No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN REED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER STEVEN REED'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW INTO COURT, through undersigned counsel, comes Petitioner Steven Reed, who moves this Honorable Court for leave to proceed *in forma pauperis* and to file the attached Petition for Writ of Certiorari without prepayment of costs, pursuant to Supreme Court Rule 39.

Petitioner's affidavit or declaration of support of this motion is not attached because the court below appointed counsel in the current proceeding, and the appointment was made under the following provision of law: Criminal Justice Act, 18 U.S.C. §3006A. *See* United States v. Walter P. Reed and Steven P. Reed, No. 17-30296 (5th Cir. April 20, 2017 minute entry appointing counsel, Rec.Doc.00513964308) (attached hereto).

WHEREFORE, Petitioner Steven Reed respectfully moves this

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AUTUMN TOWN
autumn@town-law.com
COUNSEL OF RECORD
LAW OFFICE OF AUTUMN TOWN, LLC
700 Camp Street
New Orleans, LA 70130
Telephone: (504) 507-0832

QUESTION PRESENTED FOR REVIEW

In Louisiana, the only body of law regulating state campaign finance expenditures is La. R.S. 1505.2 *et seq.*, which allows for money to be spent on either (a) a political campaign *or* (b) the holding of a public office or party position. The holding of a public office is vaguely defined.

Louisiana has reviewed Walter Reed's expenditures and campaign finance reports for years, which included all campaign acts alleged in the federal indictment, and found no ethics violations.

Can the federal government, citing a violation of the first prong of that same Louisiana law (while ignoring the second prong entirely), then convict Walter Reed (and thus his son, Petitioner Steven Reed) for conspiracy to commit wire fraud and money laundering, wire fraud, and money laundering, when both Reeds acted consistently with a demonstrably reasonable interpretation of an ambiguous state law?

Put another way, when the federal government leaves state campaign regulatory schemes to the individual states, and a politician complies with those local regulatory schemes, can the federal government then convict under a vague allegation of wire fraud that relies on a misapplied version of the state scheme? Is this an unwarranted expansion of federal power that provides no fair warning or notice to the defendant, triggering the concerns recently addressed in *McDonnell v. United States*, 579 U.S. ___, 136 S. Ct. 2355 (2016)?

PARTIES TO THE PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Steven Reed	Petitioner
United States of America	Respondent
Walter Reed	Co-Appellant below, and filing a separate Petition for writ of Certiorari on mostly similar issues.

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OPINIONS BELOW

The opinion of the United States Fifth Circuit Court of Appeals is reported at 908 F.3d 102 (November 5, 2018) and reprinted in the Appendix to the Petition ("App.") at 3a-35a. Rehearing was denied in *United States v. Walter P. Reed and Steven P. Reed*, No. 17-30296, Rec.Doc.00514805218 (5th Cir. 1/23/2019)(not published), and reprinted in the Appendix to the Petition ("App.") at 1a-2a. The district court Order denying Petitioner's *Motion for Acquittal, New Trial, and Arrest of Judgment* is found at *United States v. Reed*, 2016 WL 6946983 (E.D. La. Nov. 28, 2016), and is reprinted in the Appendix to the Petition ("App.") at 36a-127a.

STATEMENT OF JURISDICTION

Petitioner seeks review of a decision rendered by the United States Court of Appeals for the Fifth Circuit in a published opinion on November 5, 2018 and in a denial of rehearing on January 23, 2019, in which the Court of Appeals found *McDonnell v. United States* did not apply to convictions of wire fraud, despite the fact that those convictions were based on underlying vague state law campaign finance issues, and thus affirmed on direct appeal. This Court has supervisory jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

STATEMENT OF THE CASE

On April 23, 2015, an Indictment was filed in the Eastern District of Louisiana, charging Walter Reed ("W.Reed") and Steven Reed ("S.Reed") with 18 counts of conspiracy to commit wire fraud and money laundering, as well as substantive counts of wire fraud, money laundering, false statements on income tax returns, and mail fraud.[1] Count 1 charged both Reeds with conspiracy to commit money laundering and fraud, in violation of 18 U.S.C. §371, and contained twenty-one overt acts. Counts 2-6 charged W.Reed with wire fraud, in violation of 18 U.S.C. §1343 and 2. Count 7 charged both Reeds with wire fraud, in violation of 18 U.S.C. §1343 and 2. Counts 8-9 charged both Reeds with money laundering, in violation of 18 U.S.C. §1956.

