

In the
United States Court of Appeals
For the Second Circuit

August Term, 2017
No. 16-3329-cr

v.

CARL A. LARSON, MICHAEL J. CAGGIANO, JEFFREY C. LENNON,
GERALD H. FRANZ, JR., JAMES L. MINTER, III, JEFFREY A. PETERSON,
KENNETH EDBAUER, GEORGE DEWALD, MICHAEL J. EDDY, THOMAS
FREEDENBERG, GERALD E. BOVE,
*Defendants.**

Appeal from the United States District Court
for the Western District of New York.
No. 07-cr-00304 — William M. Skretny, *Judge*.

* The Clerk of Court is directed to amend the caption as set forth above.

1 ARGUED: SEPTEMBER 25, 2017

2 DECIDED: SEPTEMBER 12, 2018

3
4 Before: LOHIER and DRONEY, *Circuit Judges*, and RAKOFF, *District*
5 *Judge*.**
6
7

8 Appeal from a judgment of conviction of the United States
9 District Court for the Western District of New York (Skretny, J.).
10 Mark N. Kirsch, a union local president, was convicted of
11 racketeering conspiracy and Hobbs Act extortion conspiracy for his
12 efforts to force non-union contractors to hire union members. On
13 appeal, Kirsch contends that: (1) the *Enmons* exception to the Hobbs
14 Act for the pursuit of lawful union objectives applies, requiring
15 reversal of his Hobbs Act conspiracy conviction; (2) an *Enmons*-like
16 exception exists with respect to New York Penal Law extortion,
17 requiring reversal of his racketeering conviction based on state law
18 predicate acts; (3) the wages that he was convicted of attempting to
19 extort are not “property” capable of being extorted, requiring reversal
20 of both convictions; (4) his Hobbs Act conspiracy conviction must be
21 reversed because the Government failed to prove his involvement in
22 the charged conspiracy; and (5) the district court erred in instructing
23 the jury as to the required mental state for threats. We conclude that
24 (1) an *Enmons*-like exception does not apply to New York Penal Law
25 extortion; (2) the wages Kirsch attempted to extort were “property”
26 capable of being extorted; (3) the district court’s threat instruction was
27 correct with respect to New York Penal Law extortion; but (4) the
28 Government failed to prove Kirsch’s involvement in the charged
29 Hobbs Act conspiracy. Accordingly, we **REVERSE** the count of

** Judge Jed. S. Rakoff, United States District Court for the Southern District of New York, sitting by designation.

1 conviction for Hobbs Act conspiracy, **AFFIRM** the count of conviction
2 for racketeering conspiracy, and **REMAND** for resentencing.

3
4
5 MONICA J. RICHARDS, Assistant
6 United States Attorney, *for* James P.
7 Kennedy, Jr., United States Attorney
8 for the Western District of New York,
9 Buffalo, NY, *for Appellee*.

10
11 BRIAN M. MELBER, Personius Melber
12 LLP, Buffalo, NY, *for Defendant-*
13 *Appellant*.

14
15 DRONEY, *Circuit Judge*:

16 In 2016, Appellant Mark N. Kirsch was convicted of Hobbs Act
17 extortion conspiracy and racketeering conspiracy based on predicate
18 acts of New York Penal Law extortion violations. The jury concluded
19 that Kirsch, the president of the local chapter of a labor union, used
20 threats of violence and destruction of property in an attempt to force
21 contractors to hire members of his union.

22 On appeal, Kirsch argues that *United States v. Enmons*, 410 U.S.
23 396 (1973), shields him from Hobbs Act liability, requiring that his

1 Hobbs Act conspiracy conviction be reversed. In *Enmons*, the
2 Supreme Court held that a union official could not be convicted of
3 Hobbs Act extortion if the official's conduct was undertaken in
4 pursuit of "legitimate union objectives." *Id.* at 400. With respect to the
5 racketeering conspiracy conviction, Kirsch contends that an *Enmons*-
6 like exception exists under New York law that shields him from New
7 York Penal Law extortion liability, also requiring the reversal of that
8 count of conviction. He also maintains that (1) the property he was
9 charged with extorting—wages and benefits for union members—
10 was not "transferable," as required by *Sekhar v. United States*, 570 U.S.
11 729 (2013); (2) the Government presented insufficient evidence of his
12 involvement in the charged Hobbs Act conspiracy; and (3) the district
13 court's instructions regarding the required mental state for threats for
14 the extortion charges were incorrect.

15 We hold that (1) under New York Penal Law, there is no
16 *Enmons*-like exception for extortion committed in pursuit of a

1 legitimate labor objective; (2) the property Kirsch was convicted of
2 extorting was “transferable” as required by *Sekhar*; (3) the district
3 court’s instructions with respect to extortion under the New York
4 Penal Law were correct; but (4) the Government presented
5 insufficient evidence of Kirsch’s involvement in the charged Hobbs
6 Act conspiracy. Because we hold that the government presented
7 insufficient evidence to support the Hobbs Act conviction, we need
8 not reach Kirsch’s argument that *Enmons* shields him from Hobbs Act
9 liability. As a result, Kirsch’s conviction for racketeering conspiracy
10 is affirmed, and his conviction for Hobbs Act extortion conspiracy is
11 reversed.

12 BACKGROUND

13 Kirsch was the president and business manager of the
14 International Union of Operating Engineers – Local 17 (“Local 17”)
15 from 1997 to 2008. Local 17 operated in the Buffalo, New York area.
16 At trial, the government presented evidence that Kirsch instructed

1 Local 17 members to “turn or burn” contractors who did not employ
2 them, meaning that non-union contractors would have to hire Local
3 17 members (“turn”) or the union would obstruct their work (“burn”).
4 Union members, at the direction of Kirsch, picketed and blocked
5 construction sites, threatened construction managers, tampered with
6 equipment, and destroyed property.

7 Kirsch was charged with multiple counts of unlawful conduct
8 with respect to numerous contractors. However, after the jury’s
9 verdict and his motion for judgment of acquittal was granted in part,
10 Kirsch remains convicted only of Racketeering Conspiracy (18 U.S.C.
11 § 1962(d)) under Count 1 for his role in attempting to extort two
12 contractors—Ontario Specialty Contracting (“OSC”) and Earth
13 Tech—and Hobbs Act extortion conspiracy (18 U.S.C. § 1951(a))
14 under Count 2 with respect to conduct directed at a third contractor,
15 Amstar Painting (“Amstar”).¹ Accordingly, we limit our review to

¹ The jury acquitted Kirsch of two counts, but found Kirsch guilty of racketeering conspiracy, Hobbs Act conspiracy, and two counts of attempted Hobbs Act

1 those two counts of conviction and the circumstances involving those
2 three contractors. We briefly summarize the evidence presented at
3 trial as to those contractors.²

4 I. OSC

5 OSC is an environmental contractor that provides soil
6 remediation services. In June 2005, OSC began a project at the
7 waterfront in Buffalo to prepare the site for later construction. Before

extortion. As to the racketeering conspiracy count, the jury found that Kirsch had conspired to commit four predicate acts: (1) attempted Hobbs Act extortion (“Racketeering Act 4A”) and (2) attempted extortion in violation of New York law (“Racketeering Act 4B”) as to the OSC project, and (3) attempted Hobbs Act extortion (“Racketeering Act 5A”) and (4) attempted extortion in violation of New York law (“Racketeering Act 5B”) as to the Earth Tech project. After trial, the district court granted in part Kirsch’s motion for a judgment of acquittal, acquitting Kirsch of the two counts of attempted Hobbs Act extortion. The Government did not cross-appeal the district court’s dismissal of those counts. As discussed below, the district court also concluded that the related predicate acts, Racketeering Acts 4A and 5A, could not support the racketeering conspiracy count of conviction, but denied Kirsch’s motion on that count because Racketeering Acts 4B and 5B were sufficient to sustain the conviction.

