NO. 14-361

In the
Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Hobbs Act's plain text resolves this case. When two people agree to exchange money between themselves, they cannot be convicted of a conspiracy to violate the Hobbs Act because they have not conspired to "obtain[] . . . property from another, with his consent . . . under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). No "another" is involved, only themselves.

The government has no answer to the statutory text or the interpretive principles addressed in petitioner's opening brief. Instead, it tries to sow confusion. It refutes claims that petitioner never advanced. It presents the same types of arguments—and commits the same fallacies—that this Court has often rejected. And it conjures up new arguments that contradict positions it took throughout this case, both at trial and in opposing certiorari. These strained attempts to defend its prosecutorial overreach only confirm that the statute does not permit it.

The government's central argument is that if a public official takes a bribe, not only is he guilty of extortion, but he and the bribe-payor are also guilty of conspiring to extort because the bribe-payor agreed to help the official obtain property from someone other than the official himself. But that makes no sense of the statute and cannot be reconciled with basic principles of criminal law. Conspiracy is a specific-intent crime that requires at least *two* parties to agree to an endeavor that, if successful, would satisfy all of the elements of the underlying substantive offense. It is not enough to show that an

official intended to commit a crime and that someone else played some role in the wrongdoing; instead, the government must show that all conspirators had the same specific intent to commit the underlying substantive offense. When a private citizen pays a bribe to a public official, the private citizen does not intend to help the official obtain property from *another*; she intends to help the official obtain property from *herself*. And because the private citizen does not intend to obtain property "from another," the official cannot be guilty of conspiring with her to extort under the Hobbs Act. That straightforward interpretation is confirmed by the government's inability to identify a single pre-Hobbs Act decision involving a conspiracy to extort from a co-conspirator.

Putting aside its wordplay masquerading as interpretation, the government offers no affirmative arguments grounded in the statutory text. The government instead spends most of its time playing defense, conjuring up a crowd of supposed anomalies that could result from interpreting the statute in commonsense fashion. But the government's objections all rely on caricatures of petitioner's position. When properly understood, there is nothing anomalous about applying the statute as written. The government's supposed "anomalies" are merely limits on the government's ability to prosecute as broadly as it would prefer.

There is also no reason the Court should credit any of the government's far-fetched policy reasons for not enforcing the statute. Nor should it accept the government's invitation to replace the statutory text

with an "active participant" test that is too vague to be useful and, if applied as proposed by the government, cannot be squared with the fact that conspiracy is an inchoate crime defined not by actions, but by agreement. Instead, the Court should reject the government's attempts to expand its prosecutorial authority beyond what the text can bear and reverse the decision below.

ARGUMENT

I. The Government Has No Answer To The Hobbs Act's Plain Text.

When two individuals agree to exchange property only between themselves, they have not conspired to obtain property from another with his consent, as the Hobbs Act requires. The government's strained efforts to avoid the statutory text reinforce that its position has no merit.

A. The Government's Attempts To Evade The Statutory Text Fail Because Conspiracy Is A Specific Intent Crime.

The government begins with a general discussion of conspiracy law that does not engage petitioner's arguments. *See* U.S. Br. 15-20. When the government eventually turns to those arguments, it leads with a diversion, emphasizing that prosecutors convicted petitioner under 18 U.S.C. § 371, the general conspiracy statute, and not under the Hobbs Act's specific conspiracy provision, 18 U.S.C. § 1951(a). U.S. Br. 15, 24. The government never raised this argument at the certiorari stage, perhaps because petitioner never contested the point. *See* Pet. Br. 2 (citing 18 U.S.C. § 371). And, in any event,

the government never explains why it matters. Section 371 makes it a crime for "two or more persons [to] conspire . . . to commit any *offense* against the United States." 18 U.S.C. § 371 (emphasis added). The provision does not stand alone; it depends on identifying the "offense" that is the object of the conspiracy. The "offense" here is defined in the Hobbs Act, which prohibits the "obtaining of property from another, with his consent . . . under color of official right." 18 U.S.C. § 1951(b)(2); *see also* JA 36 (superseding indictment). It is *that* substantive offense—and all of its elements—that the government must prove the alleged conspirators agreed to commit. Section 371 thus leads the government right back to the Hobbs Act.

