenneth Brissette Once Described His Job as 'Minister of Fun'*, THE BOSTON GLOBE (May 19, 2016, 11:58 a.m.), https://www.bostonglobe.com/metro/2016/05/19/kenneth-brissette-once-described-his-job-minister-fun/PJ4Pq8ZjHYShZwDi48HrXM/story.html (reporting on indictment).

> "The mission of the Office of Tourism, Sports, and Entertainment is to promote all public events in the city of Boston," the indictment said of Brissette's job. "As part of that mission, the Office of Tourism, Sports, and Entertainment should assist companies and individuals seeking to stage events in Boston, including music and sports performances, filmmaking, etc., including assistance in securing permits to use at public areas in Boston."

Ryan, *supra* note 7.

[8] *See Brissette*, 919 F.3d at 672 (describing Crash Line's agreement with City of Boston). "The licensing agreement required Crash Line to obtain permits from the City to stage each festival." *Id.*; *see also* Crash Line Productions, LINKEDIN, https://www.linkedin.com/company/crash-line-productions/about/ (last visited Oct. 13, 2019). "Crash Line Productions is a leading live music event company, founded in 2012 in Boston, MA. [It] produces Boston Calling Music Festival, Eaux Claires Music & Arts Festival in Eau Claire, WI and Copenhagen Beer Festival in

In July 2014, Crash Line requested a permit to host the September "Boston Calling" festival.[9] Over the next two months, Brissette and Sullivan repeatedly told the company that it needed to hire local union workers to staff the music festival in order to receive a permit.[10] Crash Line explained that it had already secured labor for the festival through pre-existing contracts with a non-union company.[11] On September 2, 2014, Crash Line, still without a permit and with only three days before the festival was scheduled to begin, met with Brissette and Sullivan who, once again, insisted the company hire union workers to staff the festival.[12] Due to persistent demands from the City and the fast approaching event date, Crash Line entered into a contract to hire nine union workers; shortly after, the City issued the necessary permit to host the festival.[13]

In April of 2016, the Boston Globe reported that the Federal Bureau of Investigation was investigating whether members of Mayor Martin J. Walsh's administration merely advised Crash Line of the potential problem that may arise if they did not staff local union workers, or whether the City pressured Crash Line to hire local union stagehands.[14] The following

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Boston, MA." Crash Line Productions*, supra* note 8; Ryan, *supra* note 7 (discussing Boston Calling Music Festival and its setting at Boston's City Hall Plaza).

[9] *See Brissette*, 919 F.3d at 672 (noting responsibilities of Brissette and Sullivan's office included issuing permits for public area venues). "Between July and September 2014, Crash Line sought certain permits and approvals from the City to put on one such festival in September 2014 as well as an extension of its licensing agreement." *Id.*

[10] *See id.* at 673 (stating Sullivan and Brissette told Crash Line to hire Local 11 Union workers); *see also About Us*, I.A.T.S.E LOCAL #11, http://www.iatse11.org/ (last visited Jan. 19, 2020) (explaining Local 11 Union workers and their responsibilities). "We are the skilled men and women who work behind the scenes in entertainment industry every day. We specialize in stage rigging, theatrical set construction, and the installation and operation of video, lighting, and sound systems in virtually any type of venue." I.A.T.S.E LOCAL, *supra* note 10.

[11] *See Brissette*, 919 F.3d at 673 (explaining "[t]he licensing agreement between Crash Line and the City did not obligate Crash Line to hire the workers that it needed to put on a festival from any union or otherwise place restraints on Crash Line's hiring practices.")

[12] *See id.* (emphasizing Brissette and Sullivan's insistence that Crash Line hire union members); *see also Past Lineups*, BOSTON CALLING, https://bostoncalling.com (last visited Oct. 19, 2019) (advertising dates for 2014 festival as September 5th, 6th, and 7th).

[13] *See Brissette*, 919 F.3d at 673 (noting coincidental timeline of Crash Line hiring union workers and receipt of permit).

[14] *See* Mark Arsenault, et al., *Feds Probe City Hall's Dealings with Boston Calling*, BOSTON GLOBE (Apr. 29, 2016, 7:20pm), https://www.bostonglobe.com/metro/2016/04/29/feds-investigating-city-hall-interaction-with-boston-calling/9ZpyZh2jc7casqedHbVDbP/story.html?_sp=7a5bdd97-c3fb-4a64-8dbb-23d4887152d7.1571005562068 (discussing investigation as well as similar investigation that occurred in prior year). The "Boston Calling" incident was not Brissette's first extortion investigation. *Id.* In 2015, Brissette was investigated after he warned two local restaurants of possible union pickets in connection with the filming of reality TV show "Top Chef." *Id.* The investigation concluded that Brissette had not done anything unlawful. *Id.*

month, Brissette was arrested in response to an eight-page indictment.[15] The initial indictment, handed up by a grand jury, charged only Brissette with Hobbs Act extortion; however, a month later, a superseding indictment added a Hobbs Act extortion charge against Sullivan and charged both men with conspiracy to commit Hobbs Act extortion. [16]

On March 22, 2018, the district court dismissed the indictment based on its interpretation of the phrase "obtaining of property" in the Hobbs Act extortion provision.[17] District court Judge Leo Sorokin explained that the government failed to prove that Brissette and Sullivan physically obtained property and that the men gained a personal benefit from their actions, noting both elements are necessary under the extortion

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[15] *See Brissette*, 919 F.3d at 672 (stating initial indictment was handed up on May 27, 2016); *see also* Andrew Ryan, et al., *City Official Pleads Innocent to Extortion Charge, Released on Bond,* BOSTON GLOBE (May 19, 2016, 9:06 PM), https://www.bostonglobe.com/metro/2016/05/19/walsh-administration-official-arrested-union-related-extortion-federal-officials-say/XJehp4hEQXVZ5ancU67KmJ/story.html (stating Brissette plead innocent and was released on $25,000 unsecured bond).

[16] *See Brissette*, 919 F.3d at 672 (stating superseding indictment was handed up on June 28, 2016). The first superseding indictment alleged:

> Brissette and Sullivan had "attempted to and did obtain" from Crash Line "money to be paid as wages for imposed, unwanted, and unnecessary and superfluous services and wages and benefits to be paid pursuant to a labor contract with Local 11." That indictment further alleged that Brissette and Sullivan had done so "with the consent of [Crash Line] . . . which consent was induced by the wrongful use of fear of economic harm to [Crash Line] and others." The indictment also alleged that Brissette and Sullivan had conspired, "together with others, known and unknown to the Grand Jury," to commit the alleged extortion.