² While Count 2—Hobbs Act Conspiracy—alleges conduct with respect to contractors other than those three, the Government does not specifically rely on that other conduct to support Kirsch’s conviction under Count 2.

1 such construction could begin, OSC was tasked with excavating
2 contaminated material and transporting it to a disposal facility.

3 Before the contract was awarded to OSC, a Local 17
4 representative invited the owner of OSC, Jon Williams, to have lunch
5 with him and Kirsch. Williams testified at trial that at the meeting,
6 Kirsch stated that if OSC did not use Local 17 members for the project,
7 OSC would not “get the project, and if [it] did get the project, [it]’d
8 never get it done.” Gov’t App. 15. Despite Kirsch’s demand that OSC
9 employ Local 17 members, OSC refused. At a meeting before the
10 project’s ceremonial ground-breaking, Kirsch again threatened to
11 stop the project. Local 17 then began picketing the site. During the
12 picketing, Local 17 members prevented trucks from entering or
13 leaving the worksite, and placed metal “stars” to puncture truck tires
14 in the entranceway of the worksite. Additionally, on multiple
15 occasions, OSC workers discovered upon arrival in the morning that

1 padlocks on the entrances to the site had been tampered with so that
2 they could not be unlocked.³

3 II. EARTH TECH

4 In 2005, Earth Tech, also an environmental remediation
5 company, entered into a \$10 million contract to remove contaminated
6 soil from a school in the Buffalo area. When Earth Tech refused to
7 sign an agreement to hire Local 17 workers, Local 17 members began
8 picketing the job site. In addition, Local 17 members blocked
9 entrances to the site and placed metal stars and roofing nails by its
10 entrance to damage tires of vehicles. As a result of this conduct, Earth
11 Tech obtained an injunction to prevent further disruption at the
12 worksite. When an Earth Tech project manager notified the picketers
13 of the injunction, one of the Local 17 members threatened him. Later,

³ There was evidence of additional instances of unlawful conduct by Local 17 directed at OSC employees: picketers told an OSC employee that they knew where he lived and threatened to throw a brick at his residence; a security guard was injured when picketers pushed a gate over on top of him; and a picketer threw a cup of hot coffee over the fence of the job site, hitting an OSC employee in the face.

1 as the project manager was leaving for the night, his car was
2 surrounded by picketers; about an hour passed before he was
3 permitted to leave.

4 **III. AMSTAR**

5 In September of 2003, Amstar, a painting contractor, was
6 involved in a bridge rehabilitation project in Buffalo. After the project
7 had begun, a Local 17 member, Edward Perkins, asked John Lignos,
8 the vice president of Amstar, to assign a Local 17 worker to operate a
9 compressor at the job site. The compressor did not actually require
10 an operator, as “operating” it simply required turning it on in the
11 morning and turning it off at the end of the day.⁴ Lignos refused to
12 hire a Local 17 member for that purpose.

13 When the Amstar employees arrived on the morning after
14 Lignos told Perkins he would not hire a Local 17 member, they

⁴ Had Lignos hired a Local 17 “operator,” Amstar would have had to pay him for eight hours of work.

1 discovered that the diesel fuel line in the compressor had been cut,
2 causing diesel fuel to spill into the asphalt, resulting in substantial
3 cleanup and repair costs.

4 **PROCEDURAL HISTORY**

5 On December 18, 2007, a grand jury in the United States District
6 Court for the Western District of New York indicted five members of
7 Local 17—not including Kirsch—on charges of Hobbs Act extortion
8 and conspiracy. On April 1, 2008, the grand jury returned a
9 superseding indictment, adding additional counts and additional
10 defendants, including Kirsch. A second superseding indictment—the
11 operative indictment at trial—was returned on January 10, 2012. It
12 included racketeering conspiracy and Hobbs Act extortion conspiracy
13 charges.

14 Kirsch and his codefendants moved to dismiss the indictment,
15 arguing—as relevant here—that the alleged threatening and violent
16 conduct was undertaken to achieve legitimate union objectives and

1 thus could not constitute extortion under either the Hobbs Act or New
2 York Penal Law. *See Enmons*, 410 U.S. at 400.⁵ The district court
3 concluded that *Enmons* did not shield Kirsch and his codefendants
4 from liability, and denied the motion to dismiss.

5 Shortly after the Supreme Court decided *Sekhar*, and still before
6 trial, Kirsch and his codefendants again moved to dismiss the
7 indictment. Their second motion argued that the property that the
8 indictment alleged was extorted was not “transferable,” as required
9 for Hobbs Act extortion by *Sekhar*. *See Sekhar*, 570 U.S. at 734. The
10 district court concluded that while certain of the forms of property
11 that the indictment alleged was extorted failed to satisfy *Sekhar*, two
12 other forms of property alleged in the indictment satisfied *Sekhar*. The
13 district court denied the motion to dismiss as to those two types of
14 property.

⁵ As discussed later in the opinion, certain of the racketeering predicate acts were based on violations of the New York Penal Law.

1 After the motion was granted in part and denied in part, only
2 the following two types of property remained charged in the
3 indictment:

- 4 • “Property of construction contractors consisting of
5 wages and benefits to be paid pursuant to labor contracts
6 with Local 17 at construction projects in Western New
7 York.”
- 8 • “Property of construction contractors consisting of
9 wages and employee benefit contributions paid or to be
10 paid by said contractors for unwanted, unnecessary, and
11 superfluous labor.”

12
13 Kirsch’s App. 373.

14 The New York state extortion predicate racketeering acts in
15 Count 1 (identified as Racketeering Acts 4B and 5B) defined the
16 property extorted in the first of these ways; Racketeering Acts 4A and
17 5A of Count 1, and Count 2 (Hobbs Act conspiracy) defined the
18 property in the second manner.

19 Kirsch and four of his codefendants proceeded to trial. The
20 codefendants were acquitted of all charges. Kirsch, however, was
21 convicted of racketeering conspiracy (Count 1) and Hobbs Act

1 conspiracy (Count 2).⁶ With respect to Count 1, the jury found that
2 Kirsch committed Racketeering Act 4, subparts A and B—attempted
3 extortion of OSC in violation of the Hobbs Act and New York Penal
4 Law, respectively—and Racketeering Act 5, subparts A and B—
5 attempted extortion of Earth Tech in violation of the Hobbs Act and
6 New York Penal Law, respectively.

7 After the verdict, Kirsch moved for a judgment of acquittal (or
8 a new trial) on all the counts of which he was convicted. With respect
9 to Racketeering Acts 4A and 5A (based on Hobbs Act extortion) of
10 Count 1 (racketeering conspiracy) and Count 2 (Hobbs Act extortion
11 conspiracy), Kirsch argued that the Government had not presented
12 sufficient evidence that he had attempted to extort “wages and
13 benefits to be paid . . . for unwanted, unnecessary, and superfluous

⁶ Kirsch was also convicted under Count 5 (attempted Hobbs Act extortion of OSC), and Count 6 (attempted Hobbs Act extortion of Earth Tech), but was acquitted of the remaining charges. The district court set aside the convictions on Counts 5 and 6 after the verdict, and those counts are not subjects of this appeal.

1 labor.” Kirsch’s App. 435. Unlike in his motion to dismiss, he did not
2 argue that *Enmons* shielded his conduct; rather, he argued that the
3 Government *chose* to define the property related to the Hobbs Act
4 violations as “wages and benefits to be paid . . . for unwanted,
5 unnecessary, and superfluous labor,” and had not proven attempted
6 extortion of such property.⁷ Kirsch’s argument was that Local 17’s
7 goal had been to replace non-union laborers with Local 17 laborers
8 who would perform actual and necessary work, and that the labor
9 therefore would not be “superfluous.” The district court agreed with
10 this argument as applied to Racketeering Acts 4A and 5A of Count 1,
11 and entered a judgment of acquittal with respect to those Hobbs Act-
12 based racketeering acts.⁸ But as to Racketeering Acts 4B and 5B of
13 Count 1, which alleged predicate act violations of New York extortion
14 statutes, the district court denied the motion for judgment of

⁷ It would appear that the Government chose this language in an attempt to ensure compliance with *Enmons*.