When it addresses the Hobbs Act, the government puts all its weight on a new argument. The government contends that because a person can be part of a conspiracy even if she does not herself *commit* every element of the underlying substantive offense, there also should be no requirement that she *agree* to every element of that offense. U.S. Br. 21-23. According to the government, as long as the official from his perspective is obtaining property from "another," it does not matter that the property belongs to the citizen whose conviction depends on the bizarre conclusion that she has conspired to extort herself.

The government's position cannot be reconciled with basic principles of conspiracy law. Since at least 1611, the gist of conspiracy has been the agreement itself, not the action taken pursuant to that

agreement. *See* Note, *Developments in the Law-Criminal Conspiracy*, 72 HARV. L. REV. 920, 923 (1959) (discussing the *Poulterers Case*). Because conspiracy is an inchoate crime, it requires a showing of "specific intent," which denotes not just "a corrupt or wrongful purpose," *id.* at 935, as the government suggests, but a specific criminal intent on behalf of each of the conspirators "to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Salinas v. United States*, 522 U.S. 52, 65 (1997); *see also Anderson v. United States*, 417 U.S. 211, 223 (1974) (to prove conspiracy, prosecutor "must show that the offender acted with a specific intent"); *United States v. Bailey*, 444 U.S. 394, 405 (1980) (conspiracy requires "heightened culpability").

This Court has held that a "'[c]onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.'" *Ingram v. United States*, 360 U.S. 672, 678 (1959); *see also United States v. Feola*, 420 U.S. 671, 686, 695 (1975). Moreover, because a conspiracy is a "partnership in crime," *Pinkerton v. United States*, 328 U.S. 640, 644 (1946), each of the conspirators must join together with a "unity of purpose" to accomplish the same objective, *Am. Tobacco Co. v United States*, 328 U.S. 781, 810 (1946), regardless of what acts are taken. In other words, "[a]lthough the government need not prove commission of the substantive offense or even that the conspirators knew all the details of the conspiracy, it must prove that the intended future conduct they agreed upon includes all the elements of the substantive crime." *United States v. Pinckney*, 85

F.3d 4, 8 (2d Cir. 1996) (internal quotation marks and citation omitted).

The government's contrary position disassembles the conspiracy by considering the underlying offense only from the perspective of the public official. But "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). That is why, for example, "the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all." *United States v. Gooding*, 25 U.S. 460, 469 (1827). Because conspiracy requires a "unity of purpose," the elements of the substantive offense must be viewed from the perspective of the conspiracy as a whole.

To convict for conspiracy to extort under the Hobbs Act, the government must therefore prove that at least two individuals—both the public official and the private citizen—each had the specific intent for the official to obtain property "from another." When the only property that changes hands is between a public official and a private citizen who pays a bribe, the private citizen does not have the specific intent to help the official obtain property "from another." The required unity of purpose is lacking, for the private citizen has merely agreed to help the official obtain her own property. As Judge Sutton explained, "[t]hese . . . people did not agree, and could not have agreed, to obtain property from 'another' when no other person was involved—when the property, so far as the record shows, went from one coconspirator . . .

to another." *United States v. Brock*, 501 F.3d 762, 767 (6th Cir. 2007).

The government's inability to answer this logic is best illustrated by its unconvincing riposte to petitioner's hypothetical conversation. In that hypothetical, John proposes to Susan a conspiracy to deprive "another" of property, and Susan is then confused to find that the intended victim, the "another" John has in mind, is herself. Pet. Br. 23. In response, the government imagines that "John might have said: 'Let us agree that I, a public official, will obtain money from another, namely you, by getting your consent through use of my right and authority as a public official." U.S. Br. 23. But this form of the exchange alters the focus of John's proposal from the *class* of potential extortion targets delineated by the statute—the indefinitely large class of third-party "anothers" that could be the conspirators' intended victims—to Susan herself, *a single named individual* ("namely you"). The government thus forgets that particular individuals, while referred to in conversation, are never named in criminal statutes.