Id. at 673. In January 2017, the defendants moved to dismiss that indictment pursuant to Federal Rule of Criminal Procedure 12(b)(3). *Id.* After the First Circuit Court of Appeals issued a decision regarding the scope of the Hobbs Act in *United States v. Burhoe*, 871 F.3d 1 (1st Cir. 2017), the defendants filed renewed motions to dismiss the first superseding indictment. *Id.* The government opposed the motion and obtained a second superseding indictment, which modified the description of "property" under the act. *Id.* at 674. On January 31, 2018, the government obtained a third superseding indictment, known as the "operative [indictment]." *Id.* "The indictment charged Brissette and Sullivan, however, only under the 'induced by wrongful use of . . . fear' prong of Hobbs Act extortion – specifically, within the 'wrongful use of fear of economic harm.'" *Id.* at 672; *see also* Evans v. United States, 504 U.S. 255, 263-64 (1992) (detailing two forms of extortion statute sets out). The "induced by wrongful use of actual or threatened force, violence, or fear" prong of the offense delineates a distinct form of extortion from the "under color of official right" prong. *Evans*, 504 U.S. at 264 n.13.

[17] *See Brissette*, 919 F.3d at 675 (resolving Rule 12(b)(1) and 12(b)(3) motions and dismissing indictment). "[T]he government's proffered evidence and the facts alleged in the indictment were insufficient to show . . . that the defendants received a personal benefit from the transfer of wages and benefits to the Local 11 workers that the defendants allegedly directed Crash Line to make." *Id.*; *see also* Hobbs Act, 18 U.S.C.S. § 1951 (1948) (defining extortion in § 1951 (b)(2)). "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Hobbs Act, 18 U.S.C.S. § 1951 (b)(2).

provision.[18] The government appealed, and the First Circuit Court of Appeals was tasked with deciding whether, under the Hobbs Act, "merely directing property to a third party" constitutes "obtaining of [that] property," or whether one must also "enjoy[] a personal benefit from" that directed transfer.[19] Aligning itself with other circuits that have resolved the same question, the First Circuit Court of Appeals held that conferring a personal benefit is not necessary to prove Hobbs Act extortion.[20] Therefore, the district court's order of dismissal was vacated and the case was remanded for further proceedings.[21]

In 1946, Congress passed the Hobbs Act to prohibit actual or attempted robbery or extortion that would negatively affect interstate or foreign commerce.[22] Since its adoption, the Hobbs Act has expanded federal

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[18] *See* United States v. Brissette, No. 16-cr-10137-LTS, 2018 U.S. Dist. LEXIS 44426, at *34 (D. Mass. Mar. 19, 2018) (rejecting government's position and ruling personal benefit required to prove extortion). Judge Leo Sorokin stated:

> To accept the government's invitation and essentially read the word "obtain" out of the Hobbs Act, such that any action taken to direct a private entity to spend money in a certain way—regardless whether the defendant himself receives the money or enjoys a personal benefit from it—would invite the precise risks against which the Supreme Court has cautioned, particularly when dealing with conduct by public officials.

Id. at *34; *see also* Jerome Campbell, *Boston Mayoral Aides Found Guilty in Boston Calling Extortion Case*, WBUR News (Aug. 7, 2019), https://www.wbur.org/news/2019/08/07/brissette-sullivan-guilty-conspiracy (stating Judge Sorokin "told jurors that political favors do not rise to . . . federal extortion charge under the Hobbs Act.")

[19] *See Brissette*, 919 F.3d at 675 (analyzing "obtaining property" prong of Hobbs Act extortion).

[20] *See id.* at 679-80; *see also, e.g.,* United States v. Carlson, 787 F.3d 939, 944 (8th Cir. 2015) (finding defendant does obtain property at issue irrespective of gaining personal benefit); United States v. Vigil, 523 F.3d 1258, 1264 (10th Cir. 2008) (holding "obtaining of property" element met when directing benefit to third party); United States v. Provenzano, 334 F.2d 678, 686 (3d Cir. 1964) ("It is enough [under the Hobbs Act] that payments were made at the extortioner's direction to a person named by him.")

[21] *See Brissette*, 919 F.3d at 685-86 (stating holding is confined to "obtaining property" element of offense). *But see* United States v. Brissette, No. 16-CR-10137-LTS, 2020 WL 718294, at *46 (D. Mass. Feb. 12, 2020) (vacating Brisette and Sullivan's guilty verdicts). Sullivan and Brisette's guilty verdicts were later vacated by Judge Sorokin, who noted that, "[e]ven if the Hobbs Act authorized its alternatives, the government failed to prove them." *Brissette*, 2020 WL 718294, at *1; *see also* The Associated Press, *Judge Tosses Convictions Of 2 Aides To Marty Walsh In Boston Calling Case*, WBUR (Feb. 12, 2020), https://www.wbur.org/news/2020/02/12/judge-tosses-convictions-of-2-aides-to-marty-walsh-in-boston-calling-case ("U.S. District Judge Leo Sorokin said in his ruling that he must overturn the jury's guilty verdict because the government failed to prove the existence of a quid pro quo.").

[22] *See* Hobbs Act, 18 U.S.C.S. § 1951 (1948) (prohibiting obstruction, delay, or affecting of commerce by robbery or extortion); *see also* Matt Evola, Comment, *You Shall Go No Further: The Hobbs Act and the Expansion of Federal Criminal Jurisdiction*, 53 AM. CRIM. L. REV. ONLINE 6 (2016) (stating act was crafted to target problem of forced fee payment for farmers de-

criminal jurisdiction and is frequently used in cases involving public corruption, commercial disputes, violent crimes, and corruption directed at labor unions.[23] By definition, the elements of extortion are: (1) interference with interstate commerce; (2) obtaining, attempting to obtain or conspiring to obtain property from another; (3) with consent; and (4) "induce[ment] by wrongful use of actual or threatened force, violence, or fear or under color of official right."[24] The use of force, violence, or fear to obtain property must be "wrongful" in order for the action to fall within the Hobbs Act and violate criminal law.[25] Courts have grappled with defining two elements

livering goods). "At the time, farmers would be stopped upon entering major cities and be forced to either pay a fee or hire a union driver to deliver their goods . . . ." Evola, *supra* note 22, at 6.

