No. 14-654

In the Supreme Court of the United States

RONALD SALAHUDDIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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The government does not dispute that prosecutors invoke the Hobbs Act conspiracy offense with considerable frequency. And it cannot dispute that the lower courts have themselves acknowledged conflicting determinations—indeed, broad confusion—about whether proof of an overt act is an element of that offense.

The opposition's focus on the merits of the question presented is for those reasons unsurprising: it is the government's last line of defense against review by this Court. But where there is a conflict among the lower courts on an important issue that arises frequently, the Court typically focuses on the merits only after granting review. They are much less relevant in determining whether review is warranted.

That conclusion is particularly appropriate here, because the government's reliance on this Court's precedents addressing the overt act issue under other statutes is completely misplaced. The Hobbs Act's formulation of the conspiracy offense differs materially from any previously considered by this Court. Unlike a stand-alone conspiracy offense or a conspiracy offense included in a statute clearly imposing liability on concerted actors, the Hobbs Act creates conspiracy liability by adding a four-word clause. That clause is most logically interpreted in light of the basic federal conspiracy crime, which requires proof of an overt act.

Moreover, this case is an excellent vehicle for resolving the issue:

- Petitioner was acquitted of all of the substantive charges against him and convicted only on the single Hobbs Act conspiracy count (Pet. 4-5);

- The government's closing argument linked the conspiracy count to the acts alleged in the indictment in connection with the substantive offenses (3d Cir. JA3518); and
- The district court, applying a preponderance of the evidence standard in connection with sentencing, held that the evidence was insufficient to show that petitioner committed those acts (principally, exercising influence over the awarding of government contracts) and that payments he received therefore could not qualify as kickbacks or payoffs but instead related to repayment of a loan (Sentencing Tr. 33, 57).

This is a case, therefore, in which the failure to require the jury to find an overt act most likely led to the conspiracy conviction.

Finally, the government is wrong in asserting that the Court's review in this case would be limited to plain error. Petitioner sufficiently raised the overt act issue in his motion for acquittal, and the question was subjected to full review by the court below. Under *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), therefore, the issue is subject to plenary review in this Court.

For all of these reasons, the petition for a writ of certiorari should be granted.

A. There Is A Broad And Acknowledged Conflict Over The Question Presented.

The government recognizes the lower courts' disagreement as to whether an overt act is a required element of the Hobbs Act conspiracy offense, but attempts—unconvincingly—to minimize the conflict's scope and importance. Thus, the government ignores the four courts of appeals that have openly acknowl-

edged the conflict. See, *e.g.*, *United States* v. *Singleton*, 565 F. App'x 108, 110 n.2 (3d Cir. 2014) (noting the split "among our sister circuits"); *United States* v. *Corson*, 579 F.3d 804, 810 n.† (7th Cir. 2009) (noting the split among circuits); *United States* v. *Pistone*, 177 F.3d 957, 960 (11th Cir. 1999) (noting that "[t]he Circuits which have spoken on" the question presented here "are divided."); *United States* v. *Rogers*, 118 F.3d 466, 474 n.8 (6th Cir. 1997) (recognizing "a split among the circuits"); *United States* v. *Thomas*, 8 F.3d 1552, 1560 n.18 (11th Cir. 1993) (noting the "split in the circuits"); Pet. App. 14a-15a.

Moreover, the government is wrong in asserting that the lower courts have not had an opportunity to consider this issue in light of this Court's decisions in *United States* v. *Shabani*, 513 U.S. 10 (1994), and *Whitfield* v. *United States*, 543 U.S. 209 (2005). Two of the Fifth Circuit cases affirming that an overt act is a required element of a Hobbs Act conspiracy were decided after this Court's decision in *Shabani* in 1994. See *United States* v. *Hickman*, 151 F.3d 446, 454 (5th Cir. 1998); *United States* v. *Box*, 50 F.3d 345, 349 (5th Cir. 1995). And after *Whitfield* was decided in 2005, the Fifth Circuit had an additional opportunity to address the issue. See *United States* v. *Herrera*, 466 F. App'x 409 (5th Cir. 2012).