⁸ The Government does not cross-appeal from this ruling.

1 acquittal. For those racketeering acts, the Government defined the
2 property not as “superfluous” labor, but rather as “wages and
3 benefits to be paid pursuant to labor contracts with Local 17.”
4 Kirsch’s App. 373. The district court concluded that the Government
5 proved that Kirsch attempted to extort such wages and benefits. As
6 to Count 2 (Hobbs Act extortion conspiracy), the district court
7 concluded that the Amstar incident constituted an attempt to extort
8 wages for labor that would have been superfluous—as the indictment
9 charged—and denied the motion with respect to that count.

10 After the district court’s decision on the post-trial motions, but
11 before Kirsch’s sentencing, the Supreme Court issued its decision in
12 *Elonis v. United States*, 135 S. Ct. 2001 (2015). Kirsch filed a motion for
13 a new trial based on *Elonis*, arguing that the district court’s
14 instructions regarding threats, which focused on the perception of the
15 recipient rather than the intent of the maker of the threats, were
16 improper under *Elonis*. The district court denied that motion.

Kirsch was sentenced to 36 months' imprisonment on Count 1, and 36 months' imprisonment on Count 2, with the sentences to run concurrently, followed by two years of supervised release. He was also ordered to pay a total of \$198,121.50 in restitution to OSC and Amstar.

DISCUSSION

I. NO *ENMONS*-LIKE EXCEPTION EXISTS UNDER NEW YORK PENAL LAW

As to Count 1, following the district court's decision on the post-trial motions, only the two predicate acts based on New York Penal Law extortion violations remained to support a racketeering violation under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). RICO provides that "[i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of,

1 any enterprise which is engaged in, or the activities of which affect,
2 interstate or foreign commerce.” 18 U.S.C. § 1962(a). Racketeering
3 under 18 U.S.C. § 1962 requires a “pattern of racketeering activity,”
4 *id.* § 1962(a), which requires the Government to prove at least two acts
5 of racketeering activity committed within ten years of one another, *id.*
6 § 1961(5). Those acts are defined to include a number of criminal
7 offenses under both state and federal law. *See id.* § 1961(1). As
8 relevant here, “racketeering activity” includes Hobbs Act extortion,
9 as well as “any act or threat involving . . . extortion . . . chargeable
10 under State law and punishable by imprisonment for more than one
11 year.” *Id.* § 1961(1)(A)–(B). Kirsch argues that an *Enmons*-like
12 exception exists under New York Penal Law and that as a result he
13 could not be convicted of extortion based on those predicate acts
14 because his conduct was committed in pursuit of a lawful union

1 objective. He challenges the denial of his pre-trial motion to dismiss
2 on this ground.⁹

3 We review *de novo* the denial of a motion to dismiss the
4 indictment. *United States v. Yannotti*, 541 F.3d 112, 121 (2d Cir. 2008).

5 We hold that no *Enmons*-like exception applies to the extortion
6 provisions of the New York Penal Law. But before we examine the
7 current New York statutes (i.e., those in effect at the time of the trial),
8 we discuss *Enmons* and its interpretation of the Hobbs Act.

⁹ As we explain further later in the opinion, in order for conduct to serve as a state law RICO extortion predicate act, it must (1) violate a state extortion statute and (2) satisfy the “generic” definition of extortion. See *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003). Kirsch argued before the district court both that an *Enmons*-like exception exists under New York Penal Law and that an *Enmons*-like exception exists with respect to the “generic” definition of extortion. Succeeding on either argument would require that his conviction be reversed. However, on appeal, he argues only that an *Enmons*-like exception exists under New York Penal Law extortion, and does not reference the “generic” definition of extortion in the context of his *Enmons* argument. We therefore deem any argument related to the applicability of *Enmons* to the “generic” definition of extortion abandoned. See *United States v. Chen*, 378 F.3d 151, 162 n.7 (2d Cir. 2004) (“[T]he court does not ordinarily consider issues not adequately raised in an opening brief.”); *LoSacco v. City of Middletown*, 71 F.3d 88, 92–93 (2d Cir. 1995) (explaining that arguments not raised in an appellate brief are abandoned).

1 The Hobbs Act prohibits robbery or extortion—including
2 conspiracy and attempt—that affects interstate commerce. 18 U.S.C.
3 § 1951(a). The Hobbs Act defines extortion as “the obtaining of
4 property from another, with his consent, induced by *wrongful* use of
5 actual or threatened force, violence, or fear.” *Id.* § 1951(b)(2)
6 (emphasis added).

7 In *United States v. Enmons*, the Supreme Court concluded that
8 the use of “wrongful” in the Hobbs Act meant that the Hobbs Act
9 could apply only to threats and violence used to obtain an objective
10 that is itself unlawful, thus limiting the scope of Hobbs Act extortion
11 liability in labor disputes. 410 U.S. at 400. In *Enmons*, union
12 employees destroyed equipment belonging to their employer, a
13 utility company, in an effort to obtain a new collective bargaining
14 agreement. *Id.* at 397–98.

15 The *Enmons* Court held that this conduct did not violate the
16 Hobbs Act, as the Act “does not apply to the use of force to achieve

1 legitimate labor ends,” such as “higher wages in return for genuine
2 services.” *Id.* at 400–01. Accordingly, the Hobbs Act is not violated
3 unless threats or force are used to obtain an illegitimate objective in a
4 labor dispute, such as personal payoffs or “no-show” jobs.¹⁰ *Id.* at 400.

5 In reaching that conclusion, the *Enmons* Court relied on both
6 the language of the statute and the legislative history of the Hobbs
7 Act. With respect to the language of the statute, the Court reasoned
8 that “‘wrongful’ has meaning in the [Hobbs] Act only if it limits the
9 statute’s coverage to those instances where the obtaining of the
10 property would itself be ‘wrongful’ because the alleged extortionist
11 has no lawful claim to that property.” *Id.* Indeed, “it would be
12 redundant to speak of ‘wrongful violence’ or ‘wrongful force’ since .
13 . . any violence or force to obtain property is ‘wrongful.’” *Id.* at
14 399–400.

¹⁰ We refer to this interpretation of the Hobbs Act by the Supreme Court as the “*Enmons* exception.”

1 As to the legislative history, the Court concluded that Congress
2 enacted the Hobbs Act in response to the Court’s decision in *United*
3 *States v. Local 807*, 315 U.S. 521 (1942). *Id.* at 401–02. As the *Enmons*
4 Court explained, *Local 807* held that the predecessor to the Hobbs
5 Act—the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979
6 (amended by Hobbs Act, ch. 537, 60 Stat. 420 (1946))—did not prohibit
7 the conduct of “members of a New York City truck drivers union
8 who, by violence or threats, exacted payments for themselves from
9 out-of-town truckers in return for the unwanted and superfluous
10 service of driving out-of-town trucks to and from the city.” *Enmons*,
11 410 F.3d at 402 (citing *Local 807*, 315 U.S. at 526). Congress enacted
12 the Hobbs Act, the Court explained, to ensure that this type of
13 conduct—extorting wages for “imposed, unwanted, and superfluous
14 services”—was criminalized under the amended statute. *Id.* at 403.
15 However, the Court also made clear that Congress did not intend the

1 Hobbs Act to reach extortion committed to achieve *legitimate* union
2 objectives. *Id.* at 402–07.¹¹

3 As described above, *Enmons* was based on the interpretation of
4 the particular language of the Hobbs Act, as well as its legislative
5 history. The question, then, is whether that interpretation informs our
6 reading of the New York extortion statute, and whether a similar
7 exception exists under that statute. Under the New York Penal Law
8 prior to 1965, section 850 defined the offense of extortion in a manner
9 similar to the Hobbs Act. Specifically, section 850 provided that
10 “[e]xtortion is the obtaining of property from another . . . with [the
11 victim’s] consent, induced by a *wrongful* use of force or fear.” N.Y.
12 Penal Law § 850 (1909 (emphasis added)). That definition closely
13 tracked the language of the Hobbs Act by including the use of the

¹¹ Comments by legislators regarding the Hobbs Act emphasized that the Act was not intended to “interfere in any way with any legitimate labor objective or activity,” *id.* at 404 (citation omitted), and Congressman Hobbs, the bill’s sponsor, “explicitly refuted the suggestion that strike violence to achieve a union’s legitimate objectives was encompassed by the Act,” *id.* at 404–05.

