No. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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CEDRIC CROMWELL
*Petitioner*,
v.

UNITES STATES OF AMERICA
*Respondent*.

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

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Prior to the case at bar, there had never been a single appellate decision in the Hobbs Act's 78-year history, published or unpublished, extending criminal liability for extortion "under color of official right"— a discrete theory of criminal liability that this Court has construed to apply only to "public officials" who misuse their "public" offices, see *Evans v. United States*, 504 U.S. 255, 260, 261-64 (1992)— to the leader of sovereign Indian tribe.

The question presented is whether United States Court of Appeals for the First Circuit erred in holding the Hobbs Act's prohibition against extortion "under color of official right" unambiguously extends to the actions of leaders or officials of federally recognized Indian tribes, which are not part of the polity of the United States or of any individual state or municipality?

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# PETITION FOR WRIT OF CERTIORARI

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Petitioner, Cedric Cromwell, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App., *infra*, at 2a) is reported at 118 F.4th 424 (1st Cir 2024). The order of the United States District Court for the District of Massachusetts's Granting Judgment of Acquittal is unpublished. The First Circuit's order denying panel hearing and rehearing en banc (App. *infra*, at 57a) is unpublished.

## JURISDICTION

The court of appeals entered judgment on September 27, 2024. (App.,

*infra*, at 2a), and then denied a timely petition for panel rehearing and rehearing en banc on October 31, 2024. (App. *infra*, at 57a) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## RELEVANT STATUTORY PROVISION

18 U.S.C. § 1951, reproduced in full in the appendix (App., *infra*, at 59a) provides in pertinent part:

> (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, . . . shall be fined under this title or imprisoned not more than twenty years, or both."
>
> (b) As used in this section—
> . . .
>
> > (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.

## INTRODUCTION

The Hobbs Act, 18 U.S.C. § 1951, imposes criminal liability on "whoever ... obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires so to do . . . ." 18 U.S.C. § 1951(a). The statute defines "extortion" in the disjunctive as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Id. § 1951(b)(2) (emphasis added). This Court has construed the "under color of official right" prong of the Hobbs Act as a substantively distinct form of extortion which, unlike the "force, violence, or fear" prong of the offense (which Congress has

expanded to reach acts by *private* individuals), retains its common-law identity as an offense which may be committed *only* by a *public* official "by colour of his office." *Evans v. United States*, 504 U.S. 255, 260, 263-264 (1992). *Cf. United States v. Percoco*, 317 F. Supp. 3d 822, 828 (S.D.N.Y. 2018) (citing cases) (holding that "only public officials—that is, persons who hold official positions within the government—are capable of committing the substantive offense of extortion under color of official right as principals").

Prior to the First Circuit's published opinion in this case, there had never been a single appellate decision in the Hobbs Act's entire 78-year history, published or unpublished, extending criminal liability for extortion "under color of official right" to a *tribal* leader, as opposed to a federal, state, or municipal official, under the Act. This issue of first impression—whether the Hobbs Act's prohibition against extortion "under color of official right" unambiguously extends to the actions of leaders or officials of federally recognized Indian tribes, which are not part of the polity of the United States or of any individual state or municipality—is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

## STATEMENT OF CASE

In November of 2020, Petitioner Cedric Cromwell ("Cromwell"), Chairman of the Mashpee Wampanoag Tribal Council ("the Mashpee Wampanoag Tribe") and President of the Mashpee Wampanoag Gaming

Authority ("the Gaming Authority"), was indicted, *inter alia*[1], on charges of Hobbs Act extortion and conspiracy to commit Hobbs Act extortion "under color of official right." 18 U.S.C. § 1951. App:1389-1391. The government's theory of the case was a number of monetary donations and gifts solicited by Cromwell from architect David DeQuattro (DeQuattro), whose firm had contracted with the Gaming Authority to facilitate the construction of a planned tribal casino, were either provided in exchange for "protection" of the casino contract or in response to an implied threat to take adverse official action against DeQuattro's company if Cromwell's requests were denied.

The Mashpee Wampanoag Tribe is a federally recognized Indian tribe with about 2,600 enrolled members. App: 319,359. The Tribe is a sovereign entity with its own constitution, own laws, and own form of government. App:353-354. It is overseen and governed by a Tribal Council, comprised of nine elected members and two appointed members (a chief and a medicine man). App:321-322. Tribal elections are conducted separate and apart from any democratic process within the United States. App:1423. Only enrolled members of the Tribe, based upon documented and verified family lineage, are allowed to vote. *Id.* Cedric Cromwell was first elected as Chair of the Mashpee Tribal Council in 2009; he was reelected to that position in 2013 and 2017. App: 500-501.