On September 3, 2015, S. Reed filed a *Motion to Dismiss* Counts 1, 7, 8 and 9[2], raising a federalism issue and arguing that those counts "fail to state an offense under 18 U.S.C. §371, 18 U.S.C. §1343 and 18 U.S.C. §1956 and seek to expand federal criminal law in the face of United States Supreme Court and Fifth Circuit Court of Appeals precedent"[3], while also adopting the *Memorandum in Support of Walter P. Reed's Motion to Dismiss* as it is applicable to Counts 1, 7, 8 and 9."[4] On October 13, 2015, the district court denied both Defendants' *Motions to Dismiss*, reasoning that there was no federal encroachment on the state's power, and

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[1] 5th Cir. 17-30296 Record on Appeal pages 10321-10351, hereinafter "ROA.___". Additional counts involving W.Reed only included Counts 11-13: false statements on income tax return, in violation of 26 U.S.C. §7206(1); and Counts 14-18: mail fraud, in violation of 18 U.S.C. §1341.

[2] ROA.10452-10460.

[3] ROA.10452.

[4] ROA.10455.

concluding that the case arguments made by Defendants were inapposite to the specific facts in this case.[5]

A superseding indictment was filed October 22, 2015, adding an additional wire fraud count (Count 8) against W. Reed and renumbering the subsequent counts.[6] On January 5, 2016[7], while ruling on other motions, the district court granted in part Defendants' *Motions to Strike Surplusage* (language from the Indictment that was prejudicial and unnecessary to the charged offenses as it related to the campaign counts), finding that:

> Defendants are entitled to have paragraphs 5 and 6 of Count 1(C) and paragraph 13 of count 1(A) struck from the Superseding Indictment (R. Doc. 64) as surplusage as those paragraphs confuse the issues and are prejudicial to the Defendants. However, notwithstanding Defendants' arguments to the contrary, none of the remaining language qualifies as surplusage and, even if it did, it can be disregarded because it is not inflammatory, confusing, or prejudicial.[8]

Trial began April 18, 2016, and continued through May 2, 2016.[9] An issue as to severance[10] was reurged during trial at multiple points, as well as the motions to dismiss. W.Reed also moved for mistrials at several points during the trial. Following the close of the government's case, both defense counsel made *Motions for*

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[5] ROA.10557-10571.
[6] ROA.10572-10603.
[7] ROA.10697-10721.
[8] ROA.10707.
[9] ROA.11087-11089, 11091-11096, 11113-11115.
[10] This issue was raised pretrial, when Petitioner filed a *Motion to Sever Counts*, arguing that the Campaign counts (1-8) should be split from the rest of the Indictment as S.Reed was not alleged to be a participant in either the tax or Hospital counts. That motion was denied, as the district court found that although there were differences between the Hospital counts and the Campaign and tax counts, those differences were insufficient to overcome the liberal rule of joinder. Further, "the Court finds that the counts in the Indictment are united by common facts and participants, and that any potential prejudice inherent in a joint trial is insufficient to justify severance under Rule 14." ROA.10709, 10715.

Acquittal under Rule 29, which were denied.[11] The Defense then called witnesses, including Walter Reed.