1 word “wrongful.” Accordingly, were that statute still in force today,
2 the *Enmons* Court’s observation that “it would be redundant to speak
3 of ‘wrongful violence’ or ‘wrongful force’ since . . . any violence or
4 force to obtain property is ‘wrongful,’” *Enmons*, 410 U.S. at 400–01,
5 would also guide us in our interpretation of that version of the New
6 York Penal Law extortion statute.¹²

¹² The Supreme Court noted that the legislative history of the Hobbs Act indicated that Congress intended that the Act “d[o] no more than incorporate New York’s conventional definition of extortion—‘the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear’” *Enmons*, 410 U.S. at 406 n.16 (citation omitted). Referring to the pre-1965 version of the New York extortion statute and citing only New York cases decided prior to 1965, the Supreme Court stated that “[j]udicial construction of the New York statute reinforces the conclusion that, however militant, union activities to obtain higher wages do not constitute extortion.” *Id.* Even though *Enmons* was decided in 1973, it is clear that the Supreme Court was referring to the “[j]udicial construction” of the pre-1965 extortion statute, which contained nearly identical language to the Hobbs Act, and was not considering the version in effect when *Enmons* was decided and still in effect today. Indeed, the Supreme Court was simply indicating that New York courts had interpreted the “conventional definition of extortion” to *not* include union violence “to obtain higher wages” at the time Congress passed the Hobbs Act, and that in adopting this “conventional definition,” Congress likely intended the same result. *Id.* However, as we have explained, New York has abandoned the “conventional definition of extortion” in favor of the definition currently in effect.

1 In 1965, however, the New York extortion statute was
2 amended. That amendment—which remains in effect today—
3 reformulated the definition of extortion and removed the word
4 “wrongful.” *See* N.Y. Penal Law §§ 155.05, 155.40 (McKinney 1967).

5 Under the current New York Penal Law,

6 [a] person is guilty of . . . larceny . . . when he steals
7 property and . . . 2. the property . . . is obtained by
8 extortion committed by instilling in the victim a fear that
9 the actor or another person will (a) cause physical injury
10 to some person in the future, or (b) cause damage to
11 property

12
13 N.Y. Penal Law § 155.40.¹³

14 The statute also explains that “[a] person obtains property by
15 extortion when he compels or induces another person to deliver such
16 property to himself or to a third person by means of instilling in him
17 a fear that, if the property is not so delivered, the actor or another
18 will,” in relevant part:

¹³ Extortion is a type of Grand Larceny in the Second Degree, a class C felony.
N.Y. Penal Law § 155.40.

1 (i) Cause physical injury to some person in the future; or
2 (ii) Cause damage to property; or
3
4 (vi) Cause a strike, boycott or other collective labor group
5 action injurious to some person's business; except that
6 such a threat shall not be deemed extortion when the
7 property is demanded or received for the benefit of the
8 group in whose interest the actor purports to act
9
10 N.Y. Penal Law § 155.05(2)(e).

11 New York's amended definition of extortion thus eliminates
12 the word "wrongful," but also provides a separate exception for
13 certain union activities. We address the implication of each of those
14 changes below.

15 First, the elimination of "wrongful" renders the Supreme
16 Court's statutory interpretation analysis in *Enmons* irrelevant to
17 interpreting the current New York extortion statute. The Supreme
18 Court's *Enmons* analysis relied on the presence of that word in the
19 Hobbs Act, and its absence in the New York statute suggests that New
20 York has not incorporated the Supreme Court's exception for labor
21 activities into its own current law. Moreover, in contrast to the

1 legislative history of the Hobbs Act, the legislative history of the 1965
2 amendment to the New York Penal Law extortion statute does not
3 indicate an intent to exempt the use of threats of force by members of
4 a labor union to achieve a legitimate union objective from the
5 prohibitions of the statute.¹⁴ Accordingly, *Enmons* does not guide us
6 in interpreting the current version of the New York Penal Law
7 extortion statute.

8 We therefore turn to the language of New York's revised
9 definition of extortion and its exemption for certain union activities.
10 The plain language of the current New York extortion statute
11 prohibits threats of violence, even in labor disputes. Section 155.05(e)
12 of the New York Penal Law broadly prohibits "instilling [in the
13 victim] a fear that" if the victim does not deliver the property, the
14 actor will, as relevant here, injure a person or damage property. For

¹⁴ See generally Legislative History compiled by the New York Legislative Service, Inc., 1965, Ch. 1030.

1 example, subsection (e)(i) prohibits “instilling [in the victim] a fear”
2 of personal harm, and subsection (e)(ii) prohibits “instilling [in the
3 victim] a fear” of property damage.

4 Subsection 155.05(e)(vi) of the New York statute also prohibits
5 extortion carried out by “instilling [in the victim] a fear” of “strike,
6 boycott or other collective labor group action injurious to some
7 person’s business,” but provides limited circumstances under which
8 such conduct does not constitute extortion, namely “when the
9 property is demanded or received for the benefit of the group in
10 whose interest the actor purports to act.” That exception to extortion
11 liability does not, however, create an *Enmons*-like exception
12 applicable to the New York extortion statute as a whole. The
13 exception is contained only within subsection (vi), and thus it does
14 not shield union members who violate other subsections of the
15 statute—such as by threatening to commit violent acts against
16 persons or property in violation of subsections (e)(i) and (ii)—from

1 extortion liability. Rather, it protects only union members who
2 threaten to perform *certain* union activities taken to benefit a labor
3 group.

4 In addition, and unlike the Hobbs Act, the protected activity is
5 clearly defined and cannot be read to encompass threats to cause
6 personal injury or damage property. As we have noted, the statute
7 lists “strike[s], boycott[s] or other collective labor group action[s]” as
8 permissible threats only where “the property is demanded or
9 received for the benefit of the group in whose interest the actor
10 purports to act.” N.Y. Penal Law § 155.05(e)(vi). The only basis to
11 argue that the statute permits threats to cause property damage or
12 personal injury in the labor dispute context is the language
13 authorizing threats for “other collective labor group action”
14 undertaken to benefit a labor group. But the context here
15 demonstrates that “other collective labor group action” does not
16 include such threats. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341

1 (1997) (“The plainness or ambiguity of statutory language is
2 determined by reference to the language itself, the specific context in
3 which that language is used, and the broader context of the statute as
4 a whole.”). Rather, the terms that precede “other collective labor
5 group action” — “strike” and “boycott” — demonstrate that the term
6 can only be understood as permitting threats to undertake traditional
7 union organizing and collective action activities. As the Supreme
8 Court has explained, a “word is known by the company it keeps,” and
9 here, that principle compels an interpretation that maintains the New
10 York Penal Law’s categorical prohibition against extortion that
11 threatens personal injury or property damage. *See also United States*
12 *v. Williams*, 553 U.S. 285, 294 (2008) (“[A] word is given more precise
13 content by the neighboring words with which it is associated.”). As a
14 result, New York’s extortion statute does not shield Kirsch from
15 criminal liability.

1 Here, the Government presented sufficient evidence to the jury
2 that Kirsch “instill[ed] in the [victims] a fear” that Local 17 would
3 cause personal injury in violation of subsection (e)(i), and cause
4 property damage in violation of subsection (e)(ii), in connection with
5 the OSC and Earth Tech episodes. Accordingly, Kirsch’s challenge to
6 the sufficiency of Predicate Acts 4B and 5B of Count 1 under
7 subsections (e)(i) and (ii) of New York Penal Law § 155.05 fails.