[23] *See, e.g.*, Evans v. United States, 504 U.S. 255, 290-91 (1992) (Thomas, J., dissenting) (describing Hobbs Act as "stunning expansion" of federal criminal jurisdiction); United States v. Culbert, 435 U.S. 371, 380 (1978) (explaining scope of statute). "Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal all conduct within the reach of the statutory language." *Culbert*, 435 U.S. at 380; United States v. Rivera-Rivera 555 F.3d 277, 286 (1st Cir. 2009) (holding de minimums interference with interstate commerce is sufficient for Hobbs Act conviction); United States v. Valenzeno, 123 F.3d 365, 367 (6th Cir. 1997) (stating Hobbs Act is valid exercise of Congress' power to regulate); *see also* U.S. Dep't of Just., Justice Manual, Title 9, Chapter 9-131.010 (2011), https://www.justice.gov/jm/jm-9-131000-hobbs-act-18-usc-1951 (detailing history and purpose of Hobbs Act).

[24] *See* Hobbs Act, 18 U.S.C.S. § 1951 (detailing elements of extortion); *see also* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 403 (2003) (stating "Congress used two sources of law as models in formulating the Hobbs Act"). The Penal Code of New York and the Field Code, a 19th-century model penal code, were both used in creating the language for the Hobbs Act. *Scheidler*, 537 U.S. at 403; *see also, e.g.*, People v. Ryan, 133 N.E. 572, 573 (1921) (explaining New York law demonstrated elements of "obtaining of property" requirement before Hobbs Act); United States v. Jackson, 180 F.3d 55, 69 (2nd Cir. 1999) (acknowledging definition of extortion in Hobbs Act is copied from New York State law); Brian J. Murray, Note, *Protestors, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 710 (1999) (tracing "extortion" definition in Hobbs Act to Anti-Racketeering Act (1934) and New York State law). *See generally* BLACK'S LAW DICTIONARY 696 (4th ed. 1957) (defining "extort" as "to gain by wrongful methods, to obtain in an unlawful manner, to compel payments by means of threats of injury to person, property, or reputation . . . to exact something unlawfully by threats or putting in fear.")

[25] *See* Howard J. Alperin, Annotation, *Elements of Offense Proscribed by the Hobbs Act, Against Racketeering in Interstate or Foreign Commerce*, 4 A.L.R. FED. 881, § 6[c] (2007) (defining "wrongful use" under statutory definition of extortion). The term "wrongful," within the meaning of the Hobbs Act, modifies the use of each enumerated means of obtaining property through actual or threatened force, violence, or fear. *Id.* This definition limits the statute's coverage to those instances where obtaining property would itself be "wrongful" because the alleged extortionist has no lawful claim to that property. *Id.*; *see also* Ocasio v. United States, 136 S. Ct. 1423, 1435 (2016) (providing example of "wrongful" use of fear). The Supreme Court explains that a store owner making periodic protection payments to gang members out of fear that the gang will otherwise trash the store is an example of "inducement by wrongful use of actual or threatened force, violence, or fear" as stated in the statute. *Ocasio*, 136 S. Ct. at 1435.

of the Hobbs Act in particular: the phrase "obtaining of property," and "wrongful" conduct.[26]

The Hobbs Act does not define the word "obtaining," nor the phrase "obtaining of property."[27] When the terms of a statute are ambiguous, courts will interpret them within the context of their statutory scheme, or, alternatively, presume that the statutory terms hold their common-law meaning.[28] The Model Penal Code's ("MPC") definition of "extortion," which is rooted in common-law, defines the term "obtaining" as "bringing about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another."[29] Relying on the MPC definition, the Supreme Court has held that the term "obtaining," as used under the Hobbs

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[26] *See* Alperin, *supra* note 25 (explaining each element of Hobbs Act and its interpretations).

[27] *See* Hobbs Act, 18 U.S.C.S. § 1951 (declining to define key words of Act). *But see* Sekhar v. United States, 570 U.S. 729, 735 (2013) (differentiating between coercion and extortion). By including the "obtaining of property" element, Congress kept compulsion outside of the scope of Hobbs act extorsion. *Sekhar*, 570 U.S. at 735; People v. Scotti 195 N.E. 162, 163 (N.Y. 1934) (per curiam) (distinguishing extortion from common law crime of coercion); People v. Ginsberg, 188 N.E. 62, 62 (N.Y. App. Ct. 1933) (affirming convictions where threats and property damage to compel store owner to join trade organization); People v. Kaplan, 269 N.Y.S. 161, 162-64 (N.Y. App. Ct. 1934) (holding that compelling union members to drop lawsuits against union leadership is coercion).

[28] *See* David v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme."); *see also* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) ("[A]mbiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); Taylor v. United States, 495 U.S. 575, 594 (1990) ("In the absence of any specific indication that Congress meant to incorporate the common-law meaning of burglary, we shall not read into the statute a definition of 'burglary' so obviously ill-suited to its purposes."); Morissette v. United States, 342 U.S.246, 262 (1952) (explaining common law meaning should not be adopted when directly contrary to congressional direction). *But see* Sekhar v. United States, 570 U.S. 729, 735 (2013) (applying New York Penal Code definition of "obtaining" as used in Scheidler). By including the "obtaining of property" element, Congress kept compulsion outside of the scope of Hobbs act extorsion. *Sekhar* 570 U.S. at 734; Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 402-03 (2003) (using "the Penal Code of New York and the Field Code" definitions of "extortion" and "obtaining of property" element). In *Scheidler*, the Supreme Court was confronted with contention that the "obtaining of property" element in the Hobbs Act extortion provision did not define the conduct for which the defendant was charged. *Schiedler*, 537 U.S. at 402. The Supreme Court also examined the common-law crime of extortion, leading the Court to consider the Model Penal Code's definition, and finding that "[o]btaining property" requires "a deprivation and acquisition of property." *Schiedler*, 537 U.S. at 404; *Kaplan*, 269 N.Y.S. at 163 (holding compelling union members to drop lawsuits against union leadership is considered coercion).