Jury deliberations lasted approximately 5 ½ hours, and the jury thereafter returned verdicts as follows: Count 1—guilty as to both Defendants, with an answer of "yes" as to the questions whether W.Reed and S.Reed conspired to commit fraud and money laundering; Counts 2-6 as to W.Reed—guilty of wire fraud; Count 7 as to both Defendants—guilty of wire fraud involving Liquid Bread; Count 8 as to W.Reed—guilty of wire fraud; Count 9 as to both Defendants—guilty of money laundering involving the Lakehouse business; Count 10—not guilty as to both Defendants; Counts 11-14 as to W.Reed—guilty involving false statements on tax returns; and Counts 15-19 as to W.Reed—guilty involving mail fraud and St. Tammany Hospital.[12]

Following trial, Petitioner filed a *Motion For Judgment Of Acquittal, Arrest Of Judgment Or A New Trial*, arguing a conflict of interest/ineffective assistant of counsel on the part of his trial attorney; again raising a federalism issue with the prosecution and citing *McDonnell* principles; an erroneous *Pinkerton* jury instruction; insufficiency of the evidence; and the severance issue. Attached to that motion was an affidavit from S.Reed detailing information discussed with his trial attorney that was not presented nor argued at trial, including potential questioning of W.Reed.[13]

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[11] ROA.2752-2753.

[12] ROA.11203-11209.

[13] ROA.11270-11303. S.Reed also adopted the arguments raised by W.Reed in his post-trial motion, as they applied.

On November 28, 2016, the district court issued its ruling on the post-trial motions, ultimately denying all relief.[14] While the district court did note that it addressed "W. Reed's federalism arguments before trial, and maintains the position detailed in its prior order"[15], it also detailed its concern with a possible chilling effect on state campaigners, finishing that:

> perhaps the appellate court, in the future, may conclude that the federal fraud statutes have no place in any campaign activity of state officeholders, as urged by Defendants. This is a result, however, that is beyond the power and scope of a federal district court and is better determined by a more policy-based court such as the Fifth Circuit Court of Appeals or the Supreme Court.[16]

Sentencing hearings were held March 8, 2017[17] and April 5, 2017[18]. Finding an offense level of 15 and a criminal history category level of I, the district court granted a downward variance and sentenced Petitioner to five (5) years probation on each of Counts 1, 7, and 9, with all terms to run concurrently, and a $300 special assessment.[19] No fine was imposed, and no restitution was required.

Appeal was filed to the United States Fifth Circuit Court of Appeals, and oral argument was heard May 1, 2018. On November 5, 2018, that court affirmed Mr. Reed's conviction, but remanded for hearing on the forfeiture issue given this Court's recent decision in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017). A petition for en banc rehearing was filed December 5, 2018, which was ultimately denied on January 23, 2019. This *Petition for Writ of Certiorari* follows.

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[14] ROA.11551-11642.
[15] ROA.11565.
[16] ROA.11575-11756.
[17] ROA.11859-11860.
[18] ROA.11894.
[19] ROA.11912-11915, 11930-11956. Co-defendant Walter Reed was sentenced to 4 years imprisonment, which was a downward departure from the suggested guidelines of 9-11 years.

REASONS FOR GRANTING THE PETITION

There are no federal laws governing the campaign expenditures of state level elected officials. Rather, the federal government has ceded authority over state campaign finance laws to each individual state. In Louisiana, those rules are codified in La. R.S. 18:1505.2 *et seq.*, which allow candidates to spend campaign funds for expenses that are related to running for office *or* the holding of office. The term related to the "holding of office" is left vague, and is not sufficiently defined. Instead, the state mandates transparent reporting of those expenses and, should an expense run afoul of state guidelines, a candidate may correct the expense, or face civil or criminal penalties.

In compliance with Louisiana law, W.Reed, an elected state official, reported all of his campaign expenditures to the Louisiana Board of Ethics in his over 20 years in office. During his career as an elected official he was informed only one time that any of his expenditures were improper.[20] More importantly, at no time was he ever prosecuted by Louisiana for any violations of its campaign expenditures law.