8 **II. THE PROPERTY SET FORTH IN RACKETEERING ACTS**
9 **4B AND 5B WAS “TRANSFERABLE”**

10
11 As discussed above, the Count 1 racketeering conspiracy
12 conviction was predicated upon New York state law predicate acts of
13 extortion. Violations of state extortion statutes *may* qualify as RICO
14 predicate acts, but only if such violations are also “capable of being
15 generically classified as extortionate.” *Wilkie v. Robbins*, 551 U.S. 537,
16 567 (2007) (quoting *Scheidler v. Nat’l Org. for Women, Inc.*, 537 U.S. 393,
17 409 (2003)). “[S]uch ‘generic’ extortion is defined as ‘obtaining
18 something of value from another with his consent induced by the

1 wrongful use of force, fear, or threats.” *Scheidler*, 537 U.S. at 409
2 (quoting *United States v. Nardello*, 393 U.S. 286, 290 (1969)). Thus, in
3 order for conduct to serve as a state law RICO extortion predicate act,
4 it must (1) violate a state statute and (2) satisfy that “generic”
5 definition of extortion.

6 Relying on the Supreme Court’s decision in *Sekhar v. United*
7 *States*, 570 U.S. 729 (2013), Kirsch argues that the property that he was
8 convicted of extorting was not transferable, and that the district court
9 should have granted pre-trial dismissal of Counts 1 and 2 on that
10 basis. Because we later conclude that the district court should have
11 granted a judgment of acquittal with respect to Count 2 based upon
12 insufficiency of the evidence, we need not reach Kirsch’s argument
13 that *Sekhar* provides a basis to set aside his conviction under Count 2.
14 Accordingly, we address only whether the reasoning of *Sekhar*
15 requires us to vacate his conviction under Count 1 for racketeering
16 conspiracy based on New York Penal Law extortion predicate acts.

1 In contrast to Kirsch’s *Enmons*-based challenge to his Count 1
2 conviction, his *Sekhar*-based challenge to Count 1 addresses both the
3 New York Penal Law definition of extortion as well as the “generic”
4 definition applicable to all state law RICO extortion predicate acts.
5 *See* Kirsch Reply Br. at 19 (“In order to serve as predicate racketeering
6 acts for a federal RICO charge, . . . state law offenses must be capable
7 of being generically classified as extortionate.”). Accordingly, we
8 address (1) whether *Sekhar*—a decision interpreting the Hobbs Act—
9 also applies to the “generic” definition of extortion, and if it does (2)
10 whether the property that Kirsch was convicted of extorting in
11 Racketeering Acts 4B and 5B satisfies *Sekhar*.¹⁵ We conclude that

¹⁵ We need not separately address whether the property Kirsch extorted qualified as “property” under the New York Penal Law extortion statute. Kirsch’s only property-based challenge to the New York Penal Law component of his Count 1 conviction is that a *Sekhar*-like “transferability” requirement also exists under New York Penal Law, and is not satisfied. Stated otherwise, Kirsch does not argue that the property he was convicted of extorting fails to qualify as “property” under New York law for some other reason. While we note that transferability does not appear to be a requirement under New York Penal law, *see People v. Garland*, 69 N.Y.2d 144, 147 (1987) (“[A]n interest need not be transferable to constitute ‘property’ under [New York] Penal Law § 155.00(1).”), we need not directly

1 *Sekhar* applies to the “generic” definition of extortion, but that the
2 transferability of property requirement of *Sekhar* is satisfied with
3 respect to the state law predicate acts.

4 The “generic” definition of extortion applicable to RICO state
5 law extortion predicate acts and the Hobbs Act definition of extortion
6 are nearly identical. *Compare Scheidler*, 537 U.S. at 409 (“‘[G]eneric’
7 extortion is defined as obtaining something of value from another
8 with his consent induced by the wrongful use of force, fear, or
9 threats.” (internal quotation marks omitted)), *with* 18 U.S.C.
10 § 1951(b)(2) (defining extortion as “the obtaining of property from
11 another, with his consent, induced by wrongful use of actual or
12 threatened force, violence, or fear, or under color of official right”).
13 That both definitions include the word “obtaining” is particularly
14 relevant to our analysis.

address the issue, for we conclude below that the property at issue here was
“transferable.”

1 In *Scheidler*, the Supreme Court, pointing to “obtaining” in the
2 Hobbs Act definition of extortion, the history of the Act, and the
3 common law crime of extortion, held that the Hobbs Act requires
4 “that a person must ‘obtain’ property from another party to commit
5 extortion.” 537 U.S. at 404. The Court held that the generic “state
6 extortion offense for purposes of RICO” also “require[s] a party to
7 obtain or to seek to obtain property.” *Id.* at 410.

8 Subsequently, in *Sekhar*, the Supreme Court further explained
9 that “[o]btaining property requires ‘not only the deprivation but also
10 the acquisition of property.’” *Sekhar*, 570 U.S. at 734 (quoting *Scheidler*,
11 537 U.S. at 404). As a result, extortion “requires that the victim part
12 with his property, and that the extortionist gain possession of it.” *Id.*
13 (internal quotation marks and citation omitted). Thus, to summarize,
14 “property extorted must . . . be *transferable*—that is, capable of passing
15 from one person to another.” *Id.*

1 *Sekhar* addressed only the Hobbs Act definition of extortion, not
2 the “generic” definition of extortion for the purpose of analyzing state
3 law RICO predicate acts. However, since *Sekhar*’s holding requiring
4 transferability is a clarification of what it means to “obtain” property,
5 *see id.* at 736 (“*Scheidler* rested its decision, as we do, on the term
6 ‘obtaining.’”), and the “generic” definition of extortion requires that
7 property be obtained, *see Scheidler*, 537 U.S. at 410, we conclude that
8 the requirement of transferability applies with equal force to
9 “generic” state law RICO predicate extortion offenses. Accordingly,
10 in order for a state extortion offense to serve as a RICO predicate act,
11 the property extorted must be “transferable—that is, capable of
12 passing from one person to another.” *Sekhar*, 570 U.S. at 734
13 (emphasis omitted).

14 We next address whether the property that Kirsch was
15 convicted of extorting under New York Penal Law in Racketeering
16 Acts 4B and 5B—namely, “[p]roperty of construction contractors

1 consisting of wages and benefits to be paid pursuant to labor contracts
2 with Local 17 at construction projects in Western New York,” —is
3 transferable. Kirsch’s App. 373. We conclude that it is.

4 In *Scheidler*, anti-abortion activists attempted to close abortion
5 clinics by interfering with doctors, nurses, clinic staff, and women
6 seeking access to the clinics. 537 U.S. at 400–01. The National
7 Organization of Women and two clinics brought a civil RICO action
8 against the anti-abortion activists, alleging a pattern of extortionate
9 racketeering acts under the Hobbs Act and state law. *Id.* at 398. The
10 Court characterized the property the defendants allegedly extorted as
11 the “right to seek medical services from the clinics, the clinic doctors’
12 rights to perform their jobs, and the clinics’ rights to provide medical
13 services and otherwise conduct their business.” *Id.* at 399. In holding
14 that such conduct was not extortionate, the Court stated that “even
15 when [the] acts of interference and disruption achieved their ultimate
16 goal of ‘shutting down’ a clinic that performed abortions, such acts

1 did not constitute extortion because [the defendants] did not ‘obtain’
2 [plaintiffs’] property.” *Id.* at 404–05. While “[the defendants] may
3 have deprived or sought to deprive [the plaintiffs] of their alleged
4 property right of exclusive control of their business assets, . . . they
5 did not acquire any such property.” *Id.* at 405. The Court observed
6 that characterizing this type of behavior as extortion would “discard
7 the statutory requirement that property must be obtained from
8 another, replacing it instead with the notion that merely interfering
9 with or depriving someone of property is sufficient to constitute
10 extortion.” *Id.*