More fundamentally, although the government sees nothing strange in its counter-hypothetical, it is a conversation that only a lawyer could dream up. If John wants Susan to agree to pay him for official acts, there is a far more direct way to ask: "Let's agree that I will obtain property from *you* in exchange for my official acts." Similarly, the government's counter-hypothetical includes a redundancy that would seldom, if ever, occur either in real conversation or in statutory language. In the

government's formulation, John says, "[l]et us agree that I" will get "your consent." But no fluent speaker of English would ask for both agreement *and* consent. The government's need to include an awkward redundancy and to insert "namely you" into its hypothetical—thus defining the term "another" to mean the opposite of its ordinary meaning (namely, not "another," but "you")—confirms that its statutory construction is at war with ordinary English usage.

The government relies heavily on *United States v. Holte*, 236 U.S. 140 (1915), but that case only highlights the problems with its atextual position. There, the Court held that a defendant could conspire to violate the Mann Act, which punished "any person who shall knowingly transport . . . *any woman* . . . for the purpose of prostitution or debauchery, or for any other immoral purpose," Pub. L. No. 61-277, ch. 395 § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421) (emphasis added), even though the defendant was the woman who was transported. *Holte*, 236 U.S. at 144-45. Focusing on the statutory text, the Court explained that the defendant could be "within the letter of the act . . . and we see no reason why the act should not be held to apply." *Id.* *Holte* would have been different if Congress, instead of referring to "*any* woman," had defined the substantive offense as "knowingly transport[ing] . . . *another* woman." If that had been what the statute required, the defendant could not have come within the letter of the Act. She could not have intended to transport "another woman" when she agreed only to transport herself.

The statutory language here is even clearer, for the Hobbs Act not only requires that the property be obtained "from another," but also "with his consent." Because each conspirator must intend to bring about every element of the substantive crime, the government's theory would punish a bribe-payor for conspiring to help a public official obtain the bribe-payor's own consent—an odd notion to say the least. The government objects that "[t]he consent of all conspirators is not required, only the consent of the person giving money to the public official." U.S. Br. 24. But petitioner has never suggested otherwise. The person from whom property is obtained is indeed the one who must consent, but "[h]ow do (or why would) [that person] conspire to obtain [his] own consent?" *Brock*, 501 F.3d at 767. The government has no answer.

The statute's contrasting use of the words "whoever" and "another" casts further shade on the government's reading. The Hobbs Act imposes liability on "whoever" conspires to obtain property from "another," making clear that the "whoever" who is subject to liability cannot be the same person as the "another" from whom property is obtained. The same textual problem exists under 18 U.S.C. § 371, which punishes "each" person who "conspire[s] . . . to commit any offense against the United States." Because the "offense against the United States" is Hobbs Act extortion, the government must prove that "each" conspirator specifically intended to further a scheme whereby a public official would obtain property "from another," making clear that the person subject to criminal punishment under Section

371 cannot be the "another" from whom property is obtained.

The government responds by criticizing petitioner for "cobbling together the . . . language of Section 1951(a) ('Whoever' interferes with commerce by 'extortion or attempts or conspires so to do') with the definition of extortion in Section 1951(b)(2) ('obtaining of property from another.')." U.S. Br. 24. But what the government derides as "cobbling together" has a more common name: reading the statute as a whole. *See Burgess v. United States*, 553 U.S. 124, 129-31 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case."). The government's interpretive approach cannot be reconciled with that principle. The government nonetheless suggests that "if petitioner were correct that 'Whoever' conspires must also be the person who 'obtain[s]' the property, then *only* public officials could be conspirators, because only public officials can obtain property 'under color of official right.'" U.S. Br. 25. That also mischaracterizes petitioner's argument. The point is not that the "whoever" must be the conspirator who obtains the property; it is that "whoever" refers to the person subject to criminal punishment—whether it is the public official who obtains the property or the private party who agrees to help the official obtain the property. *That* is the person who cannot also be the "another" from whom the property is obtained.

