No. 07-1461

In the Supreme Court of the United States

RAJAH BAYLOR, PETITIONER
v.
UNITED STATES OF AMERICA, RESPONDENT

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

BRIEF FOR THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE, THE CATO INSTITUTE, AND THE GOLDWATER INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether use of the Hobbs Act to prosecute local robberies that have only a *de minimis* effect on interstate commerce is consistent with the Commerce Clause, congressional intent, and constitutional clear-statement rules.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The Sixth Circuit in this case held that the Commerce Clause permits the United States to prosecute any robbery under the Hobbs Act that has some *de minimis* effect on interstate commerce. Federal jurisdiction over petitioner's crime was established by the fact that the pizzeria he robbed bought its flour from Minnesota, its sauce from California, and its cheese from Wisconsin.

If allowed to stand, this decision threatens to eliminate any meaningful limitation on the scope of the commerce power. As this Court recognized in *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), Congress has the power to regulate only activities that have a "substantial effect" on interstate commerce; it does not have the power to criminalize robbery of a pizzeria based only on a case-by-case showing that out-of-state objects were present at the crime scene. Reliance on these sorts of *de minimis* connections to interstate commerce is particularly inappropriate given that the Congress that enacted the Hobbs Act in 1946 never purported to expand so broadly the scope of the commerce power.

These *amici curiae*[1] believe that federal powers must be properly cabined to respect federalism and

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[1] Counsel of record for all parties received notice at least 10 days before the due date of the *amici*'s intention to file this brief and have consented. The parties' letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

foster political accountability—as our Constitution provides, and the Founders intended. *The Center for Constitutional Jurisprudence* was founded in 1999 as the public interest litigation arm of the Claremont Institute to advance the Institute's mission to restore the principles of the American Founding to their rightful and preeminent authority in our national life. *The Cato Institute* is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. *The Goldwater Institute* is a nonpartisan educational organization, which engages in research dedicated to developing a comprehensive vision for a balanced, constitutional rule of law through its Dorothy D. and Joseph A. Moller Center for Constitutional Government.

In addition to various research and publishing activities, all three *amici* conduct litigation, including the filing of *amicus* briefs in cases involving issues that go to the heart of our constitutional structure. This case is of central interest to *amici* because it asks whether the decision below drew a proper line between the States' power to punish local violent crime and the federal government's power to regulate interstate commerce. The *amici* believe that it did not.

STATEMENT OF THE CASE

Petitioner robbed a Cleveland-area Little Caesar's pizzeria of $538. He was charged with violating the Hobbs Act, 18 U.S.C. § 1951, which makes it a federal crime to "in any way or degree obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce by robbery or extortion." Pe-

titioner was convicted by a federal jury and sentenced to 56 months in prison.

The Sixth Circuit held that the Commerce Clause authorized this prosecution because petitioner's robbery had a *de minimis* effect on interstate commerce. Specifically, federal jurisdiction was established by the fact that the ingredients that the pizzeria used to make pizza came from outside Ohio—its flour, sauce, and cheese, for example, all traveled in interstate commerce. Based on the presence of these well-traveled ingredients, petitioner's robbery of a pizza shop became a federal offense.

REASONS FOR GRANTING THE PETITION

This Court's guidance is needed to draw a sensible and constitutional line between the States' power to punish violent crime, *United States* v. *Morrison*, 529 U.S. 598 (2000); *United States* v. *Lopez*, 514 U.S. 549 (1995), and Congress's power to regulate interstate markets under the Commerce Clause, *Gonzales* v. *Raich*, 545 U.S. 1 (2005). Contrary to the decision below, the Commerce Clause does not give Congress the power to punish a robber merely because ingredients that traveled in interstate commerce witnessed his crime. Our constitutional system divides the people's sovereign power between the national and state governments. The decision below would obliterate this division of power because it admits of no limit on the power of Congress to "regulate commerce."

In addition, using the *de minimis* standard to delimit the scope of federal authority under the Hobbs Act ignores the fact that *every* State has traditionally criminalized robbery. Federal law may not be applied so as to systematically ignore the state interest in

criminal law enforcement—particularly where jurisdiction is determined on a case-by-case basis, as it is under the Hobbs Act. Even where Congress determines that a comprehensive federal regime is necessary to protect interstate commerce, federalism must be respected. See *Raich*, 545 U.S. at 39 (Scalia, J., concurring) ("a law is not *proper* for carrying into execution the Commerce Clause when it violates a constitutional principle of state sovereignty") (internal quotation and alteration marks omitted); *Morrison*, 529 U.S. at 614 (ultimately, the issue of constitutionality is always for this Court).