11 The Court reached a similar conclusion in *Sekhar*. In that case,
12 the defendant was convicted of Hobbs Act extortion for attempting to
13 force the general counsel for the New York State Comptroller to
14 recommend investing in a fund managed by the defendant’s
15 company by threatening to expose the general counsel’s alleged
16 extramarital affair. 570 U.S. at 731. The Court characterized the

1 property right as “the general counsel’s intangible property right to
2 give his disinterested legal opinion . . . free of improper outside
3 interference.” *Id.* at 737–38 (internal quotation marks omitted). The
4 Court concluded that while the defendant could deprive the general
5 counsel of this right, he could not possibly have “obtained” it for
6 himself. *See id.* Accordingly, the property was not transferable, and
7 the defendant’s Hobbs Act attempted extortion conviction was
8 reversed. *See id.*

9 In both *Scheidler* and *Sekhar*, the conduct did not constitute
10 extortion because the defendants could not obtain the property for
11 themselves; rather, they could merely “interfere” with the victims’
12 use of it. Such conduct perhaps constituted the New York offense of
13 coercion, but not extortion. *See Scheidler*, 537 U.S. at 404–08; *Sekhar*,
14 570 U.S. at 734–35; *see also* N.Y. Penal Law § 135.60 (“A person is guilty
15 of coercion . . . when he or she compels or induces a person to engage

1 in conduct which the latter has a legal right to abstain from engaging
2 in").¹⁶

3 In contrast, Kirsch sought to extort property that Local 17
4 members could clearly “obtain”: wages and benefits from
5 construction contractors. Wages and benefits are “capable of passing
6 from one person to another,” —in this case, from the employer to the

¹⁶ In discussing the New York crime of coercion, the *Sekhar* Court stated that “[a]t the time [Congress enacted the Hobbs Act], New York courts had consistently held that the sort of interference with rights that occurred [in *Sekhar*] was coercion.” 570 U.S. at 735 (emphasis omitted). In support, the Court included, *inter alia*, the following citation: “*People v. Scotti*, 266 N.Y. 480, 195 N.E. 162 (1934) (compelling victim to enter into agreement with union).” Based on that citation, Kirsch argues that his conduct constituted only the offense of coercion, not extortion. But neither *Scotti* nor the Supreme Court’s citation to it can bear the weight Kirsch assigns to them. First, the property charged in Racketeering Acts 4B and 5B is “wages and benefits,” not a union agreement. Second, *Scotti*, a summary disposition of an appeal of four defendants’ coercion convictions, conveys only that the defendants were convicted of using “threats and force [to] compel[] the complainant, a manufacturer, to enter into an agreement with a labor union of which the defendants were members,” and that there was insufficient evidence to support the convictions of three of those defendants. *Scotti*, 266 N.Y. at 480. Accordingly, we do not know the type of agreement sought, and whether it would have qualified as “obtainable” or “transferable” property. We therefore decline to read *Sekhar*’s citation to *Scotti* as creating a broad rule that *any* type of agreement with a union is *per se* not property that may be extorted.

1 employee—and are therefore “transferable.” *Sekhar*, 570 U.S. at 734.
2 Indeed, when an employer pays wages and provides benefits to an
3 employee, the employer “part[s] with” that property, and the
4 employee “gain[s] possession” of it. *Id.* (citations omitted).
5 Accordingly, Kirsch’s conviction under Count 1 meets the
6 requirement recognized in *Scheidler* and *Sekhar* that the targeted
7 property be transferable.

8 **III. SUFFICIENCY OF THE EVIDENCE FOR COUNT 2**

9
10 Kirsch argues that his conviction for Count 2—Hobbs Act
11 extortion conspiracy—must be reversed because the Government
12 presented insufficient evidence that Kirsch agreed with others to
13 extort wages for “unwanted, unnecessary, and superfluous labor.”
14 Specifically, he contends that the Government failed to prove his
15 involvement in the Amstar incident.

16 In granting in part and denying in part Kirsch’s motion for
17 judgment of acquittal, the district court ruled that only the Amstar

1 incident was evidence of an attempt to extort wages for “unwanted,
2 unnecessary, and superfluous labor,” and upheld the jury’s Count 2
3 verdict on that basis.¹⁷ The court rejected the Government’s argument
4 that Kirsch’s conduct with respect to other contractors qualified as
5 such. On appeal, the Government defends the Count 2 conviction
6 with two arguments. First, the Government contends that it
7 presented sufficient evidence with respect to the Amstar incident to
8 support the Hobbs Act conspiracy conviction. Second, the
9 Government argues that the actions of Kirsch and Local 17 towards
10 OSC and EarthTech constitute an attempt to extort wages for

¹⁷ Even assuming that the district court was correct that the Government presented sufficient evidence of Kirsch’s involvement in the Amstar episode, its conclusion that a new trial was not warranted was incorrect. The district court decided that all of the non-Amstar evidence that the Government presented with respect to Count 2 did not prove a conspiracy to extort wages for “unwanted, unnecessary, and superfluous labor.” The jury rendered only a general guilty verdict for Count 2. Accordingly, it is impossible to conclude that the jury relied on the Amstar incident in convicting Kirsch under Count 2. Rather, the jury’s Count 2 verdict could have been based upon its belief that Kirsch committed unlawful conduct with respect to other contractors, conduct that the court later found did not qualify as attempts to extort wages for “unwanted, unnecessary, and superfluous labor.”

1 “unwanted, unnecessary, and superfluous labor” because Local 17
2 workers were not qualified to do the work at those job sites and
3 therefore could not have been substituted for the other workers.¹⁸
4 Kirsch responds that the Government failed to prove that Local 17
5 workers lacked the requisite qualifications for the OSC and EarthTech
6 work.

7 Before we more fully discuss the evidence the Government
8 presented regarding Amstar, EarthTech, and OSC, we address the
9 language of Count 2 of the indictment. Although the indictment
10 curiously identifies 76 “overt acts in furtherance of Count 2,” Kirsch’s

¹⁸ As explained above, the district court rejected the Government’s argument that the conduct with respect to EarthTech and OSC constituted attempts to extort wages for “unwanted, unnecessary, and superfluous labor” and accordingly granted judgment of acquittal with respect to Racketeering Acts 4A and 5A, and Counts 5 and 6 (all involving EarthTech and OSC). The Government does not cross-appeal from the judgment of acquittal, but challenges the district court’s reasoning. But because the Government does not challenge the district court’s reasoning “with a view either to enlarging [its] own rights thereunder or of lessening the rights of [its] adversary,” *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (quotation marks omitted), its failure to cross-appeal does not foreclose it from disputing the correctness of the district court’s conclusion as to the Earth Tech and OSC incidents in arguing on appeal that Kirsch’s conviction under Count 2 should be affirmed.

1 App. 394–411, proof of an overt act is not necessary to sustain a
2 conviction for Hobbs Act conspiracy, *see United States v. Gotti*, 459 F.3d
3 296, 338 (2d Cir. 2006). However, that does not relieve the
4 Government of its burden to prove the existence of the conspiracy
5 charged in the indictment—in this case a conspiracy to extort wages
6 for “unwanted, unnecessary, and superfluous” labor. *See In re*
7 *Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 113 (2d
8 Cir. 2008) (“To establish the existence of a criminal conspiracy, the
9 government must prove that the conspirators agreed on the essence
10 of the underlying illegal objective[s], and the kind of criminal conduct
11 . . . in fact contemplated.” (alterations in original) (internal quotation
12 marks omitted)). The 76 “overt acts” are therefore properly viewed
13 as incidents allegedly supporting Kirsch’s membership in a Hobbs
14 Act extortion conspiracy, not as overt acts that the Government was
15 required to prove to sustain a conviction. Also, while the 76 “overt
16 acts” are listed in the indictment, on appeal the Government has

1 identified only those involving Earth Tech, OSC, and Amstar as
2 providing evidentiary support for the conviction under Count 2.