The government likewise suggests that it would be anomalous if the bribe-payor could be the "another" for purposes of substantive extortion but not for purposes of a conspiracy to commit extortion.

U.S. Br. 26. There is nothing anomalous about that at all. In fact, the bribe-payor is the "another" for purposes of both the substantive offense and the conspiracy, as she is the individual from whom the property was obtained. Because she is the "another" in that context, however, she cannot be a co-conspirator, because otherwise she would have to conspire to obtain her own property. That does not "beg[] the question presented." U.S. Br. 27. It merely recognizes that the crime of conspiracy involves an agreement between at least two people who both must have the specific intent to commit the same underlying offense. Although one person on his own can extort property from someone else ("another"), those same two people cannot *conspire to* extort property from "another" when no one else is involved.

B. The Government's Atextual Reading Cannot Be Reconciled With Basic Principles Of Criminal Law.

The government makes little effort to address the problems its position would pose for the network of state and federal statutes that have long governed this area of law. Because every act of extortion-under-color-of-official-right requires the bribe-payor's "consent," the government's approach would turn the Hobbs Act into a blanket prohibition on the paying of bribes, overriding the careful limits Congress has placed on federal bribery statutes. *See* Pet. Br. 25. It would also enable the government to add a conspiracy charge to every count of substantive extortion involving bribery, giving the government additional leverage in plea bargaining and violating

the principle that a conspiracy conviction is supposed to punish something different from the underlying offense. *See* Pet. Br. 37-39.

The government's only response is to suggest that "[o]btaining property with another's 'consent' is not equivalent to forming a conspiratorial agreement," because "[a]s used by the Hobbs Act . . . consent simply indicates the taking of property under circumstances falling short of robbery." U.S. Br. 30, 31. But the government offers no metric for figuring out the difference between a bribe-payor who "agrees" and one who merely "consents." *Cf.* Oxford English Dictionary 760 (2d ed. 1989) (consent: "[t]o agree together"); *id.* at 264 (agree: "to give consent"). And it again forgets that conspiracy is a specific-intent crime. When Susan pays John in exchange for official acts, Susan has both consented to the exchange and formed an agreement to commit the elements of substantive extortion. Under the government's theory, every act of receiving a bribe is therefore equivalent to a conspiratorial agreement, because the bribe-payor intends to assist the official in obtaining property under color of official right.

The government is correct, of course, that the obtaining of property, with consent, "induced by wrongful use of actual or threatened force, violence, or fear" would not be a conspiratorial agreement, and neither would an agreement to pay an official who demands property under false pretense of official right. In those circumstances, the person paying the money does not have the specific intent to commit the elements of substantive extortion. The person facing a threat of violence pays the money to avert the

threat. And the person who encounters a demand under false pretense of official right believes that the official is entitled to the payment, and thus does not intend to facilitate the wrongful obtaining of property. But none of this diminishes petitioner's point: The government's reading would transform every *payment of a bribe* into a conspiracy to extort under the Hobbs Act, laying waste to the many statutes that prohibit bribery in more precisely defined circumstances.

The government's reading would also violate the principle that "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime," the government cannot convict the defendant for both. *Pinkerton*, 328 U.S. at 643. The government suggests that this rule does not apply because Hobbs Act extortion does not "require concerted criminal activity." U.S. Br. 32 n.6. But the type of color-of-official-right extortion at issue here—voluntary payments made in exchange for official acts—certainly requires "a plurality of criminal agents." *Iannelli v. United States*, 420 U.S. 770, 785 (1975). Nor would the "circumstances of this case . . . fall under the so-called third-party exception," U.S. Br. 32 n.6, as the jury could have found an agreement between only petitioner and the repair shop owners.