Yet, in 2015, after over 20 years of proper campaign finance reporting, the federal government, essentially using the first prong of La. R.S. 18:1505.2 only, contended that its interpretation of that statute's vague description for the use of funds did not include the expenditures W.Reed had been making and reporting for decades. The government claimed that these payments were in fact violations of

[20] Petitioner acknowledges that W.Reed testified at trial concerning a refund to his campaign account following a letter received from the Ethics Board, but the district court prevented W.Reed from delving into that letter further. ROA.6030-6034.

Louisiana's campaign expenditures statute, and hence fraud. Steven Reed, who was a party to some of these reported payments[21], was then convicted of conspiracy to commit wire fraud, wire fraud, and money laundering. These convictions, in a case where the Reeds had acted clearly and consistently with not only an objectively reasonable interpretation of an ambiguous state law, but with the implicit approval of Louisiana itself, cannot stand in light of *McDonnell v. United States*, 136 S.Ct. 2355 (June 27, 2016) and other existing federal jurisprudence.

A. The Federal Government Convicted Steven Reed Using a Vague Definition (As Applied in This Case) of Wire Fraud[22] for State Crimes That Were Not Illegal, Thus Petitioner Had No Fair Notice, Which is a Violation of Due Process

The government's theory of this case was that Petitioner and his co-defendant/father conspired to launder money and commit fraud using W.Reed's campaign fund as their personal bank account. But the fundamental flaw in this theory is that at no point did W.Reed hide any of his campaign expenditures during 20 years of reporting as an elected official. Rather, for over two decades, all of W.Reed's campaign expenditures were properly and duly reported on his state finance disclosures. And after the absolute adherence to state law and complete transparency, he was never once prosecuted by the Louisiana State campaign ethics board.

The reason why Walter Reed was never prosecuted is clear. In Louisiana,

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[21] La. R.S. 18:1505.1(I)(5)(b) allows for payments or expenditures to a business in which an immediate family member has an ownership interest, provided certain requirements are met.

[22] All counts involved some reliance on wire fraud, which is defined as when someone "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted" by means of wire in interstate commerce. 18 U.S.C. §1343.

Revised Statute 18:1505(I)(1)[23] specifies that there are two purposes for which campaign donations may be expended:

> contributions received by a candidate or a political committee may be expended for any lawful purpose, but such funds shall not be used, loaned, or pledged by any person for any personal use unrelated to a *political campaign, the holding of a public office or party position*, or, in the case of a political committee, other than a candidate's principal campaign committee or subsidiary committees.

Emphasis added.

Considering that this was the only regulatory law in place, the government lacked the ability to prosecute W.Reed federally for wire fraud, which has no specific definition, and by design requires an underlying crime (here, La. R.S. 18:1505.2). This prosecution thus raises federalism concerns by encroaching upon the State of Louisiana's right to regulate state campaign laws, and subjected the Reeds, who had complied with Louisiana law, to prosecution with an absolute lack of notice of any wrongdoing. No federal law made illegal the conduct for which W.Reed (and consequently S.Reed) was indicted, and there is no federal law that sets parameters for campaign spending for state political candidates. The Court has cautioned against reading a "statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987), *superseded by statute as recognized in Skilling v. United States*, 561 U.S. 358 (2010). Moreover, both Reeds were thus convicted for conduct

[23]Subsection I was not enacted until 1988. Act No. 994, §1, effective January 1, 1989. Prior to that time, there was no prohibition on the use of campaign funds for personal expenses, as long as income taxes were paid on those expenditures.

that is not unlawful. Because Petitioners' conduct was not unlawful and they were complying with all laws regulating *this* specific conduct (thus had no fair notice), they did not possess the requisite intent required to commit fraud. Additionally, the Court has long held that fair notice is imperative:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926).

This lack of notice also parallels the issue addressed by this Court in *McDonnell v. United States*. 136 S.Ct. 2355 (June 27, 2016). And like the defendant in *McDonnell*, the Reeds could not adequately defend against this prosecution having no notice that they were in violation of a vaguely defined state statute.