3 We review the denial of a motion for a judgment of acquittal *de*
4 *novo*. *United States v. Reyes*, 302 F.3d 48, 52–53 (2d Cir. 2002). To
5 prevail on a motion for judgment of acquittal, the defendant must
6 demonstrate that “no rational trier of fact could have found the
7 essential elements of the crime charged beyond a reasonable doubt.”
8 *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (internal
9 quotation marks omitted). In evaluating whether a defendant has met
10 this burden, “we consider all of the evidence, both direct and
11 circumstantial, in the light most favorable to the government,
12 crediting every inference that the jury might have drawn in favor of
13 the government.” *United States v. Velasquez*, 271 F.3d 364, 370 (2d Cir.
14 2001) (internal quotation marks omitted).

15 We first address whether sufficient evidence connected Kirsch
16 to the Amstar incident to support a Hobbs Act conspiracy conviction.

1 Applying the Norris-LaGuardia Act (“NLGA”), we conclude that it
2 does not. The NLGA limits the liability of union officers and
3 members for the conduct of their fellow union members. 29 U.S.C.

4 § 106. It provides that

5 [n]o officer or member of any association or
6 organization, and no association or organization
7 participating or interested in a labor dispute, shall be
8 held responsible or liable in any court of the United
9 States for the unlawful acts of individual officers,
10 members, or agents, except upon clear proof of actual
11 participation in, or actual authorization of, such acts, or
12 of ratification of such acts after actual knowledge thereof.

13
14 *Id.* The Hobbs Act specifically incorporates the limitations set forth in
15 the NLGA. 18 U.S.C. § 1951(c) (“This section shall not be construed
16 to repeal, modify or affect . . . sections . . . 101–115 of Title 29 . . .”).

17 In *United Brotherhood of Carpenters v. United States*, the Supreme
18 Court held that the NLGA precludes liability of a union member for
19 the unlawful conduct of a fellow union member “except upon clear
20 proof that the particular act charged, or acts generally of that type and
21 quality, had been expressly authorized, or necessarily followed from

1 a granted authority, by the [union] or non-participating member
2 sought to be charged or was subsequently ratified by such [union] . .
3 . or member after actual knowledge of its occurrence.” 330 U.S. 395,
4 406–07 (1947). The Court added that “the custom or traditional
5 practice of a particular union can . . . be a source of actual
6 authorization of an officer to act for and bind the union.” *Id.* at 410.

7 As a result, in order for the Amstar incident to support Kirsch’s
8 conviction on Count 2, the Government would have had to present
9 evidence that Kirsch participated in, “expressly authorized,” or
10 “subsequently ratified” attempts to extort wages for “unwanted,
11 unnecessary, and superfluous labor”—i.e., not replacement labor—or
12 was responsible for “a custom or traditional practice” of extorting
13 wages for such labor. It did not.

14 The evidence presented to the jury that Perkins, the Local 17
15 member who contacted Amstar about its compressor, was
16 responsible for the destruction at the Amstar job site was scant.

1 Additionally, the evidentiary link between Kirsch and that
2 destruction was absent. There was no testimony that Kirsch was
3 personally involved in the Amstar incident, directed unlawful
4 conduct towards Amstar, or ratified it after it occurred. Accordingly,
5 in order for Kirsch to be liable under the NLGA with respect to the
6 Amstar incident, there would have to be evidence that (1) Kirsch was
7 at least responsible for “a custom or traditional practice” of seeking
8 such fictitious work that caused Perkins to make the request for the
9 union employment that he made to Lignos of Amstar, and that (2) the
10 “custom or traditional practice” resulted in cutting the fuel line. *See*
11 *United Bhd. of Carpenters*, 330 U.S. at 410. The evidence presented to
12 the jury did not support such a connection.

13 There was evidence that Kirsch referred to his general strategy
14 for Local 17 as “turn or burn.” Gov’t App. 217–18. The “turn” part of
15 that phrase refers to convincing contractors to sign collective
16 bargaining agreements with Local 17 and to hire Local 17 workers.

1 The “burn” refers to picketing at worksites and even vandalizing
2 equipment if contractors refused Local 17’s requests. As one Local 17
3 member testified, “turn or burn” indicated that contractors “would
4 either become union or we would put them out of business.” Gov’t
5 App. 417. However, that general strategy is insufficient to connect
6 Kirsch to the particular threat and destruction of the Amstar property,
7 and as we have stated, no other evidence connects Kirsch to the
8 Amstar incident. Accordingly, no reasonable jury could find beyond
9 a reasonable doubt that Kirsch was responsible for the Amstar
10 incident.

11 Next, we turn to the Government’s argument that Kirsch’s
12 conduct with respect to OSC and EarthTech constituted evidence of
13 attempts to extort wages for “unwanted, unnecessary, and
14 superfluous labor.”

15 The Government argues that the employees at Earth Tech and
16 OSC were “uniquely trained and qualified” to do the work that

1 needed to be done at those sites—specifically “excavating
2 contaminated earth, getting that earth safely into specially outfitted
3 trucks, and then getting it to landfills quickly and with no spillage” —
4 and that workers from Local 17 were unqualified to do such work.
5 Gov’t’s Br. at 41. Indeed, if Local 17 workers were not qualified and
6 able to do the work they sought, the wages they would be paid would
7 be for “superfluous” labor. However, the evidence did not establish
8 that Local 17 members did not meet—or that it would be particularly
9 difficult for them to meet—the OSC and Earth Tech job site
10 requirements.

11 James Minter, a former Local 17 member and former Kirsch co-
12 defendant, and a Government cooperating witness, testified that
13 Local 17 members completed a 40-hour Occupational Safety and
14 Health Administration training on handling hazardous materials as
15 part of their apprenticeship program. Similarly, Kirsch’s co-
16 defendant Thomas Freedenberg testified that Local 17 members

1 received the "training necessary to work on hazardous waste jobs,
2 jobs where you have contaminated material and it needs to go to a
3 disposal site." Tr. 4057-58.

4 There was no testimony regarding whether Local 17 members'
5 hazardous materials training specifically qualified them to work with
6 the contaminated soil at the two particular sites. However, testimony
7 regarding the Earth Tech and OSC job sites did not show that Local
8 17 workers were unqualified to perform such general soil remediation
9 work.

10 With respect to Earth Tech, William Lindheimer, the project
11 manager for Earth Tech at the Buffalo site, testified regarding the
12 qualifications necessary to work at that site:

13 First of all, there's a lot of prequalifications that go into
14 the employees that we have to hire. Our operators and
15 laborers, they have to go through a pretty extensive
16 physical process. They have to be first qualified. They
17 have to have some proper training and certificates. They
18 have to be suitable for the work. They have to wear
19 respiratory protection. They have to be capable of
20 performing their tasks in respirators. In addition, the

1 kind of the prequalifications they, also—you know, we
2 spend a great deal of time with our operators with our
3 own what we would call standard operating procedures,
4 how we like to excavate the soil, how we like to load that
5 soil into the trucks, how we like to move the material on
6 our particular job sites.

7

8 Gov't App. 290–91.

9 No further details were provided regarding how much effort it
10 would have taken to train Local 17 workers on Earth Tech's "standard
11 operating procedures." Furthermore, Lindheimer testified that he
12 was unaware whether Local 17 employees had the requisite training
13 and certificates to work on the Earth Tech job site. Kirsch Reply Br.
14 App. 39–40. Thus, the Government failed to prove that Local 17
15 members were unqualified to work at the Earth Tech site, or that
16 training them on the particular procedures of Earth Tech would have
17 been so extensive as to preclude hiring them.