With its many diversions swept aside, the government has nothing left to say. It makes no effort to explain why Congress would have enacted 18 U.S.C. § 666—or any other federal bribery statute—if a Hobbs Act conspiracy already covered

the same territory and more. *See* Pet. Br. 25. It makes no attempt to justify the intrusion on state bribery laws that its position would create. Nor does it so much as acknowledge the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000). The government also does not dispute that early English and state cases involved conspiracies between two or more people to obtain property from some other person outside the conspiracy. *See* Pet. Br. 39-41. In fact, the government does not identify a single early decision involving a conspiracy to extort property from a co-conspirator.

II. The Government Has No Persuasive Reasons To Depart From The Hobbs Act's Text.

The government offers a host of policy reasons for not complying with the statute. These arguments are unpersuasive and far outweighed by the many reasons to apply the statutory text as written and as Congress intended.

The government claims, for instance, that "petitioner's reading would . . . create a substantial loophole in conspiracy law, because many federal criminal statutes use phrases like 'from another' or 'to another." U.S. Br. 28. But this case does not require the Court to announce any judgment on how the word "another" is used in other statutes. Statutory language is read in context and in light of its place in the overall statutory scheme. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120,

133 (2000); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (recognizing that statutory terms may have different meanings within the same statute). Especially when interpreting criminal statutes, there is no warrant for making sweeping judgments about the meaning of statutory terms ripped out of context.

In any event, there is nothing troubling about interpreting the word "another" according to its ordinary meaning. The government's example proves the point. Suggesting that reading the text as written could somehow affect the government's ability to prosecute spies, the government notes that federal law punishes federal employees who "obtain[] from another" any coded information and without authorization "willfully publish[] or furnish[]" that information "to another." U.S. Br. 28 (citing 18 U.S.C. § 952). Imagining "a State Department employee who forms an illicit agreement to acquire coded information from a Ukrainian spy and sell it to his contact in the Russian government," the government claims that "[u]nder petitioner's interpretation, *none* of the three participants in that scenario would face conspiracy liability: The conspirators would be incapable of 'obtain[ing] from another' or 'furnish[ing] to another.'" U.S. Br. 28-29.

But why does that matter? Even if the government could not prosecute for conspiracy under 18 U.S.C. § 952, Congress has enacted many other provisions targeting similar conduct. There is no reason the government could not use these other provisions to pursue a conspiracy conviction. For example, the government could potentially prosecute

the State Department employee, the Ukrainian spy, and the Russian official for conspiracy to violate 18 U.S.C. § 798(a), which punishes "[w]hoever knowingly and willfully communicates . . . to an unauthorized person . . . for the benefit of any foreign government . . . any classified information." The Ukrainian spy might also be prosecuted under 18 U.S.C. § 951, which punishes agents of foreign governments who act secretly in the United States. And if *two* State Department employees formed an agreement to acquire coded information from the Ukrainian spy and sell it to a contact in the Russian government, the employees could be punished for conspiracy to violate 18 U.S.C. § 952.

The criminal code contains many other prosecutorial tools that fill in the supposed "gaps" the government fears. Many conspiracies to forge writings for the purpose of obtaining money from the United States, for example, could be punished under 18 U.S.C. § 510 (forging Treasury checks or bonds or securities), or under 18 U.S.C. § 1343 (wire fraud). A conspiracy to forge a money order might be punished under the first paragraph of 18 U.S.C. § 500, and a conspiracy to forge a passport for the use of another would probably be covered by the first paragraph of 18 U.S.C. § 1543. These examples show that Congress "knows how to" create conspiracy liability "when it wishes to do so." *Whitfield v. United States*, 543 U.S. 209, 216 (2005). The government has more than enough federal crimes in its arsenal. There is no need for it to torture the text of ones that do not apply.

The government also suggests that applying the Hobbs Act as written could "create serious conceptual problems in cases involving . . . artificial entities" like businesses or unions. U.S. Br. 27-28. But there is no reason basic principles of corporate law would not be up to the task. As this Court has emphasized, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). Indeed, "[f]ew norms are more deeply ingrained into the fabric of American law than the principle that 'a corporation and its stockholders are deemed separate entities.'" Br. for United States at 23, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, et al.), 2014 WL 173486 (quoting *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442 (1934)). *Cedric Kushner* itself held that a corporate officer could be punished for violating the Racketeer Influenced and Corrupt Organizations Act because "the employee and the corporation are different 'persons,'" *Cedric Kushner*, 533 U.S. at 163, demonstrating that liability indeed can "turn on the particular . . . form of the entity." U.S. Br. 28 n.5.