[29] *See Schiedler*, 537 U.S. at 408, n.13 ("Under the Model Penal Code § 223.4, cmt. 1, at 201-02. "Extortion requires that one 'obtains [the] property of another' using threat as 'the method employed to deprive the victim of his property.'") This "obtaining" is further explained as "bringing about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another." *Id.; see also* Murray, *supra* note 24, at 703 (noting MPC contains useful definition of extortion).

Act extortion provision, does not impliedly require that a personal benefit be conferred.[30] On the contrary, the Supreme Court has consistently found that the phrase "obtaining property" is not exclusive to the extortioner, but includes situations where the defendant directs a transfer from the victim to a third party.[31] The Supreme Court has also established that Congress intended for the "obtaining of property" element to be satisfied through "ex-

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[30] *See* United States v. Green, 350 U.S. 415, 420 (1956) (holding extortion, as defined in Hobbs Act, does not depend on direct benefit conferred). A union and its representative were charged with extortion in attempting to obtain wages from employers to pay for unwanted and fictitious services. *Id.* at 417. For purposes of the act's proscription of extortion, the Court noted it is not necessary to show that a direct benefit is conferred upon the person who obtains the property allegedly extorted. *Id.* at 420.

[31] *See* United States v. Carlson, 787 F.3d 939, 944 (8th Cir. 2015) (noting "obtaining" does not mean defendant must enjoy personal benefit). The defendant sent threatening letters to the plaintiff, demanding that money and veterinary supplies be brought to a certain address or else the defendant would follow through on the threats made. *Id.* at 942. The court held that "obtaining of property" element was met where the defendant "did demand items of value, she just did not seek to obtain them for herself." *Id.* at 944; *see also* United States v. Burhoe, 871 F.3d 1, 27-28 (1st Cir. 2017) (stating that taking work away from one union member and giving to another satisfies "obtaining of property" element); United States v. Vigil, 523 F.3d 1258, 1264 (10th Cir. 2008) (holding "obtaining of property" element met where state treasurer "attempted to obtain money from [a company's head] and direct that money to [a political supporter's wife]"). The defendant in *Vigil* argued that his conduct was merely hard bargaining, however the court held that a rational jury could have concluded that it was exploitation due to fear of economic loss and his actions were done in order to obtain property to which he was not entitled. *Vigil*, 523 F.3d at 1261-62; United States v. Gotti, 459 F.3d 296, 324 n.9 (2d Cir. 2006) (noting defendant may "obtain property" by "order[ing] the victim to transfer the [victim's property] rights to a third party of the extortionist's choosing"). In this case, the Gambino family had a corrupt influence over several "labor unions, businesses, and individuals operating at the piers in Brooklyn and Staten Island." *Gotti*, 459 F.3d at 301. The indictment alleged that the defendants sought to extort wages, positions, and employee benefits from local union workers to another set of individuals. *Gotti*, 459 F.3d at 305-06; United States v. Panaro, 266 F.3d 939, 943 (9th Cir. 2001) (explaining how obtaining element is satisfied under Hobbs Act). The defendants agreed to force the victim out of his share of an auto shop and to intimidate the remaining business owner to share the proceeds of the business. *Panaro*, 266 F.3d at 945-46. The court held that Hobbs Act extortion does not apply simply when someone parts with property, rather "someone – either the extortioner or a third person –must receive the property of which the victim is deprived." *Panaro*, 266 F.3d at 948; United States v. Hyde, 448 F.2d 815, 843 (5th Cir. 1971) (stating "one need receives no personal benefit to be guilty of extortion . . . ") In *Hyde*, the defendants, an attorney general and two associates, were convicted of extortion because of threats made to loan and insurance companies; they stated that, unless payments were made to them, the companies would be driven out of business. *Hyde*, 448 F.2d. at 843. Following the precedent set in *Provenzano*, the court held that one does not need to receive a personal benefit to be convicted of extortion. *Hyde*, 448 F.2d at 843; United States v. Provenzano, 334 F.2d 678, 686 (3d Cir. 1964) (holding "it is enough [under the Hobbs Act] that payments were made to a person named by the extortioner"). In *Provenzano*, the defendant was convicted of obstructing, delaying, and affecting interstate commerce by extorting from a transportation company through economic fear in violation of the Hobbs Act. *Provenzano*, 334 F.2d. at 680-81. The court affirmed the judgment and held that the payments by the company were a continuous series of payments made because of fears instilled by defendant. *Provenzano*, 266 F.3d at 945-46.

tortion under the guise of obtaining wages . . .” regardless of whether it was for actual or fictitious labor.[32]

When determining whether the means used to obtain property is “wrongful,” courts have ruled that the use of actual or threatened violence or fear, as well as fear of physical harm, is inherently wrongful under the statute.[33] The Supreme Court has held that the obtaining of property itself is “wrongful” when the extortioner uses wrongful means to accomplish a wrongful end.[34] The term “wrongful,” qualifies each of the enumerated means of obtaining property found in the Hobbs Act: “actual or threatened force, violence or fear.”[35] Though “fear of economic loss” is a type of fear, courts have held that it is not considered “wrongful” under the Hobbs Act because the fear of economic harm is a part of many legitimate business transactions.[36] It should be noted, however, that the fear of economic loss

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[32] *See* United States v. Kemble, 198 F.2d 889, 891 (3rd Cir. 1952) (stating historical scope of Anti-Racketeering Act, now called Hobbs Act). “[T]he conclusion seems inescapable that Congress intended that the language used in the [Hobbs Act] be broad enough to include, in proper cases, the forced payment of wages.” *Id.* at 891; *see also* United States v. Enmons, 410 U.S. 396, 403 (1973) (stating purpose of Hobbs Act). Congressman Hancock stated: “This bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce. That is all it does.” *Enmons*, 410 U.S. at 403; United States v. Local 807, Int’l Bhd. of Teamsters, 315 U.S. 521, 538 (1942) (holding Supreme Court’s decision put into perspective scope of Hobbs Act). The Supreme Court held that members of the Teamsters’ Union were exempt from the provisions of the Anti-Racketeering Act when attempting to obtain wages for a job through the threat of violence, whether they rendered any service or not. *Local 807, Int’l Bhd. of Teamsters*, 315 U.S. at 521.