Moreover, in this case, Congress made no such determination. To the contrary, Congress enacted the Hobbs Act to close a narrow gap in the Anti-Racketeering Act, and understood itself to be providing direct protection for goods and persons actually in the flow of interstate commerce. Congress did not mean for the federal government to police every robbery with a *de minimis* effect on commerce. Under the circumstances, therefore, deference to Congress weighs strongly *against* the extension of federal power approved by the decision below. That is especially so in light of this Court's precedents holding that federal criminal statutes should be interpreted narrowly to avoid constitutional infirmities under the Commerce Clause. *E.g., Jones* v. *United States*, 529 U.S. 848, 859 (2000) (construing the federal arson statute narrowly to avoid "mak[ing] virtually every arson in the country a federal offense").

In fact, this Court has already held that the Hobbs Act does not contain the kind of unambiguous language required for such a significant encroachment on state authority. See *United States* v. *Enmons*, 410

U.S. 396, 411 (1973) (Hobbs Act does not apply to violence committed during a lawful strike). Unfortunately, the lower courts and federal law enforcement officials have been less conscientious about respecting the constitutional limits on federal power. It was only in the 1970s—decades after enactment—that the Hobbs Act was first used to prosecute local robberies. But today, unconstitutional misapplication of the Act is widespread. This Court's guidance is needed to ensure that the Hobbs Act does not become a vehicle for the federalization of garden-variety local crimes, to the detriment of the principles of federalism that undergird our Constitution.

I. The Decision Below Failed To Consider Whether Local Robbery Is *Violent Crime* Properly Controlled By The States, Or *Economic Activity* Within The Federal Commerce Power.

The sweeping aggregation rule applied by the court below allows a federal statute to reach localized instances of violent crime, in contravention of *Lopez*, *Morrison*, and the principle that Congress's Commerce Clause powers are limited. This Court's guidance is needed to clarify that regulation of violent criminal activity with only a *de minimis* effect on interstate commerce lies solely within the province of the States.

A. The Decision Below Fails To Distinguish Between Violent Crime And Economic Activity.

The decision below threatens to eliminate any meaningful limit on the commerce power by treating local robberies not as violent crime but as interstate commerce. Article I of the Constitution lists the powers "herein granted" to Congress, including the com-

merce power here at issue: "Congress shall have power * * * [t]o regulate commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3. The Tenth Amendment, by expressly reserving to the States and the people all powers the Constitution had not delegated to the federal government, further confirms that Congress's powers are exclusive and limited, rather than illustrative and broad. The interpretation of every enumerated power in the Constitution must be consistent with this larger design. An interpretation that amounts to a plenary grant of power where a limited grant was intended cannot be correct. Yet that is precisely the power ascribed to Congress by the court below.

Since its first major Commerce Clause decision, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), this Court's interpretation of the commerce power has understandably expanded, consistent with revolutionary changes in how our economy operates and the problems that such changes have created in distinguishing inter- from intra-state commerce. As one distinguished commentator put it: "Constitutional limits expressed in terms of interstate consequences lead to different results when applied to railroads than when applied to a horse and buggy." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1488 (1987).

At the same time, it has always been recognized that there are limits on the scope of federal power. In *Lopez*, for example, the Court held that the commerce power was not so broad as to allow Congress to regulate possession of guns in school zones. "The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition

elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567. The Court emphasized that the gun-ban at issue was a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. [It] is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561.

The Court grounded its decision in principles of federalism and the Framers' conception that a federal government of delegated, enumerated, and thus limited powers was a vital check on abuse of governmental authority: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S. at 552 (citation omitted). Treating the robbery of a pizza shop as interstate commerce based on where sauce and mozzarella are made makes no more sense than treating gun possession as interstate commerce based on where iron ore is mined. The primary focus of any meaningful commerce clause analysis must be on the nature of the activity being regulated.

Morrison reaffirmed these limits, holding that the effect of violence against women on interstate commerce was not substantial enough to justify federal regulation. The Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." 529 U.S. at 617. The

Court stressed that there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Id.* at 618. Thus, after *Morrison*, the fact that an activity may, in the aggregate, have a substantial effect on interstate commerce is not sufficient to justify congressional regulation, especially if such regulation interferes with a power generally reserved to the States, such as the police power.

