No. 24-6364

IN THE SUPREME COURT OF THE UNITED STATES

CEDRIC CROMWELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether bribery of the elected chairman of the governing council of an Indian tribe, who was also president of the governing board of the tribe's gaming authority, is exempt from the Hobbs Act's criminalization of extortion "under color of official right," 18 U.S.C. 1951(a) and (b)(2).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Mass.):

United States v. Cromwell, 20-cr-10271 (Jan. 31, 2023)

United States Court of Appeals (1st Cir.):

United States v. Cromwell, 23-1116 (Sept. 27, 2024)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-50a) is reported at 118 F.4th 424.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 2024. A petition for rehearing was denied on October 31, 2024 (Pet. App. 57a). The petition for a writ of certiorari was filed on January 17, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on two counts of federal program bribery, in violation of 18 U.S.C. 666(a)(1)(B); one count of conspiring to commit Hobbs Act extortion under color of official right, in violation of 18 U.S.C. 1951; and three counts of Hobbs Act extortion under color of official right, in violation of 18 U.S.C. 1951. Judgment 1. The district court granted petitioner's posttrial motion for a judgment of acquittal on the Hobbs Act counts but denied a judgment of acquittal on the federal program bribery counts. Pet. App. 7a. The court of appeals reversed the federal program bribery convictions, reinstated the Hobbs Act counts, and remanded the case for further proceedings. Id. at 2a-50a.

1. In 2007, the United States recognized the Mashpee Wampanoag as a Native American tribe in Massachusetts. See 72 Fed. Reg. 8007 (Feb. 22, 2007). Petitioner was then repeatedly elected chairman of the governing tribal council. C.A. App. 358-359, 500-501. Petitioner also became the president of the tribe's gaming authority and furthered its efforts to build a casino. Id. at 1438-1454. The gaming authority aimed to construct the casino on land that the federal government had placed into trust for the tribe. Id. at 286-287, 308-310, 359-361.

In 2014, petitioner persuaded the gaming authority to enter into a consulting agreement with Robinson Green Beretta

Corporation (RGBC), a Rhode Island architecture and design firm run by petitioner's codefendant. C.A. App. 264, 281-282, 289-290, 338-341, 374-377, 699-702, 715-716. The agreement was worth millions of dollars in fees but could be canceled by the gaming authority at will. Id. at 716-717, 1525, 1557-1559. And once RGBC started submitting invoices, petitioner began asking the company for large checks. Id. at 780-785, 797-801, 806, 962-967, 1400-1418.

Petitioner instructed RBGC to issue those checks under a pseudonym and to make them out either to a shell company under petitioner's control or to a company belonging to one of petitioner's non-Indian associates (who would route the money to petitioner). C.A. App. 555-557, 584-594, 779-785, 798-801, 958-967, 1400-1418. Petitioner then deposited the funds into various accounts and used the money for personal expenses. Id. at 960-965, 987, 993-996. He also demanded and received from RGBC an exercise bike and a weekend stay at a Boston hotel. Id. at 820-827, 1581-1598; see Pet. App. 5a-6a.

2. A grand jury in the District of Massachusetts indicted petitioner on one count of conspiring to commit federal program bribery, in violation of 18 U.S.C. 371; two counts of federal program bribery, in violation of 18 U.S.C. 666(a)(1)(b); one count of conspiring to commit Hobbs Act extortion under color of official right, in violation of 18 U.S.C. 1951; and four counts of Hobbs Act extortion under color of official right, in violation of 18

U.S.C. 1951. Pet. App. 5a-6a. A jury found petitioner guilty on the federal program bribery counts, the Hobbs Act conspiracy count, and three of the Hobbs Act extortion counts. Id. at 6a.

Petitioner moved for a judgment of acquittal. Pet. App. 6a-7a. He challenged his Hobbs Act convictions on the theory that "the evidence failed to establish that he was a public official" as required to support a conviction for Hobbs Act extortion. Id. at 7a (brackets and emphasis omitted). Petitioner also challenged his federal program bribery convictions. D. Ct. Doc. 253, at 5-9 (June 3, 2022).

The district court declined to acquit petitioner on the federal program bribery counts, but entered a judgment of acquittal on the Hobbs Act extortion and conspiracy counts. C.A. App. 2029-2150. In acquitting petitioner on the Hobbs Act counts, the court did not adopt petitioner's arguments; instead, it took the view that tribal sovereign immunity precluded Hobbs Act liability. Id. at 2036-2037.

3. The court of appeals set aside the Section 666 convictions, but reinstated the Hobbs Act convictions. Pet. App. 2a-50a. And it remanded the case to the district court for further proceedings. Id. at 50a.