18 Regarding the qualifications needed to work at the OSC job site,
19 Jon Williams, the founder of OSC, testified that

1 [I]ndividuals that are on these job sites have to have a
2 certain level of training that's mandated by the federal
3 government, and in some cases, New York State
4 Department of Labor. And most of that training is just to
5 make sure that the employee has knowledge,
6 understanding, and awareness of the contaminants.
7

8 Gov't App. 20. Like with Earth Tech, there was no testimony
9 indicating how much of such training was required. More
10 importantly, the Government provided no evidence that Local 17
11 workers were not already qualified to do the work at OSC's site.¹⁹

12 The trial record establishes that Local 17 members would have
13 likely qualified for the work on the Earth Tech and OSC projects.
14 Even if there were some particular steps needed to qualify for such
15 work, those were minimal, and certainly would not make the Local
16 17 members' employment by those two companies "unwanted,
17 unnecessary, and superfluous." Accordingly, we conclude that the
18 Government presented insufficient evidence at trial of Kirsch's

¹⁹ On cross-examination, Williams testified that, like Lindhemer on the Earth Tech project, he did not know whether Local 17 members received the requisite training to do the work at OSC's job site.

1 involvement in a conspiracy to extort wages for “unwanted,
2 unnecessary, and superfluous” labor to support his conviction under
3 Count 2, and that therefore a judgment of acquittal must be entered
4 with respect to that count.²⁰

5 **IV. THE JURY WAS PROPERLY INSTRUCTED WITH**
6 **RESPECT TO THREATS UNDER NEW YORK PENAL LAW**
7 **EXTORTION**
8

²⁰ The Government also argues that *United States v. Robilotto*, 828 F.2d 940 (2d Cir. 1987), requires us to hold that Kirsch’s conduct with respect to OSC and EarthTech constituted an attempt to extort wages for “unwanted, unnecessary, and superfluous labor.” In *Robilotto*, a local union forced an employer to pay wages to a local union worker for a job already being performed by an out-of-state union member. *Id.* at 943. Because the employer had to “hire two workers for the same job,” and “the work [was] performed . . . by the employee from [out-of-state],” *id.*, the Court concluded that “[i]t would be difficult to imagine a more obvious instance of imposed, unwanted, superfluous and fictitious labor services,” *id.* at 945. The Government argues that *Robilotto* controls here because “it was the employer’s determination to capitulate to the union’s demand that put him in the position of now paying for two employees to do the work of one” that distinguishes the situation here from *Robilotto*, and that this is a distinction without legal significance. Gov’t’s Br. at 40. It appears to be the Government’s position that if Kirsch’s threats succeeded, the contractors would have had to pay wages to both the non-union workers and the Local 17 workers who replaced them. If this were true, *Robilotto* would be relevant. However, the Government cites no evidence that the contractors would have continued to pay the non-union workers after replacing them with Local 17 workers, as opposed to terminating the non-union workers.

1 Finally, Kirsch argues that the district court improperly
2 instructed the jury with respect to the mens rea required for the
3 extortion threats, and that his racketeering conspiracy conviction
4 (Count 1) and Hobbs Act conspiracy conviction (Count 2) must
5 therefore be vacated. “We review a claim of error in jury instructions
6 *de novo*, reversing only where, viewing the charge as a whole, there
7 was a prejudicial error.” *United States v. Aina-Marshall*, 336 F.3d 167,
8 170 (2d Cir. 2003). Since we have already held that Kirsch’s conviction
9 for Count 2 must be vacated, we need only address his argument that
10 the court’s instructions with respect to Count 1, specifically
11 Racketeering Acts 4B and 5B under New York law, were improper.
12 We conclude that because the challenged instruction was given only
13 with respect to Hobbs Act extortion, and that the court’s instruction
14 regarding New York Penal Law extortion complied with New York
15 law, Kirsch is not entitled to a new trial on Count 1.

1 While instructing the jury on the elements of Hobbs Act
2 extortion with respect to Counts 3 through 7, the district court stated
3 that “[y]our decision whether a defendant used or threatened fear of
4 injury involves a decision about the *victim’s* state of mind at the time
5 of the defendant’s actions.” Gov’t App. 533 (emphasis added).
6 Relying primarily upon *Elonis v. United States*, 135 S. Ct. 2001 (2015),
7 Kirsch argues that that instruction was improper because it focused
8 only on the victim’s perception of the threat, rather than on the intent
9 of the person who made the threat. In *Elonis*, the Court interpreted
10 U.S.C. § 875(c)—which criminalizes threats to injure a person when
11 made in interstate commerce—to require that the Government prove
12 that the defendant have the mental state of “transmit[ting] a
13 communication for the purpose of issuing a threat, or with knowledge
14 that the communication will be viewed as a threat.” 135 S. Ct. at 2012.
15 The Court reversed *Elonis’s* conviction because the jury was not so
16 instructed. *Id.*

1 Neither the Supreme Court nor this court has decided whether
2 *Elonis* extends beyond 18 U.S.C. § 875(c).²¹ But even if it does and the
3 district court's instructions were incorrect as to the Hobbs Act, any
4 error with respect to the Hobbs Act extortion count instructions did
5 not prejudicially affect the jury's verdict with respect to the New York
6 Penal Law extortion racketeering predicate acts charged in Count 1,
7 on which the jury was properly charged. *See Aina-Marshall*, 336 F.3d
8 at 170 (We . . . revers[e] only where, viewing the charge as a whole,
9 there was a prejudicial error.").

10 The New York extortion statute specifically proscribes
11 "instilling in the victim . . . fear" in order to obtain property, N.Y.
12 Penal Law § 155.40, thus appearing to focus the statute on the threat's

²¹ Prior to *Elonis*, we stated that "[t]his Circuit's test for whether conduct amounts to a true threat 'is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury.'" *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) (alteration in original) (quoting *United States v. Davilla*, 461 F.3d 298, 305 (2d Cir. 2006)). We need not address the effect, if any, of *Elonis* on Hobbs Act extortion because we need only consider the intent requirement under New York law.

1 effect on the recipient rather than the intent of its maker.
2 Furthermore, in instructing the jury with respect to the New York
3 Penal Law racketeering predicate acts, the district court recited the
4 New York model jury charge for the offense of extortion. Kirsch does
5 not argue that the court's instructions with respect to New York Penal
6 Law extortion failed to accurately and adequately instruct the jury on
7 the elements of that offense. Nor does he explain how the threat
8 instruction given in connection with the Hobbs Act counts could have
9 affected the instruction given on New York Penal Law extortion.

10 Accordingly, we find that there was no error with respect to the
11 court's instructions on New York Penal Law extortion for Count 1,
12 and that any possible error with respect to the required mens rea for
13 Hobbs Act extortion did not result in prejudicial error as to the New
14 York Penal Law extortion charge.

15

16

1 **V. KIRSCH’S SENTENCE**

2 Kirsch was sentenced to 36 months’ imprisonment on Count 1,
3 and 36 months’ imprisonment on Count 2, with the sentences to run
4 concurrent to one another. Our decision vacates Count 2. In order
5 “to give the district court an opportunity to reevaluate the sentence[]
6 in this changed light,” we remand the matter to the district court for
7 resentencing on Count 1. *United States v. Petrov*, 747 F.2d 824, 832 (2d
8 Cir. 1984) (remanding for resentencing after affirming only six of 11
9 counts with respect to which concurrent sentences were imposed).²²

10 **CONCLUSION**

11 For the foregoing reasons, we **AFFIRM** Kirsch’s conviction
12 under Count 1, **REVERSE** Kirsch’s conviction under Count 2, and

²² In a letter submitted on June 5, 2018, pursuant to Federal Rule of Appellate Procedure 28(j), Kirsch argues that the Supreme Court’s decision in *Lagos v. United States*, 138 S. Ct. 1684 (2018), requires vacatur of the district court’s restitution award. Since we remand this case for resentencing, we leave it to the district court to address this argument in the first instance, including the Government’s contention that Kirsch forfeited it. On remand, the district court should also address the impact of our holding that Kirsch’s involvement in the Amstar incident was not proved beyond a reasonable doubt on the restitution amount.

- 1 **REMAND** the case to the district for entry of judgment of acquittal
- 2 with respect to Count 2, and for resentencing with respect to Count 1.