Finally, the government claims that the Fifth, Sixth, and Seventh Circuits will reject their prior statements and hold that a conviction for Hobbs Act conspiracy does not require proof of an overt act, relying on statements by some panels pointing out inconsistent approaches in circuit precedent. Opp. 16. But it provides no basis for that prognostication. Rather, the decisions cited by the government further demonstrate the frequency with which the issue

arises and the uncertainty among the lower courts regarding how it should be resolved. They confirm the need for this Court's intervention to resolve the conflict among the lower courts.[1]

B. The Section 1951(a) Conspiracy Offense Requires Proof of an Overt Act.

The government's response focuses principally on the merits, invoking this Court's decision in *Shabani* and its progeny. As the petition explains, however, Section 1951(a) differs from the statutes at issue in those cases because it does not include a separate,

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[1] As the petition explains (at 10 n.3), the government itself has on occasion argued that Hobbs Act conspiracy charges require proof of an overt act. The government disputes this point (Opp. 9 n.1), asserting that it did not take that position in *United States* v. *Manzo*, 636 F.3d 56 (3d Cir. 2011)—even though the court of appeals stated in its opinion that "the government argues that" among the "elements of a conspiracy" is "an overt act," which was satisfied in that case because, "when the Manzos accepted down payments in furtherance of this scheme, this constituted an overt act substantiating a charge for conspiracy." *Id*. at 66. Although the oral argument before the court of appeals is not easy to follow, the statement in the court's opinion is at least consistent with statements made by the government at oral argument, in particular during the government's rebuttal. See Oral Argument at 27:42-29:14, *United States* v. *Manzo* (3d Cir. No. 10-2489), available at goo.gl/fZ2PpG.

And *Manzo* is not unique. In *United States* v. *Kale*, 2010 WL 1718291 (E.D. Pa. Apr. 26, 2010), for example, the court described the government's "assert[ion] that proof of a Hobbs Act conspiracy also requires proof of an overt act." *Id*. at *4, n.3. And in its Answer to Defendant's Rule 33 Motion for Judgment of Acquittal (Dkt. 135), the government in that case did indeed argue that, "[i]n order to prove a violation of 18 U.S.C. § 1951 the government must establish," among other things, that "[t]he defendant committed at least one overt act alleged in the superseding indictment." *Id*. at 5.

standalone conspiracy offense—but rather creates a conspiracy offense through the inclusion of a two-word phrase ("or conspires") in the very same sentence that establishes the substantive offense. Pet. 12-14; compare 18 U.S.C. § 1951(a) with 21 U.S.C. § 846 (at issue in *Shabani*); 18 U.S.C. § 1962(d) (at issue in *Salinas*); and 18 U.S.C. § 1956(h) (at issue in *Whitfield*). Accordingly, as we have explained, the binary "formulary" analysis applied in these earlier cases is inapplicable. Pet. 12-14.

Singer v. *United States*, 323 U.S. 338 (1945), upon which the government relies (Opp. 9-10, 12-13), does not support a different result. It is true that the portion of the statute at issue in *Singer* expressly relating to conspiracy was formulated in a manner similar to the Hobbs Act. However, key differences in the formulation of the substantive offense make *Singer* inapplicable.

In particular, the statutory provision at issue in *Singer* includes antecedent clauses that expressly refer to joint action. See, *e.g.*, Selective Training and Service Act § 11, Pub. L. No. 76-783, 54 Stat. 885, 894 (1940) ("any person who shall knowingly make, or be a party to the making of, any false statement"; any person "who knowingly counsels, aids, or abets another to evade registration or service"). Because the statute in *Singer* separately specified liability for concerted actors and included the reference to conspiracy as a "catch-all" provision, it was reasonable to interpret that statute in the same manner as a statute specifying a separate conspiracy offense. In both contexts, the statutory structure enabled Congress to specify an overt act requirement in the course of detailing the liability standard for concerted action if Congress had wished to do so.

Singer does not control this case, because the text of the Hobbs Act that precedes the express reference to conspiracy says nothing about concerted action (see Pet. 1), and therefore precludes the conclusion drawn in *Singer*. For this reason, and for the reasons discussed in the petition, the structure of the Hobbs Act precludes application of the bipolar "formulary" approach applied in *Shabani* and its progeny. See Pet. 10-15.

Instead, this Court should look to the broader, contemporaneous statutory context: the Hobbs Act was enacted against a statutory background that included a general federal conspiracy offense requiring proof of an overt act. The terms of that more specific statute therefore elucidate Congress's intent with respect to the Hobbs Act's conspiracy clause: an intent to preserve an overt act requirement. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Respondent suggests (Opp. 12) this Court foreclosed a "similar argument" in *Whitfield*. That is not correct. The petitioners in *Whitfield* argued that 18 U.S.C. § 1956(h) "d[id] not establish a new conspiracy *offense*" at all. 543 U.S. at 214. Instead, petitioners there asserted that § 1956(h) was implemented solely to "increase the *penalty* for conviction of a money laundering conspiracy under § 371." *Ibid.* "In other words," according to petitioners in that case, "the Government must continue to prosecute money laundering conspiracies under § 371, but that § 1956(h) now provides enhanced penalties for conviction." *Id.* at 214-215. It was this idiosyncratic claim that *Whitfield* rejected, reasoning that "if Congress had intended to create the scheme petitioners envision, it would have done so in clearer terms,"

such as by "provid[ing] * * * cross-reference to § 371." *Id*. at 215.