The court of appeals declined to follow *Lopez* and *Morrison* on the basis that the crime at issue here—robbing a pizzeria of $528 dollars—is economic or commercial activity. But while the Hobbs Act applies to racketeering activity (which may conceivably be considered "economic," see Part II, below), that is not the application of the Act challenged here. As the Court observed in *Raich*, "economics" refers to "the production, distribution, and consumption of commodities." 545 U.S. at 25-26 (quoting *Webster's Third New International Dictionary* 720 (1966)). A local robbery may not fairly be characterized as the production, distribution, or consumption of commodities. Robberies are violent crime—far more akin to the violence against women at issue in *Morrison* than to the interstate commercial narcotics market at issue in *Raich*.

Nor is the *aggregate* effect that local robberies might have on economic activity sufficient to justify regulating them under federal law. In *Raich*, the Court reaffirmed Congress's power to regulate matters of local concern, but only as part of comprehensive regulation of an interstate market. 545 U.S. at 18. The statute at issue there regulated the manu-

facture and distribution of narcotics; the question was whether that law could be applied to prohibit the growth of marijuana for purely in-state, medicinal use. As the Court explained, federal drug laws are part of a broad regulatory scheme that is within the bounds of Congress's authority. *Id.* at 18-19. Without the ability to regulate the local growth of marijuana, Congress's ability to accomplish its constitutionally-legitimate goals for the interstate drug market would be compromised.

The Hobbs Act regulates no such market; indeed, the government has not even attempted to show an interstate market in the robbery of pizzerias. Cf. *Wickard* v. *Filburn*, 317 U.S. 111, 125-128 (1942) (focusing on the aggregate commercial effects of on-farm wheat production). Of course, "Congress may protect, enhance, or restrict some particular interstate economic market, such as those in wheat, credit, minority travel, abortion service, illegal drugs, and the like, and Congress may regulate intrastate activity as part of a broader scheme." *United States* v. *McFarland*, 311 F.3d 376, 400 (5th Cir. 2002) (Garwood, J., dissenting from *per curiam* order for equally divided *en banc* court). But the Hobbs Act, as applied in these circumstances, "is not a regulation of any relevant economic market, nor are there other rational connections among nationwide robberies that would entitle Congress to make federal crimes of them all." *Ibid.*

The decision below fails even to attempt to distinguish between the violent crime swept into the federal domain by its application of the Hobbs Act, and the violent crime placed off-limits by *Lopez* and *Morrison*. The Sixth Circuit's rationale (if not necessarily the result) thus goes far towards destroying the tradi-

tional line between state and federal jurisdiction and overthrowing the truism that "[t]he Constitution creates a Federal Government of *enumerated* powers." *Lopez*, 514 U.S. at 552 (emphasis added). If this view is to become the law, such a decision should come from this Court, not the courts of appeals.

B. The Decision Below Ignores Local Interests In Policing Violent Crime.

The Sixth Circuit's failure to recognize that States uniformly regulate conduct like petitioner's as garden-variety violent crime further confirms the need for this Court's review. The criminal code of every State provides for the prosecution of robberies of the sort committed by petitioner.[2] And even before the