On the Hobbs Act counts, the court of appeals rejected the district court's immunity-based rationale for acquittal -- which even petitioner did not defend -- by observing that "the United States [is] a superior sovereign from whose suits the tribes enjoy

no sovereign immunity." Pet. App. 38a (citation omitted). The court of appeals also rejected petitioner's alternative rationale that a tribal officer is not a "public official" who would be covered by the Hobbs Act. Id. at 39a-42a.

The court of appeals noted that the Hobbs Act prescribes punishment for "[w]hoever in any way or degree obstructs, delays, or affects commerce . . . by . . . extortion . . . under color of official right." Pet. App. 39a (quoting 18 U.S.C. 1951). The court observed that under this Court's precedent, "extortion 'under color of official right'" is "an 'offense committed by a public official.'" Ibid. (quoting Evans v. United States, 504 U.S. 255, 260, 261-264 (1992)). And the court explained that the extortion prohibition accordingly "applies to any public official." Ibid. The court also observed that the statute was did not contain "ambiguity" that could justify resort to the rule of lenity. Id. at 40a.

ARGUMENT

Rather than defend the district court's reasoning, petitioner renews (Pet. 8-15) his contention that the Hobbs Act's prohibition on extortion under color of official right does not apply to Indian tribal officials. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. This Court has denied petitions for writs of certiorari presenting questions about whether generally applicable federal criminal statutes

validly apply to members of an Indian tribe. See, e.g., Mitchell v. United States, 553 U.S. 1094 (2008) (No. 07-9351); Wadena v. United States, 526 U.S. 1050 (1999) (No. 98-7027). It should follow the same course here.

1. This Court has made clear that "general Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960). Accordingly, the government may prosecute Native Americans for federal crimes "[for] which there is federal jurisdiction regardless of whether an Indian is involved." United States v. Wheeler, 435 U.S. 313, 330 n.30 (1978). And the courts of appeals have recognized that generally applicable federal criminal laws apply to Indians, regardless of whether the crime occurs in Indian country. See, e.g., United States v. Mitchell, 502 F.3d 931, 947-948 (9th Cir. 2007) (carjacking), cert. denied, 553 U.S. 1094 (2008); United States v. Brisk, 171 F.3d 514, 520-522 (7th Cir.) (drug offenses), cert. denied, 528 U.S. 860 (1999); United States v. Wadena, 152 F.3d 831, 842 (8th Cir. 1998) (bribery, money laundering, mail fraud, and conspiracy), cert. denied, 526 U.S. 1050 (1999); United States v. Boots, 80 F.3d 580, 593 (1st Cir.) (mail and wire fraud), cert. denied, 519 U.S. 905 (1996); see also 1 Cohen's Handbook of Federal Indian Law § 11.02[4][a] (2024).

No sound reason exists to exclude tribal officials from the generally applicable prohibitions of the Hobbs Act. This Court

has recognized that the statute was designed "to prohibit robbery and extortion perpetrated by anyone." United States v. Culbert, 435 U.S. 371, 377 (1978). And its plain terms accordingly prescribe punishment for "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a) (emphasis added).

When Congress adopted that language, see Act of July 3, 1946, ch. 537, 60 Stat. 420, the term "whoever" meant "[w]hatever person or persons," 12 Oxford English Dictionary 89 (1st ed. 1933); see 1 U.S.C. 1 (1948) (defining "whoever" to include "individuals" and corporate bodies).* Thus, as the court of appeals recognized, the statutory text "exudes comprehensiveness" and "clearly" and "unequivocally" covers tribal officials. Pet. App. 42a (quoting Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 388, 399 (2023)).

Nor does the definition of "'extortion" to encompass extortion "under color of official right," 18 U.S.C. 1951(b)(2), differentiate tribal officials from federal, state, or local ones. Had Congress intended to exclude tribal officials, "it easily could have drafted language to that effect." Gallardo v. Marstiller, 596 U.S. 420, 429 (2022) (citation omitted). Indeed, before

* As originally enacted in the Anti-Racketeering Act of 1934, the statute similarly forbade "[a]ny person" to engage in extortion under "color of official right" if it affected commerce over which Congress had jurisdiction. Ch. 579, §§ 1, 2(b), 48 Stat. 979-980.

Congress enacted the Hobbs Act, it had enacted statutes that focused on persons acting under color of state law, e.g., 42 U.S.C. 1983, or those acting under federal law, e.g., Judicial Code, ch. 231, § 33, 36 Stat. 1097 (1911) (federal-officer removal). But no such limiting language appears in the Hobbs Act.