[33] *See* United States v. Strum, 870 F.2d 769, 773 (1st Cir. 1989) (discussing whether “wrongful” applied to means used or to ends sought by alleged extortioner). “[T]he use of actual or threatened force or violence to obtain property is inherently wrongful.” *Id.*; United States v. Kattar, 840 F.2d 118, 123 (1st Cir. 1988) (ruling that means used to obtain end must be “wrongful”); United States v. Coppola, 671 F.3d 220, 241 (2nd Cir. 2012) (stating requirements necessary to meet wrongfulness element). “What is required is evidence that the defendant knowingly and willfully created or instilled fear or used or exploited existing fear with specific purpose of inducing another to part with property.” *Coppola*, 671 F.3d at 241.

[34] *See* United States v. Enmons, 335 F. Supp. 641, 643 (E.D. La. 1971) (explaining extortion under the Hobbs Act requires “wrongful” taking of property). In this case, violence erupted during a lawful strike. *Id.* at 641. The strike was meant to compel an employer to accept certain provision for higher wages. *Id*. The question before the court was whether the violence qualified as Hobbs Act extortion due to the violence making the strike unlawful. *Id*.; *see also Kattar*, 840 F.2d at 123 (holding that means used to obtain end must also be wrongful). “Actual or threatened force, violence or fear” is the Hobbs Act’s reference to the means of obtaining property that are wrongful. *Kattar*, 840 F.2d at 123.

[35] *See supra* text accompanying note 25; *see also Burhoe*, 871 F.3d at 9 (citing Hobbs Act, 18 U.S.C.S. § 1951(b)(2) (1948) (“The Hobbs Act references means used to obtain property through the phrase ‘actual or threatened force, violence, or fear.’”)

[36] *See Burhoe*, 871 F.3d at 9 (stating fear of economic harm not wrongful); United States v. Rivera-Rangel, 396 F.3d 476, 483 (1st Cir. 2005) (explaining how to establish extortion through fear of economic loss). “To establish extortion through fear of economic loss, the government

has been deemed wrongful "when [it's] employed to achieve a wrongful purpose."[37]

In *United States v. Brissette*, the First Circuit held that a defendant need not receive a personal benefit when "obtaining" property under the Hobbs Act.[38] The court reached this conclusion by applying the MPC definition of "obtaining," as the court in *Scheidler* did.[39] Though the defendants argued that the use of the word "obtaining" impliedly imposes a "personal benefit requirement," the court viewed the term in context to rule

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must 'show that the victim believed that economic loss would result from his . . . failure to comply with the alleged extortionist's terms, and that the circumstances . . . rendered that fear reasonable.'" *Rivera-Rangel*, 396 F.3d at 483 (quoting United States v. Bucci, 839 F.2d 825, 828 (1st Cir. 1988)). The court found that the plaintiff was making payments out of fear that they could lose the opportunity to compete with government contracts and future business opportunities with the state, not that they would simply lose the business altogether. *Rivera-Rangel*, 396 F.3d at 483-84; *see also* Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 523 (3d Cir. 1998) (stating fear of economic loss is normal business consequence and not inherently wrongful).

> Indeed, the fear of economic loss is a driving force of our economy that plays an important role in many legitimate business transactions. This economic reality leads us to conclude that the reach of the Hobbs Act is limited in cases, such as this one, which involve the use of economic fear in a transaction between two private parties.

Brokerage Concepts, Inc., 140 F.3d at 523; United States v. Capo, 791 F.2d 1054, 1063 (2d Cir. 1986) (stating economic loss is not necessarily wrongful, but part of many business transactions).

> We recognize, of course, that fear of economic loss plays a role in many business transactions that are entirely legitimate; awareness of that fear and use of it as leverage in bargaining, in which each side offers the other property, services, or rights it legitimately owns or controls, is not made unlawful by the Hobbs Act.

Capo, 791 F.2d at 1062.

[37] *See Kattar*, 840 F.2d at 123 (quoting United States v. Clemente, 640 F.2d 1069, 1077 (2nd Cir. 1981). "Use of fear of economic loss is wrongful when employed to achieve the wrongful purpose of obtaining property to which one is not entitled." *Id.*

[38] *See* United States v. Brissette, 919 F.3d at 685-686 (stating holding).

> [The "obtaining of property"] element may be satisfied by evidence showing that the defendants induced the victim's consent to transfer property to third parties the defendants identified, even where the defendants do not incur any personal benefit from the transfer and even where the transfer takes the form of wages paid for real rather than fictitious work.

Id.

[39] *See id.* at 677 (applying interpretive approach that Supreme Court used in *Scheidler*). There is nothing in *Scheidler* or similar case law that would suggest that the Hobbs Act codify a form of extortion different from common-law extortion. *Id.*; *see also Scheidler*, 537 U.S. 393, 410 (2003) (stating where MPC recognizes and defines extortion, Hobbs Act must have similar requirements).

against the defendants' position.[40] Once the court defined the term, it then used precedent to determine the application of "obtaining of property."[41]

The court rejected the appellees' argument that the element of "obtaining" cannot include a transfer of property to a third party, stating that the defendants misinterpreted the holding in *Sekhar v. United States*.[42] Aligning itself with the Second, Third, Eighth, Ninth and Tenth Circuits, the First Circuit found that the "obtaining" element of the extortion provision of the Hobbs Act is satisfied when property is transferred to a third party, notwithstanding any personal benefit.[43] Lastly, by clarifying the

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[40] *See id.* at 676-77 (stating defendants' interpretation of "obtaining").

> The defendants nevertheless contend that the text – apparently through the use of the word "obtaining" itself – impliedly imposes that "personal benefit" requirement in a circumstance in which the defendant is charged only with having "induce[d]" the victim's "consent" to transfer "property" to an identified third party. But when we focus on the possible meaning of the word "obtaining," we see no reason to import such a "personal benefit "requirement into that text.

Id. at 676. The court states the surrounding context of the word "obtaining" reinforces their conclusion. *Id.*

[41] *See Brissette*, 919 F.3d at 677 (following Supreme Court's interpretive approach in *Scheidler* to define "obtaining of property").

> [In *Scheidler*], the Court was similarly confronted with a contention that the "obtaining of property" element in the Hobbs Act extortion provision did not encompass the conduct for which the defendants had been charged. The Court proceeded by looking to the common-law crime of extortion, which in turn led the Court to consider how the Model Penal Code ("MPC") defined extortion and its "obtaining of property" element.