The government argues that giving the statutory text its ordinary meaning "would perversely penalize the government for alleging and proving additional facts at trial." U.S. Br. 27. Here, again, the government has distorted petitioner's position. Petitioner has never contended that the fact of an agreement between an official and property owners makes an otherwise criminal conspiracy non-

criminal, thereby penalizing the government for proving too much. Quite the opposite: the problem with the government's position is that it allows the government to convict a defendant while proving *too little*, as this case well illustrates. At trial, the government thought it needed to prove only that petitioner and the repair shop owners formed an agreement to exchange property between *themselves*. While the government alleged that petitioner participated in a larger conspiracy involving other police officers, it made no effort to prove that petitioner directly agreed with those officers to obtain property from third parties. As a result, the jury convicted petitioner without finding that petitioner formed an agreement with anyone outside the conspiracy.

If the government had litigated this case differently—that is, if the government had tried to prove an agreement between petitioner and other police officers to obtain property from someone outside the conspiracy—the government may well have failed to secure a conviction. Indeed, the whole problem with petitioner's trial is that the government gained all the litigation advantages of a conspiracy charge without having to meet its burden of proof. It does not penalize the government to require that it prove the elements of the crime it has chosen to prosecute.

The government tries to reassure the Court that "any error in the jury instructions would have been harmless" because "it is hard to imagine how the jury could believe that petitioner committed extortion . . . yet *not* believe that he participated in the scheme

along with other officers." U.S. Br. 44. But merely committing a crime "along with" others is not a conspiracy; what is required is an *agreement* between the supposed co-conspirators. And the jury never found—nor was it asked to find—that petitioner formed an agreement with other police officers to extort property from the repair shop owners. Instead, the government's strategy throughout trial focused on connecting petitioner with the repair shop owners, not with other officers. *See, e.g.*, JA 64-66, 95-98. Although the government asserted in the indictment that petitioner participated in a broad conspiracy, and it now cites isolated snippets from the record where other officers were discussed, it never sought to show a direct agreement *between* officers; the repair shop owners were supposed co-conspirators at the center of a conspiracy linking all the officers together.

In other words, "the pattern" the government attempted to prove "was that of separate spokes meeting [in] a common center, though . . . without the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755 (1946) (internal quotation marks omitted). Because "[t]hieves who dispose of their loot to a single receiver—a single fence—do not by that fact alone become confederates," *id.*, it cannot be assumed that they are all part of the same conspiracy absent proof that they agreed to participate in a broader conspiracy. If anything, "[t]he proof" offered by the government here "made out a case, not of a single conspiracy," but of multiple different instances of police officers agreeing to receive bribes from the repair shop owners. *Id.*

For that reason, petitioner was entitled to a judgment of acquittal on the conspiracy charge. As this Court has cautioned, jury instructions should "scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass" in order to "protect[] against unwarranted imputation of guilt from others' conduct." *Id.* at 776-77. In this case, the jury instructions did not accomplish that task. Even if there were some possibility—contrary to the evidence presented and the government's strategy—that the jury might have convicted based on a legitimate theory, reversal would still be required. *See Skilling v. United States*, 561 U.S. 358, 414 (2010) ("[C]onstitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory.").

III. The "Active Participant" Standard Cannot Rescue The Government's Position.

The Fourth Circuit's decision warrants reversal not only because it fails to apply the statutory text, but also because it replaces the elements of the offense with an unmanageable "active participant" test. At the certiorari stage, the government maintained that the Fourth Circuit's test merely restates basic conspiracy principles. *See* Opp. 9. Shifting positions, the government now suggests that the test adds something in situations "where Congress has chosen to criminalize only one half of a transaction that typically involves consent or acquiescence"; in that situation, the government says, "conspiracy liability should presumptively

require a higher level of coordinated activity" on the part of the bribe-payor. U.S. Br. 34.