The Mashpee Wampanoag Tribal Gaming Authority, in turn, is an entity created by Tribal Ordinance to further the Tribe's gaming interests

[1] Cromwell was also convicted of two counts of federal program bribery, in

including the construction of a Tribal Casino. The Gaming Authority operated through a five-member Board, consisting of the then-serving "Chairperson and Treasurer of the Tribal Council" and "up to three additional individuals appointed by the Tribal Council . . . ." App:1445-1446. In 2014, the five-member Board voted 4-1 to hire architecture and design firm Robinson Green Beretta (RGB) as owner's representative for its planned casino. RGB's lead representative for the project was its vice-president of architects, David Dequattro. App:702,712. Over a three-year period between 2014 and 2017 Cromwell solicited from DeQuattro and/or DeQuattro provided to Cromwell a number of monetary donations and gifts, including a used exercise bicycle and a stay at a Boston hotel on Cromwell's birthday.

Following an eleven-day trial in April 2022, a jury convicted Cromwell on three of four of substantive Hobbs Act extortion counts and one count of Hobbs Act conspiracy. App:1389-1391. In pre- and post- judgment motions brought pursuant to Fed. R. Crim. P. 29, Cromwell sought judgment of acquittal on all the Hobbs Act charges on multiple grounds, including, as relevant here, that in the absence of clear evidence of legislative intent to designate Native American leaders like Mr. Cromwell "public officials" for purposes of the "under color of official right" prong of Hobbs Act extortion, the rule of lenity precludes conviction of Mr. Cromwell on that theory of liability. App.1872-1875. The district court granted Cromwell's motion for judgment of acquittal as to Hobbs Act counts on the logic that Hobbs Act extortion under

color of official right does not apply to tribal officials. [JA.2157-60, 2180-87, 2268-68]. The district court stated:

> [M]y own view is that the Supreme Court and the First Circuit have been moving in the direction of saying, Look, if you want to take away the immunity of a tribe or its leaders, Congress is going to do that with specificity. That in fact is what they did with respect to [18 U.S.C. §] 666(a). The statute was amended in I think 1984 or so. And almost immediately the Tenth Circuit [in *United States v. Barquin,* 799 F.2d 619 (10th Cir. 1986)], dealing with a case then under appeal said, you know, if you want 666 to apply to Indian tribes, you've got to say so directly, and they granted acquittal. Within several months, Congress amended again to make it direct that [] Indian tribes and their officials were included.
>
> Now, what do I draw from that? Well, first that it's very important, having in mind the integrity of tribal governments and their relationships that they have as sovereigns, to observe the parameters. It is the case that no one would suggest that [18 U.S.C.] section 201, which is the traditional bribery statute, applies to tribes. [].
>
> What happened is 666 was amended to make it clear, but we also have here an extortion claim, extortion under color of official right. That does not specify tribes or tribal leaders as officials. And my view is I have to grant acquittal with respect to that. That is a statute that just doesn't apply, unless we are to just run roughshod over the particular attributes of sovereignty that Indian tribes have.

[J.A.2036-2037].

In a published opinion, the United States Court of Appeals for the First Circuit reversed the District Court's judgment of acquittal, and reinstated the Hobbs Act convictions. Notwithstanding the absence of a single previous appellate decision extending criminal liability for extortion "under color of official right" to a tribal leader in the entire 78-year history of

the Hobbs Act, the First Circuit found no "lenity-triggering ambiguity as to whether Cromwell -- having been elected by tribal members to be Chairman of the Council and therefore having been an official of that Tribe's government -- qualifies as a 'public official' under the Hobbs Act." App. 40a, Opinion.

The panel reasoned that: "while it is true that the Hobbs Act does not expressly refer to Indian tribal governments or to the officials serving in them, the Hobbs Act also does not refer to any other type of government or government official." Opinion at p. 40. Thus, the panel found apposite to the novel question of Congress's intent to extend criminal liability for Hobbs Act extortion "under color of official right" to leaders of sovereign *tribes*, prior applications of that theory of Hobbs Act liability to officials of "state and local governments" the former of which, the panel emphasized, "themselves enjoy sovereign immunity[.]" Opinion, App. 41a-42a.

Ultimately, the panel concluded that Congress's prefatory use of the broad term "whoever" is dispositive of the Act's applicability to tribal leaders like Cromwell. Opinion at p. 41. The panel opined that, in combination, the Hobbs Act's references to "whoever" and "under color of official right" exude a "comprehensiveness" similar in kind to the Bankruptcy Code's definition of "governmental unit" 11 USCS § 101(27)[2], which this Court in *Lac du*

[2] See 11 U.S.C. § 101(27) (defining "governmental unit" to mean "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a

*Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023), recently deemed broad enough to "clearly" and "unequivocally" encompass Indian tribal governments notwithstanding the lack of any no express mention of the same. App. 42a Opinion.