Id. (citations omitted). The court then turned to Hobbs Act extortion precedent to directly address the application of the statute's "obtaining of property" element definition to the circumstances of the case at hand. *Id.*

[42] *See id.* at 678 (citing Sekhar v. United States, 570 U.S. 729, 735 (2013)). The *Sekhar* holding stated that the Hobbs Act extortion provision's "obtaining of property" element requires proof of the acquisition of property – meaning "proof that 'the victim part[ed] with his property, and that the extortionist gain[ed] possession of it.'" *Id.* In correcting the defendant's misinterpretation of *Sekhar*, the First Circuit stated:

> But, we do not see how [the holding] of *Sekhar* precludes the conclusion that a defendant may "acqui[re]" property within the meaning of *Sekhar* by directing its transfer from the victim to a party of his choosing, notwithstanding that he does not otherwise personally benefit from the transfer. Sekhar contains no suggestion that it reads the Hobbs Act to codify a form of extortion that, with respect to the "obtaining of property" element is distinct from the one set forth in the version of the MPC quoted by *Scheidler*.

Id. at 678-79.

[43] *See Brissette*, 919 F.3d at 679 (citing United States v. Carlson, 787 F.3d 939, 944 (8th Cir. 2015. The cases the *Brissette* court cited each held that a defendant is deemed to have acquired the property at issue by directing its transfer to another of his choosing, irrespective of whether he receives a personal benefit as a result. *See also* United States v. Burhoe, 871 F.3d 1, 27-29 (1st

purpose of the Hobbs Act, the court rejected the defendants' alternative arguments that their conduct did not warrant a Hobbs Act federal violation, but instead a possible common-law coercion violation.[44] Judge Baron, writing for the First Circuit, distinguished coercion from extortion by examining *United States v. Enmons* and *United States v. Kemble*, ultimately finding that the act of directing wages to a third person, regardless of whether it's for actual or fictitious labor, constitutes "obtaining property" under the Hobbs Act.[45]

The defendants pointed to a line of cases concerning the "under color of official right" element of Hobbs Act extortion; however, the Court determined that these cases did not address the "obtaining" element and were therefore irrelevant to the case at hand.[46] The court solely dealt with the "under color of official right" element, which was not addressed in Brissette and Sullivan's indictment.[47] The court did not address the

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Cir. 2017); United States v. Vigil, 523 F.3d 1258, 1264 (10th Cir. 2008); United States v. Gotti, 459 F.3d 296, 324 n.9 (2d Cir. 2006); United States v. Panaro, 266 F.3d 939, 943 (9th Cir. 2001); United States v. Provenzano, 334 F.2d 678, 686 (3d Cir. 1964).

[44] *See id.* at 681-82 (rejecting contention that defendants must obtain benefit themselves). The defendants argued that the Hobbs Act extortion provision does not apply because they were not trying to acquire Crash Line's right to hire their own workers, but rather attempting to procure an opportunity for union workers. *Id.* The defendants equated their behavior to that of *Sekhar*'s cited example of common-law coercion, which contained no "obtaining of property" element. *Id.* They argued that the indictment failed to establish that they "directed" wages or benefits to anyone, and therefore their conduct was not extortion under the Hobbs Act. *Id.* at 680-81. The court explained that there is a difference between an interference with rights and a Hobbs Act extortion, which is why Congress choose to include the "obtaining of property" element in the language of the statute. *Id.* at 681 (citing *Sekhar*, 570 U.S. at 735). The First Circuit decided to address this argument despite the district court's silence on the issue, noting that it was closely related to the government's ability to prove the "obtaining of property" element and that the defendants had fully briefed it on appeal. *Id.* (citing Oxford Aviation, Inc. v. Glob. Aerospace, Inc., 680 F.3d 85, 87-88 (1st Cir. 2012)).

[45] *See Brissette*, 919 F.3d at 682 (detailing what constitutes "obtaining property" under Hobbs Act). Referencing both *Enmons* and *Kemble*, Judge Baron stated that the court clearly concluded the employer's property was "misappropriated" and, therefore, the Hobbs Act applied. *Id.*

> [T]he Supreme Court has made it quite clear in *Enmons* that "the Hobbs Act has properly been held to reach instances where union officials threatened force of violence against an employer in order to . . . exact 'wage' payments from the employer in return for imposed, unwanted, superfluous and fictitious services of workers."

Id. (citing United States v. Enmon*s*, 410 U.S. 396, 400 & n.4 (1973)).

[46] *See id.* at 680 (noting that cases were largely irrelevant regarding "obtaining of property" element).

[47] *See id.* (stating that cases concerning "under color of official right" have no bearing on this case). "[T]he passages from these cases on which the defendants rely do not even concern the 'obtaining of property' element of the Hobbs Act extortion provision that is our concern here. They concern the statue's 'under color of official right element' which the indictment in this case does not implicate." *Id.*; *see also* Hobbs Act, 18 U.S.C. § 1951(b)(2) (1948) (separating elements

"wrongfulness" element of the provision, confining its holding to the "obtaining of property" element that the parties raised on appeal.[48]

Ultimately, the First Circuit improperly expanded the extortion provision of the Hobbs Act in *Brissette v. United States*.[49] The Supreme Court has repeatedly held that the rule of lenity prevents courts from adopting a broad interpretation of an act where the language and history of the Hobbs Act is ambiguous.[50] In *United States v. Bass*, the Supreme Court listed two vitally important reasons for applying the rule of lenity: first, "a fair warning" and fair understanding of the law "should be given to the

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of "obtaining property" and "under color of official right"); Wilkie v. Robbins, 551 U.S. 537, 564-65 (2007) (highlighting that "under color of official right" element is separate from "obtaining of property element"). "Under color of official right" cases require proof of "the sale of public favors for private gain." *Wilkie,* 551 U.S. at 564; Evans v. United States, 504 U.S. 255, 267-68 (1992) (stating "under color of official right" requires proof of quid pro quo); McCormick v. United States, 500 U.S. 257, 273-74 (1991) (explaining public official's convictions for extortion under "color of official" right prong of Hobbs Act). Specifically, a quid pro quo is a payment to a person in a position of public power in return for official acts. *See McCormick,* 500 U.S. at 273.