[2] Ala. Code § 13a-8-41; Alaska Stat. § 11.41.500; Ariz. Rev. Stat. § 13-1902; Ark. Code § 5-12-102; Cal. Penal Code § 1016; Colo. Rev. Stat. § 18-4-301; Conn. Gen. Stat. § 53a-133; Del. Code Tit. 11, § 831; D.C. Code § 22-2901; Fla. Stat. § 812.13; Ga. Code § 16-8-40; Haw. Rev. Stat. § 708-840; Idaho Code § 18-6501; 720 Ill. Comp. Stat. 5/18-1; Ind. Code § 35-42-5-1; Iowa Code § 711.1; Kan. Stat. § 21-3426; Ky. Rev. Stat. § 515.00; La. Rev. Stat. § 14:64.1; Me. Rev. Stat. Tit. 17-A, § 651; Md. Code, Crim. Law § 3-402; Mass. Gen. Laws Ch. 265, §17; Mich. Comp. Laws § 750.530; Minn. Stat. § 609.24; Miss. Code § 97-3-77; Mo. Stat. § 569.020; Mont. Code § 45-5-401; Neb. Rev. Stat. § 28-324; Nev. Rev. Stat. § 205.270; N.H. Rev. Stat. § 636:1; N.J. Stat. 2c:15-1; N.M. Stat. § 30-16-2,; N.Y. Penal Law § 160.00; N.C. Gen. Stat. § 14-87.1; N.D. Cent. Code § 12.1-22-01; Ohio Rev. Code § 2911.01; Okla. Stat. Tit. 21, § 797; Ore. Rev. Stat. § 164.415; 18 Pa. Cons. Stat. § 3701; R.I. Gen. Laws § 11-39-1; S.C. Code § 16-11-325; S.D. Codified Laws § 22-30-1; Tenn. Code § 39-13-401; Tx. Penal Code § 29.02; Utah Code § 76-6-301; Vt. Stat. Tit. 13, § 608; Va. Code § 18.2-90; Wash. Rev. Code § 9a.56.190; W. Va. Code, § 61-2-12; Wis. Stat. § 943.32; Wyo. Stat. § 6-2-401.

Revolutionary War, robberies similar to petitioner's were prosecuted at common law.[3]

Petitioner's offense took place entirely within Ohio, and Ohio law provides for its punishment. Ohio Rev. Code § 2911.01.[4] The decision below provides no reason why the federal government should be able to strip Ohio, or any other State, of its authority to prosecute violent offenses occurring entirely within its borders. But that is the implication of the decision below, since Congress may preempt the States from regulating in any area that Congress itself may regulate pursuant to its enumerated powers. U.S. Const. art. VI; see also *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 30 (1996).

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[3] *E.g.*, *Phippard* v. *Forbes*, 4 H. & McH. 481 (Md. Prov., April Term 1721) (conversion and embezzlement of assets); *Smith* v. *Brown*, 1 Va. Colonial Dec. R1 (Va. Gen. 1729) (discussing "whether a man that is robbed after Convicting the Party may have an Action for Trespass for his goods"); *Hannaball* v. *Spalding*, 1 Root 86 (Conn. Super. 1783) (indictment "for stealing a handkerchief"); *State* v. *David*, 1 Del. Cas. 160 (Del. Quar. Sess. 1797) ("Defendant had been indicted for stealing two barrels of herrings"); *Neal* v. *Lewis*, 2 Bay 204, 2 S.C.L. 204 (S.C. Const. App. 1798) ("[t]heft, mentioned in the third count, is a felony, which, when committed under some circumstances, would affect a man's life").

[4] Providing in relevant part, "(A) No person, in attempting or committing a theft offense * * * or in fleeing immediately after the attempt or offense, shall * * * (1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that the offender possesses it, or use it; * * * (3) Inflict, or attempt to inflict, serious physical harm on another * * * (C) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree."

Our nation's long tradition of regulating local matters locally ultimately serves as a check on governmental excesses and a safeguard for individual liberty. Citizens who dislike the manner in which their state representatives approach criminal justice can vote for candidates with different viewpoints. Relocating local law-making authority in the federal government would not only make addressing purely local concerns impossible, it would frustrate citizens' rights and dilute their opportunities to oust disfavored representation. "[T]he boundaries between the spheres of federal and state concern would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). "The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Ibid.* As the Court observed in *New York* v. *United States*, 505 U.S. 144 (1992), "the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Id.* at 181 (citation and internal quotation marks omitted).

Moreover, allowing federal prosecutors to shift offenders from the state system into the federal system can have "dramatic penal consequences because states generally take more lenient, flexible, and creative approaches to sentencing than the federal system." Steven F. Smith, *Proportionality & Federalization*, 91 Va. L. Rev. 879, 893 (2005). Under a system of limited federal powers, "state governments also may find that they are able to enforce criminal laws and regulations of social mores less coercively than

the national government because of the lower costs and greater ease of monitoring citizen behavior in a smaller jurisdiction." Steven G. Calabresi, *A Government of Limited & Enumerate Powers: In Defense of* United States v. Lopez, 94 Mich. L. Rev. 752, 756 (1995).

Although all States criminalize violent theft, they take widely varying approaches. This kind of diversity and experimentation by individual States leads to more effective methods of punishment for the nation as a whole.[5] As Justice Kennedy has observed, a federal statute that criminalizes local violence "forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); see also McConnell, 54 U. Chi. L. Rev. at 1498-1500.