Indeed, the Hobbs Act's definition of "commerce" to "encompass[] 'all . . . commerce over which the United States has jurisdiction,'" Taylor v. United States, 579 U.S. 301, 305 (2016) (quoting 18 U.S.C. 1951(b)(3)), underscores its coverage of Indian tribes. That "unmistakably broad" language, ibid., reflects Congress's intent to "use all the constitutional power [it] has" to prohibit extortion, Culbert, 435 U.S. at 373 (citation omitted). And that constitutional power includes the authority "[t]o regulate commerce with * * * Indian Tribes." U.S. Const. Art. I, § 8, Cl. 3.

Specifically, the Constitution vests Congress with "virtually all authority over Indian commerce and Indian tribes," Haaland v. Brackeen, 599 U.S. 255, 273 (2023) (citation omitted), and the "power to legislate * * * across a wide range of areas, including criminal law," id. at 275. When exercising this power, Congress may regulate both "Indian affairs" and "individuals," id. at 278 (citations omitted), by prohibiting tribal officials from using their position to extort others in ways affecting interstate or Indian commerce.

2. Petitioner's contrary arguments are unsound.

Petitioner's reliance (Pet. 11-12) on the Model Penal Code and certain federal bribery laws is misplaced. The Model Penal Code expressly limits the definition of a "'public servant,'" for purposes of the model offense of "Bribery in Official and Political Matters," to an "officer or employee of" a state "government." Model Penal Code § 240.0(7) (1980); see id. § 240.0(2) (defining "'government'" as "any branch, subdivision or agency of the government of the State or any locality within it"). The federal bribery statute explicitly cabins the definition of a "public official" to federal officials or those exercising federal authority. 18 U.S.C. 201(a)(1). And the federal programs bribery statute, 18 U.S.C. 666(a), identifies non-federal officials -- that is, any "agent of * * * a State, local, or Indian tribal government," ibid. -- because Congress intended to "extend" Section 201's coverage "to bribes offered to state and local officials employed by agencies receiving federal funds," Salinas v. United States, 522 U.S. 52, 58 (1997). None of those statutes shares the Hobbs Act's "all-encompassing scope," Coughlin, 599 U.S. at 389, which covers "government officials generally," Pet. App. 41a-42a.

Petitioner's reference (Pet. 9-11) to common law is similarly misconceived. Petitioner asserts (ibid.) that he did not commit Hobbs Act extortion under color of official right because that offense tracks common-law extortion and, at common law, tribal

leaders were not "public officials." But while the common law may inform which actions might qualify as extortion under the Hobbs Act, see Evans v. United States, 504 U.S. 255, 264 (1992), it does not atextually limit the set of actors to whom the statute's plain language applies. In any event, the particular sources of common law to which petitioner looks are inherently unilluminating. The common law of England -- where "there was only one sovereign," Central Va. Cmty. Coll. v. Katz, 546 U.S. 356, 366 (2006), and no tribes -- has no bearing on the issue here. Nor does the common law of States, which lack the federal government's "plenary and exclusive" federal jurisdiction over tribes. See Brackeen, 599 U.S. at 272 (citation omitted).

Petitioner also errs in suggesting (Pet. 13) that Indians "are not part of the polity of the United States." Congress granted American citizenship to all native-born Indians. Act of June 3, 1924, ch. 233, 43 Stat. 253. Those who belong to a federally recognized tribe remain subject to tribal criminal laws, United States v. Lara, 541 U.S. 193, 198 (2004), as well as the federal laws that apply to everyone in the United States, Tuscarora Indian Nation, 362 U.S. at 120. Tribes' ability to exercise "inherent sovereign authority," Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (citation omitted), does not meaningfully differentiate them from States, whose officials -- both employed directly by the State and less directly by municipalities -- are indisputably subject to the Hobbs Act. If

anything, tribes' unique status as "domestic dependent nations," ibid. (citation omitted), should render tribal officials more appropriate subjects of federal regulation than their state and municipal counterparts.

Finally, petitioner errs in relying on (Pet. 14) the rule of lenity. That principle "applies only if 'after seizing everything from which aid can be derived,' there remains 'grievous ambiguity,'" Pugin v. Garland, 599 U.S. 600, 610 (2023) (citation omitted), "such that the Court must simply guess as to what Congress intended," United States v. Castleman, 572 U.S. 157, 173 (2014) (citation omitted). No such grievous ambiguity exists here.

3. At all events, petitioner has identified no case of this Court or of any court of appeals adopting his view or otherwise conflicting with the decision below. He accordingly presents no sound basis for this Court's review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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