[48] *See Brissette,* 919 F.3d at 685 (explaining why court need not address wrongfulness element). Neither the district court nor the parties on appeal addressed the wrongfulness element; therefore, the First Circuit confined its holding to the elements of the parties' arguments. *Id.*

> [W]e express no view as to whether the indictment sufficiently alleges the other elements of Hobbs Act extortion or whether the government would ultimately be able to prove its case beyond a reasonable doubt were it to proceed to trial. Thus, we express no view as to whether, for example, the defendants' conduct was "wrongful," as it must be under the statute . . . .

Id.

[49] *See* United States v. Enmons, 410 U.S. 396, 411 (1973) (stating Hobbs Act cannot be expanded). "[T]his being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity." *Id.*

[50] *See* United States v. Bass, 404 U.S. 336, 347 (1971) (explaining preference for narrower reading of ambiguous criminal statutes).

> In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

Id. (quoting United States v. Universal C. I. T. Credit Corp., 344 U.S. 218, 221-222 (1952)); *see also* United States v. Enmons, 410 U.S. 396, 411 (1973) (stating it is improper to expand application of Hobbs Act). "Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests . . ." *Enmons*, 410 U.S. at 411; Rewis v. United States, 401 U.S. 808, 812 (1971) (stating "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); Bell v. United States, 349 U.S. 81, 83 (1955) (explaining Congress's role of enacting statute and judiciary's of applying statute). When Congress enacts statutes that leave elements of criminal offenses undefined, it "leaves to the Judiciary the task of imputing to Congress an undeclared will, [and] the ambiguity should be resolved in favor of lenity." *Bell*, 349 U.S. at 83; Arroyo v. United States, 359 U.S. 419, 424 (1959) (reasoning penal laws cannot be construed so strictly as to defeat obvious intention of legislature).

world in language that the common world will understand," and second, due to the severity of criminal penalties, legislators should be responsible for defining statutory criminal activity rather than judges.[51] While the Act was historically designed to address highway robberies, the Supreme Court has given it a broader application that includes acts of robbery and extortion that were traditionally addressed through state law.[52] This expansion stems from the "*de minimis* standard" that has applied to cases with a tenuous effect on interstate commerce, resulting in the expansion of federal jurisdiction into areas traditionally governed by state law. [53] In his dissenting opinion in *Evans v. United States*, Justice Thomas critiqued this expansion of the Hobbs Act to include acts of public corruption by state and local officials, stating that "[o]ver the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws."[54]

An expansive view of the Hobbs Act raises a federalism concern because it impedes States' substantial sovereign powers.[55] Under the U.S.

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[51] *See* United States v. Bass, 404 U.S. at 348 (stating two important reasons for applying rule of lenity); Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 101-02 (2016) (explaining origin and purposes of applying rule of lenity). The courts have applied four differing standards to determine whether a statute is sufficiently ambiguous that the rule of lenity requires an interpretation in favor of the defendant: whether the state's interpretation is unambiguously correct, whether there is reasonable doubt as to the meaning of the statute, whether the court can make "no more than a guess" at the statute's meaning, and whether there is grievous ambiguity in the statute's text. Ortner*, supra* note 51, at 106-20.

[52] *See* Evola, *supra* note 22, at 7 (describing Supreme Court's expanded interpretation of Hobbs Act to include robbery and extortion); Alperin, s*upra* note 25, at § 3 (explaining reasons for enacting Anti-Racketeering Act and later Hobbs Act).

[53] *See* United States v. Rivera-Rivera, 555 F.3d 277, 286 (1st Cir. 2009) (noting well-established rule that Hobbs Act conviction requires only *de minimis* interference with commerce); *see also* Evola, *supra* note 22, at 7-8 (providing further explanation and context on *de minimis* standard).

[54] *See* Evans v. United States, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting) (criticizing majority's interpretation of Hobbs Act as "repugnant" to federalism). Justice Thomas opined that, when courts adopt broader readings of statutes like the Hobbs Act, it can "become[] impossible to tell where prosecutorial discretion ends and prosecutorial abuse, or even discrimination, begins." *Id.* at 296. "The potential for abuse, of course, is particularly grave in the inherently political context of public corruption prosecutions." *Id.* at 296-97; *see also* Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1213-14 (1977) (arguing federal prosecutors tend to abuse discretion criminal statutes grant them); Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for A Structured Approach*, 78 VA. L. REV. 1617, 1653 (1992) (stating expansion of Hobbs Act should be curtailed by limiting jurisdiction under federal statutes).

[55] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") The Supreme Court has reinforced this principle for more than a century. *See, e.g.,* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (explaining dual sovereignty between states and federal

Constitution, states have the power to determine and regulate the scope of interaction between appointed officials and their constituents.[56] This issue of federalism overshadows public officials' responsibility to their respective communities and constituents, and makes it difficult to differentiate extortion and representative government conduct.[57] The Hobbs Act's expansion of jurisdiction over criminal acts that are traditionally policed by state and local laws has given federal prosecutors "a license for ferreting out all wrongdoing[s] at a state and local level," by allowing them to "prosecute state officials for political courtesies and other innocent acts that are part of the fabric of American political life."[58]

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government); Lane Cty. v. State of Oregon, 74 U.S. 71, 76 (1868) ("The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence."); Texas v. White, 74 U.S. 700, 725 (1868) ("[T]he perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States.")

[56] *See* McDonnell v. United States, 136 S. Ct. 2355, 2373 (2016) (describing regulatory power of states). "A state defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority.'" *Id.* (quoting *Ashcroft*, 501 U.S. at 460); *see also* United States v. *Enmons*, 410 U.S. 369, 410-11 (1973) (rejecting "broad concept of extortion" that would lead to "an unprecedented incursion into the criminal jurisdiction of the States.")

[57] *See Amici Curiae Brief of 77 Former State Attorneys General*, *supra* note 22, at 18 (arguing broad interpretation of Hobbs Act blurs public officials' delivery of basic services to constituents); *see also* Judge Nancy Gertner, *There Should Be a Chorus Crying Foul Over Boston Calling Verdict*, The BOSTON GLOBE (August 28, 2019, 11:26 AM), https://www.bostonglobe.com/opinion/2019/08/28/there-should-chorus-crying-foul-over-boston-calling-verdict/UKU4JzIhSC6CiN4CYz9DFJ/story.html (providing thought provoking question about role of public officials).