## REASONS FOR GRANTING THE PETITION

The Court of Appeals' unprecedented appellate application of criminal liability for Hobbs Act extortion "under color of official right" to the leader of sovereign Indian tribe decides—incorrectly—"an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The panel's analysis errs in its assumption that prosecutions of plainly domestic "state and local" governmental officials for Hobbs Act extortion "under color of official right" bear meaningfully on Congress's intent to extend such criminal liability to leaders of *tribes* which occupy a "hybrid position" between "foreign and domestic states" *Coughlin*, 599 U.S. at 409 (Gorsuch J. dissenting), are not part of the polity of the United States, and would have been so understood at common law. For this same reason, the panel's analysis likewise errs in its conclusion that references in the Hobbs Act's to "whoever" and "under color of official right" exude a "comprehensiveness" similar in kind to the definition of "governmental unit" at issue in *Coughlin*, which was express in its application to "a State, a

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United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.").

Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." *Id.* at 387 (quoting 11 U.S.C. § 101(27)).

## I. In Becoming the First Appellate Court the Hobbs Act's Entire 78-year History to Extend Criminal Liability for Hobbs Act Extortion "Under Color Of Official Right" to the Leader of a Sovereign Indian Tribe, the First Circuit Has Decided, Incorrectly, an Important Question of Federal Law that has not Been, but Should Be, Settled by this Court.

The Hobbs Act imposes criminal liability on "whoever ... obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires so to do . . . ." 18 U.S.C. § 1951(a). The statute defines "extortion" in the disjunctive as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, *or under color of official right*." *Id.* § 1951(b)(2) (emphasis added). Cromwell was indicted solely under the "official right" theory of extortion, App.63-64, 93-94, which this Court has identified as a "distinct form of extortion" delineated from the "'induced by wrongful use of actual or threatened force, violence, or fear' prong of the offense[.]" *Brissette*, 919 F.3d at 672 (citing *Evans*, 504 U.S. at 263-64).

The text of the Hobbs Acts does not define the phrase "under color of official right" and does not otherwise elucidate its scope. In the absence of such statutory guidance, this Court has ascribed to Congress an intent to adopt and incorporate the common law definition of extortion under color of official right, to wit: "an offense committed by *a public official* who took 'by

colour of his office' money that was not due to him for the performance of his official duties." *Evans v. United States*, 504 U.S. 255, 260 (1992) (emphasis added). Any question as to the Act's scope of liability, therefore, necessarily reduces to whether the term "public official" was unambiguously understood at *common law* to include the leaders of sovereign tribes. *Id.* at 259-260 (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952). ("Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

While there is little authority to assist in deciding this question[3], plainly nothing within the statutory language, the legislative history, or case precedent reveals any affirmative indication to *include* tribal officers within the concept of "public official." There are several reasons to doubt such an intent. In *Evans*, this Court stated that common-law extortion "by [a] public official was the rough equivalent of what [is] now describe[d] as 'taking a bribe.'" *Evans*, 504 U.S. at 260. To the extent that this statement of

[3] *See United States v. Manzo*, 636 F.3d 56, 62 (observing that "when the Hobbs Act was passed, no mention was made of the meaning of extortion 'under color of official right' in the legislative history" and that its predecessors, the Anti-Racketeering Act of 1946 and the Anti-Racketeering Act of 1934 were likewise accompanied by "surprisingly little legislative history."

equivalency is apt[4], it is notable that neither 18 U.S.C. § 201, which Congress enacted to govern "[b]ribery involving public officials" on a federal level, nor the provisions of the Model Penal Code ("MPC") broadly addressing "Bribery in Official and Political Matters", suggest a definition of "public official" extending outside the polity being regulated. See 18 U.S.C. 201(a)(1) (defining "the term 'public official'" to include "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof"); MPC Article 240, § 240.0 (defining "public servant" as "any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function").