Instead of taking over prosecution of local robberies, the federal government should "better focus its resources and unique expertise on truly 'federal' matters and, where possible, leave enforcement of general criminal laws to the States." *United States* v. *Rutherford*, 236 Fed. Appx. 835 (3d Cir. 2007) (dis-

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[5] State robbery statutes, for example, have been continually revised. Formerly under Ohio law, making a forceful escape after theft could be prosecuted as robbery. Now, however, to constitute robbery, the force must have been done in the taking and not in the escape. See *State* v. *Strear*, 25 Ohio Dec 277 (Ohio Ct. Comm. Pl. 1910); *Hanson* v. *State*, 1 N.E. 136 (Ohio 1885). And just this year, the Ohio Supreme Court held that theft is a lesser included offense of robbery, rejecting the possibility of a defendant being convicted of both theft and robbery for a single taking. *State* v. *Smith*, 884 N.E.2d 595 (Ohio 2008).

agreeing with *de minimis* standard under the Hobbs Act, but considering itself bound by *stare decisis*); Police Exec. Research Forum, *Position on Federalism*, quoted in Am. Bar Ass'n Task Force on the Federalization of Crim. Law, *The Federalization of Crim. Law* 41 n.72 (1998) (criticizing trend of federalizing routine crime because it "diverts federal authorities from what they do best and puts more distance between law enforcers and local community residents—in direct conflict with community policing objectives").

The problem with the *de minimis* standard is that it takes none of this into account. One cannot determine what is within Congress's domain without considering what is not. "The Constitution," after all, "requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. The Founders made a considered decision to adopt a federal system, and it has served us well. But ensuring its continued vitality means that this broadest of all federal powers—the power to regulate interstate commerce—cannot be delimited entirely by testing for what is *not national*; the analysis must also consider whether something *is local*. Commerce Clause analysis should not be a treasure hunt. Nor should federal jurisdiction depend on an interstate ingredient sitting on the shelf behind a local crime. This Court's guidance is needed to make that clear.

II. The Decision Below Is Contrary To Both Congressional Intent And Constitutional Clear-Statement Rules.

Certiorari is also warranted because the overbroad application of the Hobbs Act approved by the court below is contrary to the considered judgment of Congress. Acts of Congress are presumed constitu-

tional. See *Morrison*, 529 U.S. at 607. And, notwithstanding this Court's ultimate obligation to say what the Constitution means, if Congress had made detailed factual findings connecting robberies like the one at issue here with protection for interstate commerce, the Court would need to decide what level of deference to accord Congress's judgment. See *id.* at 614; *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). In this case, however, deference cuts *against* the decision below because Congress itself would have disapproved of using the Hobbs Act to federally prosecute local robberies such as petitioner's.

In other words, there is no reason to worry about stepping on Congress's toes—and every reason to enforce a narrower construction of the statute than that adopted below. As this Court has recognized in several recent cases, the Commerce Clause constrains expansive interpretations of federal law. See, *e.g.*, *Jones*, 529 U.S. at 857-858 (federal arson statute should not be interpreted to make every arson a federal crime); *Solid Waste Ag. of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159, 173-174 (2001) (no deference to administrative interpretation that would allow regulation of intrastate ponds used by migratory birds); see also *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality) (rejecting interpretation of "waters of the United States" as applying to channels that intermittently provide drainage for rainfall). The Court should grant certiorari to rein in the federal government's expansive use of the Hobbs Act, which is inconsistent not only with the Commerce Clause, but also with congressional intent and settled clear-statement rules that minimize constitutional adjudication and protect federalism.

A. The Hobbs Act Was A Limited Amendment To The Anti-Racketeering Act, Never Intended To Apply To Local Robberies.

The decision below is contrary to the enacting Congress's purpose in passing the Hobbs Act, as well as that Congress's contemporaneous understanding of the Commerce Clause.