> If the purpose here was to "secure real work for members of a specific union" (the First Circuit's words in an earlier Brissette-Sullivan appeal), how can that be unlawful? Assume no union involvement: Let's say a company using city property for a concert doesn't hire women or minorities. A city official says to the company representative, "[i]f you don't hire women or minorities, you will be picketed by women's groups or by the NAACP." And let's say the support of those groups happened to have been crucial to his boss's election. Is that extortion or just representative government?
> The law doesn't distinguish between constituents—the ones you are allowed to help, and the one you can't. In fact, unions are an important constituency. That's why so many observers are decrying the jury's verdict.

Gertner, *supra* note 57.

[58] *See Amici Curiae Brief of 77 Former State Attorneys General*, *supra* note 22 (explaining how prosecutors may prosecute crimes covered by both state and local laws); *see also* Evans, 504 U.S. at 290-91 (Thomas, J., dissenting) (alteration in original) (citing United States v. Kenny, 462 F.2d 1205, 1229, cert. denied, 409 U.S. 914 (1972) (explaining how *Kenny* altered distinction between extortion and bribery).

> *Kenny* obliterated the distinction between extortion and bribery, essentially creating a new crime encompassing both. "As effectively as if there were federal common law crimes, the court in *Kenny* . . . amended the Hobbs Act and [brought] into existence a

Lastly, the First Circuit Court of Appeals failed to address whether the defendants' conduct under the extorsion provision of the Hobbs Act would ultimately satisfy the statute's "wrongfulness" requirement.[59] The court should have determined whether the public officials in this case impeded on "the right [of Crash Line] to make business decisions free from outside pressures wrongfully imposed."[60] To answer this question, the court would need define and apply "wrongful" to the circumstances of the case.[61] Due to many circuits' view that fear of economic harm is not inherently "wrongful," it is likely that a court could find this element of the provision unsatisfied.[62]

In *United States v. Brissette*, the First Circuit Court of Appeals considered how to properly define and apply the elements of the extortion provision of the Hobbs Act. The court overturned the district court's decision and held that, under the Hobbs Act, a defendant need not receive a personal benefit when "obtaining" property through extortion. In doing so, the court improperly applied the rules of statutory construction and impeded on the state of Massachusetts' sovereign power to regulate the behavior of its own public officials. There is a longstanding debate regarding where the line can be drawn between public officials engaging in forceful advocacy for their constituents and engaging in unlawful extortion. In this case, the First Circuit took an incorrect and overly expansionist approach by criminalizing behavior that should be considered legitimate public advocacy.

Alexis Soares

> new crime—local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun."

Id. at 291 (quoting J. NOONAN, BRIBES 586 (1984)).

[59] *See* United States v. Coppola, 671 F.3d 220, 241 (2nd Cir. 2012) (stating requirements necessary to meet wrongfulness element).

[60] *See* United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978) (holding defendant guilty of Hobbs Act extortion). "We agree with the government that here . . . the property extorted was the right of [third party] to make a business decision free from outside pressure wrongfully imposed, and this is sufficient to sustain the [Hobbs Act] convictions . . ." *Id.*

[61] *See* United States v. Kattar, 840 F.2d 118, 123 (1st Cir. 1988) (stating means used to obtain end must be "wrongful"). The court made clear that the use of actual or threatened violence or force is inherently wrongful. *Id.*

[62] *See supra* text accompanying note 38 (stating fear of economic loss is normal business consequence and not inherently wrongful).

TRADEMARK LAW—LOOKING OUT FOR THE BIG GUYS: OUTDATED PRECEDENT REVEALS THE NEED FOR NEW LEGAL TEST IN *FORTNITE* LIKENESS CASE—*PELLEGRINO V. EPIC GAMES, INC.*, 451 F. SUPP. 3D 373 (E.D. PA. 2020).

States have an interest in both protecting an individual's right of publicity and safeguarding the proprietary interest in their acts and likeness.[1] In a world of viral videos and overnight fame, issues have arisen regarding the extent to which public figures have ownership over their image and signature moves, and whether third parties, like video game developers, can profit off them.[2] In *Pellegrino v. Epic Games, Inc.*,[3] the United States District Court for the Eastern District of Pennsylvania considered whether Epic Games, Inc. ("Epic") misappropriated Leo Pellegrino's ("Pellegrino") likeness and signature move when creating the "Phone It In" emote for its game *Fortnite Battle Royale* ("Fortnite").[4] The court ultimately dismissed Pellegrino's right of publicity claims and found that Epic's use of Pellegrino's likeness in creating the "Phone It In" emote satisfied the Transformative Use Test ("Test"), granting the emote First Amendment protection.[5]

Pellegrino is a professional baritone saxophone player and member of the "brass house" group Too Many Zooz.[6] At concerts and festivals, Pellegrino performs his signature move: a series of movements that "express his own unique dancing style."[7] Pellegrino performs his signature move so frequently and in front of so many people that "it has become inextricably linked to his identity."[8] Epic is a video game developer that cre-

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[1] *See* Zacchini v. Scripps-Howards Broad. Co., 433 U.S. 562, 573 (1977) (highlighting right of publicity is "right of the individual to reap reward of his endeavors").

[2] *See* Katie Thomas, *Image Rights vs. Free Speech in Video Game Suit*, N.Y. TIMES (Nov. 15, 2010), https://www.nytimes.com/2010/11/16/sports/16videogame.html (discussing importance of balancing First Amendment free speech rights against right of publicity).

[3] 451 F. Supp. 3d 373 (E.D. Pa. 2020).

[4] *See id.* at 378 (describing legal issue).

[5] *See id.* at 381 (concluding Epic's use of Pellegrino's likeness is sufficiently transformative); *see also infra* notes 25-26 (describing Transformative Use Test).

[6] *See Pellegrino,* 451 F. Supp. 3d at 378 (describing Pellegrino's profession).

[7] *See id.* (explaining Pellegrino's unique ability and anatomy to perform signature move). "Using his unique anatomy—specifically his externally rotatable feet—Pellegrino was able to create the Signature Move. . . ." *Id.*

[8] *See id.* at 378 (explaining how Pellegrino's signature move has become synonymous with him).