The government's "higher level of coordinated activity" test cannot be reconciled with basic conspiracy law. To be guilty of conspiracy, a defendant need not actively participate in anything; he simply must agree. As this Court has held, "a conspiracy to commit [the substantive] offense is nothing more than an *agreement* to engage in the prohibited conduct." *Feola*, 420 U.S. at 687 (emphasis added); *see also Iannelli*, 420 U.S. at 777 ("Conspiracy is an inchoate offense, the essence of which is an *agreement* to commit an unlawful act." (emphasis added)). Indeed, the government has insisted elsewhere that "proof of an overt act is not required to establish the crime of conspiracy to violate the Hobbs Act, in violation of 18 U.S.C. 1951(a)." Br. for United States at 7, *Salahuddin v. Dennison*, 135 S. Ct. 2309 (Mem) (2015) (No. 14-654), 2015 WL 1534352. And as the jury instructions in this case make clear, although a Section 371 conspiracy does require an overt act, the government need not prove that the bribe-payor was the one who committed it. *See* JA 217-18 ("It is sufficient for the government to show that *one* of the conspirators knowingly committed an overt act"). If the government does not need to prove that the bribe-payor did *anything*, how can it be required to prove a "higher level of coordinated activity"?

This Court's decisions in *Holte* and *Gebardi* also do not support replacing the statutory elements of the offense with an unwritten active-participant test. In both cases, the Court suggested that a woman who

actively procured her own transportation could be convicted for aiding and abetting or conspiring to violate the Mann Act. *Holte* and *Gebardi* are best understood not as replacing the elements of conspiracy with an active-participant test, but as addressing what evidence may be relied on to prove that a defendant specifically intended to accomplish the purposes of the conspiracy. *See Glasser v. United* States, 315 U.S. 60, 80 (1942) ("Participation in a . . . conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and collocation of circumstances."), *superseded by statute on other grounds*. The government also claims that, "[f]or decades, lower courts have permitted bribe-payors to face aiding-and-abetting liability for actively participating in bribery schemes." U.S. Br. 36. But that improperly conflates aiding and abetting, which requires proof of affirmative acts beyond agreement, with conspiracy, which does not. *See Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014) (explaining that the general aiding-and-abetting statute "reflects a centuries-old view of culpability: . . . a person may be responsible for a crime he has not personally carried out if he *helps another to complete its commission*.") (emphasis added).

The government's vigorous defense of its new "higher level of coordinated activity" test is doubly strange, because the jury instructions in this case had nothing to say about it. Consistent with basic conspiracy principles, the trial court instructed the jury that it could "infer . . . the existence of an agreement" from "the conduct of the parties involved." JA 213-14. In a footnote, the government

observes that the jury instructions "caution[ed]" that "mere knowledge or acquiescence, without participation in the unlawful plan, [was] not sufficient." U.S. Br. 35 n.7 (citing JA 195). But that instruction does not reflect the government's "higher level of coordinated activity" test. Instead, it is word-for-word the model instruction that applies to *all* conspiracy cases. *See* Leonard Sand, et al., *Model Federal Jury Instructions* § 19.01 (2015) ("I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient."). That instruction reflects the government's certiorari-stage position: the active-participant test merely restates the basic conspiracy principle that the government must prove an *agreement*. If *that* is all the test means, then it does nothing to prevent the government's interpretation from turning every payment of a bribe into a conspiracy to commit extortion. If the test is to avoid that problem, it has to do additional work beyond merely requiring a knowing agreement.

The government's attempt to defend the active-participant test thus underscores the problems with its position. If the government's test requires courts to "ascertain what level of enthusiasm, ambivalence or regret is required to escape prosecution," *Brock*, 501 F.3d at 771, then it is vague and unworkable. The Court can avoid this confusion entirely by reading the statute according to its plain text.

CONCLUSION

The Fourth Circuit's decision should be reversed and the case remanded for further proceedings.

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Respectfully submitted.

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