Congress did not intend to reach local robberies such as petitioner's or otherwise to interfere in matters of traditional state concern. To the contrary, the Hobbs Act was a targeted response to this Court's decision in *United States* v. *Local 807*, 315 U.S. 521 (1942), which held that the 1934 Anti-Racketeering Act did not apply to members of a truck drivers' union who extorted payments from *out-of-state* drivers attempting to deliver goods to New York City. As the Court explained in *Enmons*: "Congressional disapproval of this decision was swift. Several bills were introduced with the narrow purpose of correcting the result in the *Local 807* case. * * * [T]he limited effect of the bill was to shut off the possibility * * * that union members could use their protected status to exact payments from employers for imposed, unwanted, and superfluous services." 410 U.S. at 402-403 (internal footnotes omitted).

To close this gap, Congress proposed "an amendment of the existing antiracketeering law," which itself "was passed in an effort to eliminate racketeering in relation to interstate commerce, *of concern to the Nation as a whole*." H.R. Rep. No. 79-238, at 1 (1945) (emphasis added). The purposes of this amendment were "(1) to prevent interference with interstate commerce by robbery or extortion * * *, and (2) to prevent interference during the war with the trans-

portation of troops, munitions, war supplies, or mail in interstate or foreign commerce." *Ibid.* As half of the Fifth Circuit recognized after a detailed review, the legislative history confirms "that Congress in enacting the Hobbs Act was concerned with protecting against relatively direct obstruction of the actual movement of goods in interstate commerce, and did not contemplate its application to robberies of local retail stores such as those here." *McFarland*, 311 F.3d at 387 (Garwood, J., dissenting from *per curiam*); see also, *e.g.*, 89 Cong. Rec. 3202 (1943) (Statement of Rep. Walter) ("it is the intention of the Committee on the Judiciary to enact legislation for one purpose, and one purpose alone, namely, to correct the unfortunate decision in the *Local 807* case"); 91 Cong. Rec. 11912 (1943) (Statement of Rep. Michener) (rejecting applications of the bill to "conditions * * * where [union members] meet and overturn milk trucks and do other things like that," insisting instead that, "[t]his bill applies to interstate commerce only").

Perhaps most telling is that, in prohibiting the kind of extortion and robbery that impedes the flow of commerce across state lines, Congress understood itself to be taking a step that the States could not take. *E.g.*, H.R. Rep. 79-238 at 11 ("The Congress does not need to be reminded that the Constitution of the United States confers on it the exclusive and unlimite[d] power to regulate interstate commerce."); see also *United States* v. *Culbert*, 435 U.S. 371, 380 (1978) ("Congress apparently believed * * * that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and that the Federal Government had an obligation to do so.") (citing legislative history). This modest purpose for

the Hobbs Act is consistent with the understanding of the Commerce Clause prevailing at the time. When the Act was passed, "the federal government's commerce power was generally viewed far less expansively than it later came to be." *McFarland*, 311 F.3d at 383 (Garwood, J., dissenting from *per curiam*). Congress was simply attempting to reverse the effect of the *Local 807* decision, and it used a definition of "commerce" that was essentially identical to that in the 1934 Act. See *id.* at 384 n.16 (comparing the two provisions).

"This Court presumes that Congress intended the phrase to have the meaning generally accepted in the legal community at the time of enactment." *Director, Office of Workers' Compensation Programs* v. *Greenwich Colliers*, 512 U.S. 267, 268 (1994). Moreover, where "[Congress] used the same words, [the Court] can only assume it intended them to have the same meaning that courts had already given them." *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Under these circumstances, giving sweeping effect to the Hobbs Act is just bad statutory interpretation. This Court's review is needed to ensure that Congress's intent in enacting the Hobbs Act is not thwarted.

B. Application Of The Hobbs Act To Ordinary Local Robberies Is Contrary To Constitutional Clear-Statement Rules Designed To Protect Federalism And Avoid Unnecessary Constitutional Adjudication.

An expansive application of the Hobbs Act is also contrary to constitutional clear-statement rules. In addition to advising adherence to the general rule of avoiding constitutionally questionable interpretations

of statutory law, this Court has said repeatedly—and in decisions applying the Hobbs Act—that "[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. * * * [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Enmons*, 410 U.S. at 411-412 (quotation omitted); accord *Jones*, 529 U.S. at 858; *Rapanos*, 547 U.S. at 738 (plurality).

Enmons specifically held that the language of the Hobbs Act does not meet this standard:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes [a traditionally local matter]. *Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work * * * such an unprecendented incursion into the criminal jurisdiction of the States*.