In the present case, by contrast, petitioner recognizes that Section 1951(a) creates a separate conspiracy offense. The contention here is that the elements of that offense include proof of an overt act. To do otherwise would be to impute to Congress an intent to affect a dramatic change in conspiracy law with an obscure, two-word clause—in other words, to "hide elephants in mouse-holes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

That conclusion, as the petition explains (at 15-16), is further supported by the rule of lenity, the importance of which has repeatedly affirmed (*e.g.*, *United States* v. *Santos*, 553 U.S. 507, 514 (2008)), especially when those statutes involve the "elastic" offense of conspiracy. *See Krulewitch* v. *United States*, 336 U.S. 440, 445-446 (1949) (Jackson, J., concurring in judgment) (internal quotation and footnotes omitted).

C. Petitioner's Claim Is Subject To Plenary Review, Not Plain Error Review.

The government contends that because petitioner "did not object to the jury instructions listing the elements of Hobbs Act conspiracy," his claim that an overt act in furtherance of the alleged conspiracy is one such element "is reviewable only for plain error." Opp. 18. That is simply wrong; petitioner's claim in fact is subject to plenary review—and this case is therefore an excellent vehicle for resolution by this Court of the conflict among the lower courts.

In *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988) (plurality), the respondent asserted that the petitioner had failed to preserve a legal issue because

he did not object to a jury instruction embodying the challenged legal principle. This Court subjected the question to plenary review, not plain error review, because the issue had also been raised in motions for summary judgment and directed verdict.

The plurality explained that "the same legal issue was raised both by those motions and by the jury instruction" and the petitioner's "legal position in the District Court * * * was consistent with the legal standard that it now advocates." *Praprotnik*, 485 U.S. at 120. For that reason, there was "no obstacle to reviewing the question presented in the petition for certiorari, a question that was very clearly considered, and decided, by the Court of Appeals." *Id.* at 121.

Petitioner here raised his argument that the government had failed to prove a Hobbs Act conspiracy in a motion for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Pet. App. 64a. As permitted by Rule 29, petitioner made his initial motion at the close of the Government's case-in-chief, and—also as permitted by Rule 29—the district court deferred ruling on the motion until after the verdict. *Ibid.*

In fact, the district court stated before petitioner's counsel made the Rule 29 motion that it preferred "to deal with the jury at this point" and "having [defense counsel] preserve your motion at this time with the right to make further arguments at a break later in the day or the end of the day." 10 Tr. 12 (Sept. 26, 2011). Petitioner's counsel therefore made a general statement that the government had failed to prove its case:

> the Court should grant a judgment of acquittal with respect to Mr. Salahuddin * * * on the ground that giving the government the best inferences that can be drawn from the evidence, the government has not shown, your Honor, that my client conspired to extort anything from anyone or that he attempted to extort under color of official right with respect to Counts 1 and 2.

Ibid.

In his renewed Rule 29 motion for acquittal, made with a Rule 33 motion for a new trial, petitioner argued in further detail that acquittal was required because the government had failed to prove, specifically, an overt act in furtherance of the conspiracy. Pet. App. 81a-85a (district court decision addressing overt act argument); Brief of Defendant Salahuddin on Motion for Acquittal or a New Trial, at 10-11 (Dkt. 75-3).

"It should not be surprising if petitioner's arguments" on the initial motion were much less detailed than the arguments in the post-trial motion given the procedure established by the district court. *Praprotnik*, 485 U.S. at 264. Here, as in *Praprotnik* (which notably was a civil case), that fact does not limit this Court to plain error review.

Application of the *Praprotnik* rule is especially sensible here because the court of appeals carefully considered the legal issue on the merits and subjected it to plenary review. The court thus concluded that "the District Court did not err, let alone plainly err," in determining that proof of an overt act was not required. Pet. App. 10a-16a.

Here, as in *Praprotnik*, "petitioner's legal position in the District Court * * * was consistent with the legal standard that [he] now advocates," and there is accordingly "no obstacle to reviewing the question that was very clearly considered, and decided, by the Court of Appeals." 485 U.S. at 120-21.

In arguing otherwise, the government simply assumes that the plain error standard applies and then asserts that petitioner cannot satisfy that test. Opp. 18 (citing *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997)). But the government's assumption begs the question—and, for the reasons just explained, the Court is not restricted to plain error analysis in its review of petitioner's claim.

Respectfully submitted.

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[2] The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.