These circumscribed definitions of "public official" accord in scope with the central common-law concern, expressed in the concept of extortion "under color of official right", with the exercise of power given to an official by the public at large. *See* 4 William Blackstone, Commentaries on the Laws of England 141 (4th ed. 1770) ("extortion is an abuse of *public justice*"); *Wilkie v. Robbins*, 551 U.S. 537, 564 (2007) ("the crime of extortion focused on the harm of *public* corruption); *United States v. Mazzei*, 521 F.2d 639, 650 ("the

[4] See *Ocasio v. United States*, 135 S. Ct. 1423, 1434 (2016) ("Petitioner does not ask us to overturn *Evans*, and we have no occasion to do so."); *id.* at 1437 (Breyer, J., concurring) (questioning *Evans* but taking the decision "as good law" because Petitioner did not ask that *Evans* be overturned); *id.* at 1437-38 (Thomas, J., dissenting) (reiterating prior position that *Evans* "wrongly equated extortion with bribery"); *id.* at 1440 n.1 (Sotomayor, J., dissenting, joined by Roberts, C.J.) ("No party asks us to overrule *Evans* in this case and so that question is not considered here.").

essence of the offense was the abuse of the *public trust* that inhered in the office"). There is no basis to presume that such "public" concerns extended at common law to the leaders of sovereign tribes like Cromwell. Indeed, the undisputed facts of the instant case point to the opposite conclusion—that neither the elections through which Cromwell obtained his positions, where voting was limited to a constituency of approximately 2,600 tribal members determined by ancestral lineage rather than geography or citizenship, nor the power he exerted on behalf of that constituency after election, were "public" in any sense of the word, and would not have been understood as such at common law. *Cf. Judicial Stds. Comm'n v. Not Afraid*, 245 P.3d 1116, 1124 (Mont. 2010) ("tribal offices are creations of another sovereign and not considered public offices of the state").

Congress has demonstrated by its specific language in other statutory contexts that where it intends to include tribes and tribal officials within the scope of a federal statute, it will explicitly do so. *See* 18 U.S.C. § 666(a)(1) (extending criminal liability to "agent[s] of an organization, or of a State, local, or Indian tribal government, or any agency thereof").[5] The Hobbs Act's silence on this crucial question lends further ambiguity to the question of whether tribal leaders are "public officials" who may be deemed to have acted

[5] It is notable that Congress added this tribal-specific language to § 666 by amendment after it was held that a statutory reference to "local government agency" was insufficiently specific to bring Indian tribes or their business councils within the statute's ambit. *United States v. Barquin*, 799 F.2d 619, 621-622 (10th Cir. 1986). See Pub. L. No. 99-646, § 59(a), 100 Stat. 3612 (1986).

"under color of official right" under the Act. This inherent ambiguity compounded greatly by the absence of a single appellate decision by any court in the Hobbs Act's entire 78-year history, referencing or upholding the conviction of a *tribal* official, as opposed to a federal, state, or municipal official, for extortion "under color of official right" under the Act. *Cf. Wilkie v. Robbins*, 551 U.S. 537 (2007) (finding it "telling[]" in construing the scope of criminal liability, the lack of a "decision by any court, much less this one, in the Hobbs Act's entire 60-year history finding extortion" on the theory proffered).

The panel's assertion that prosecutions of plainly domestic "state and local" governmental officials for Hobbs Act extortion "under color of official right" bear meaningfully on Congress's intent to extend such criminal liability to leaders of *tribes* does not withstand scrutiny. Tribes, in contrast to states or municipalities, occupy a "hybrid position" between "foreign and domestic states." *Coughlin*, 599 U.S. at 409 (Gorsuch J. dissenting). They are not part of the polity of the United States, and would have been so understood at common law. Similarly, and for the same reason, the panel's analysis errs in its assertion that references in the Hobbs Act's to "whoever" and "under color of official right" exude a "comprehensiveness" similar in kind to the language examined in *Coughlin*. The definition "governmental unit" at issue in *Coughlin*, and which this Court there deemed broad enough to "clearly" and "unequivocally" encompass Indian tribal governments

notwithstanding the lack of any no express mention of the same, was explicit in its reference to "a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." *Id.* at 387 (quoting 11 U.S.C. § 101(27)). The same can plainly not be said here.

In light the foregoing, "it cannot be said, with certainty sufficient to justify a criminal conviction," *Rewis v. United States*, 401 U.S. 808, 811 (1971), that Congress, in incorporating the common law phrase "under color of official right" into its definition of extortion, unambiguously intended to bring the acts of *tribal* officials, as opposed to federal, state, or municipal official, within the ambit of the Act on that discrete theory. This Court "ha[s] instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'" *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis*, 401 U.S. at 812), and made clear that the rule of lenity applies to ambiguous applications of the Hobbs Act. *Scheidler v. NOW, Inc.*, 537 U.S. 393, 408-409 (2003). "When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-360 (1987). If "under color of official right" extortion is going to be extended for the first time to tribal leaders or officials that are not part of the polity of the United States or of any individual state or municipality, "such a significant expansion of the law's coverage must come from Congress, and not from the courts." *Scheidler*, 537 U.S. at 409.

## CONCLUSION

For the foregoing reasons, the Court below has decided, incorrectly, "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The petition for a writ of certiorari should be granted.

Respectfully submitted,
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