410 U.S. at 411 (emphasis added).

If the Hobbs Act had altered the traditional federalism balance through an expansion of federal jurisdiction, an immediate and substantial effect would have been observed. But it was not. Indeed, the 1934 Act has never been applied to robberies of local retail stores, and the federal government did not seek to prosecute actual or threatened violence under the Hobbs Act until the 1970s. *Enmons*, 410 U.S. at 409;

McFarland, 311 F.3d at 383 (Garwood, J., dissenting from *per curiam*). As the Court observed in *Enmons*, "[i]t is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." 410 U.S. at 410.

The federal government's expansive reading of the Hobbs Act is thus a relatively recent development. In this case, it was the presence of out-of-state ingredients at the crime scene that purportedly established federal jurisdiction over a run-of-the-mill robbery of the sort that Ohio itself has prosecuted for more than two centuries. But the decision below does not stand alone. Courts in other cases have applied the Act if the injured business had previously purchased supplies from out-of-state, sent a percentage of its profits to an out-of-state headquarters, hired employees from out-of-state, sold products or services to out-of-state customers, or received insurance proceeds from an out-of-state insurer.[6]

The Eighth Circuit recently held that the Act applied to the robbery of several drinking establishments (*i.e.*, bars), since the bars sold out-of-state beer. See *United States* v. *McAdory*, 501 F.3d 868,

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[6] See, *e.g.*, *United States* v. *Clausen*, 328 F.3d 708 (3d Cir. 2003) (restaurant advertised in out-of-state newspaper, and had out-of-state employees, musicians, and customers); *United States* v. *Nutall*, 180 F.3d 182 (5th Cir. 1999) (part of a nationwide company that cashed checks and sold money orders); *United States* v. *Hickman*, 179 F.3d 230 (5th Cir. 1999) (companies either purchased products out-of-state or transferred their profits to out-of-state national headquarters); *United States* v. *Juvenile Male*, 118 F.3d 1344 (9th Cir. 1997) (business sent percentage of profits to out-of-state headquarters, and used out-of-state distributors for food, paper and plastic products, and uniforms).

871 (8th Cir. 2007). Since out-of-state beer is sold at every bar in the country, the Eighth Circuit's theory would permit Congress to criminalize any barroom brawl that might disrupt business. Straying almost as far from reason, the Second Circuit has held the Act applicable to a defendant who stole money from an undercover officer because the theft left the officer with less money to buy cocaine in future sting operations—and cocaine, of course, is a commodity that travels in interstate commerce. *United States* v. *Jones*, 30 F.3d 276, 285 (2d Cir. 1994).

The courts are thus becoming comfortable using the *de minimis* standard to fish for a federal factor; and it is not clear what falls outside the federal domain on the reasoning of decisions such as the one below. Lacking the courage of their convictions, other courts that follow the *de minimis* standard nonetheless purport to distinguish robberies of individuals. See, *e.g.*, *United States* v. *Lynch*, 282 F.3d 1049, 1052-1055 (9th Cir. 2002); *United States* v. *Wang*, 222 F.3d 234, 238-240 (6th Cir. 2000). The theory that caught petitioner, however, admits of no such exception. His conviction was upheld simply because pizza ingredients from out of state were present at the crime scene, not because he stole any Wisconsin cheese, California sauce, or Minnesota flour.

Surely the burned-down house in *Jones* contained out-of-state goods, yet this Court concluded that the federal arson statute "is not soundly read to make virtually every arson in the country a federal offense." 529 U.S. at 859. Instead, the Court concluded that "[under] *Lopez*, it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the 'traditionally local criminal

conduct' in which petitioner Jones engaged 'a matter for federal enforcement.'" *Id.* at 858 (quoting *United States* v. *Bass*, 404 U.S. 336, 350 (1971)). Likewise here, the scope of the Hobbs Act should be narrowed, consistent with the "guiding principle" that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [this Court's] duty is to adopt the latter." *Id.* at 857 (citations omitted).

For the reasons discussed above—the Commerce Clause problems posed by the *de minimis* standard; the narrow purpose of the Hobbs Act; the enacting Congress's understanding of the Commerce Clause; the requirement that significant changes to the federal-state balance be supported by clear statements of congressional intent; this Court's narrow interpretation of the Hobbs Act in *Enmons*; and the canon of constitutional avoidance—the Hobbs Act should not be construed to reach conduct such as petitioner's. This Court's review is needed to cut the Hobbs Act back to the size that Congress intended—and the Constitution permits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2008