It was shortly after trial in the instant matter that this Court handed down its decision in *McDonnell*. This Court found that McDonnell did not have fair notice of the term "official act", and the government's expansive definition of such raised serious constitutional concerns. Analogously, there was no fair notice in the Reeds' case as to what constituted "unrelated to the Campaign or the holding of public office". "[W]e cannot construe a criminal statute on the assumption that the Government will "use it responsibly." 136 S.Ct. at 2373. Continuing, this Court noted "White House counsel who worked in every administration from that of

President Reagan to President Obama warn that the Government's "breathtaking expansion of public-corruption law would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties."" *Id.* at 2372. This Court rebuked a broad reading of federal criminal statutes, finding that "public officials could be subject to prosecution, without fair notice, for the most prosaic interactions. "Invoking so shapeless a provision to condemn someone to prison" for up to 15 years raises the serious concern that the provision "does not comport with the Constitution's guarantee of due process."" *Id.* at 2373.

The appellate court's opinion herein found that "the Reeds' due process arguments are without merit. We agree with the district court that the conspiracy and wire fraud statutes at issue do not suffer the difficulties of "technical interpretation" of "official act," as in McDonnell; and so are unattended by its vagueness concerns."[24] However, that court also noted that fair notice *is* a concern, stating "[t]his is not to say that the federalism or vagueness concerns raised in *McDonnell* could never have teeth beyond the specific statutes *McDonnell* interpreted, but rather that *McDonnell* should not be taken to prohibit prosecution for any federal crime that overlaps or intersects with state law or local governance."[25] But, when, as in the instant case, a lack of notice and a lack of a definitive definition of conduct clearly exist, a conviction of fraud cannot stand, especially if there is no agreement as to what conduct is prohibited. "The

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[24] 17-30296 November 5, 2018 Ruling, pg.8, hereinafter "Ruling". Official cite is *United States v. Reed*, 908 F.3d 102, 111 (5th Cir. 2018).

[25] Ruling, pg. 10-11.

constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954). *See also Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964).

Accordingly, the same dangers warned of in *McDonnell* are clearly present in Petitioner's case. More specifically, this Court warned:

> The Government's position also raises significant federalism concerns. A State defines itself as a sovereign through "the structure of its government, and the character of those who exercise government authority." That includes the prerogative to regulate the permissible scope of interactions between state officials and their constituents. Here, where a more limited interpretation of "official act" is supported by both text and precedent, we decline to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards" of "good government for local and state officials."

McDonnell, 136 Sct. at 2373.

Moreover, not only does Louisiana regulate campaign finance expenditures, but within Louisiana Revised Statute 18:1505.2 the state also established penalty provisions for violations of the statute. Specifically, La. R.S. 18:1505.2(J)(1) provides civil penalties:

> Any candidate, treasurer, or chairman of a political committee who violates any provision of Subsection H or I of this Section shall be assessed a penalty of not more than five thousand dollars or the amount of the violation, whichever is greater, except that the penalty for a knowing and willful violation shall not be more than ten thousand dollars or two hundred percent of the violation, whichever is

> greater. "Knowing and willful", for purposes of this Subsection, means conduct which could have been avoided through the exercise of due diligence. The civil penalties provided for in R.S. 18:1505.5 shall be inapplicable to violations of Subsection H or I. Enforcement of Subsections H and I shall be in the same manner provided for in Part VI of this Chapter.

Id. Internal citations omitted.

La. R.S. 18:1505.2 also provides criminal penalties for violation of the statute: "[t]he criminal penalties provided in R.S. 18:1505.6(C) shall be applicable to any violation of this Subsection." And La. R.S. 18:1505.6 appears to mandate a criminal penalty of up to 6 months in jail.[26] Thus, not only does the state of Louisiana regulate campaign expenditures, and require complete reporting, the state has provisions in place for violation of its law. And the Reeds, unequivocally, followed

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[26] La. R.S. 18:1505.6 A.(1) It shall be unlawful for any candidate, treasurer, or chairman of a political committee, or any other person required to file reports under this Part to knowingly, wilfully, and fraudulently fail to file or knowingly, wilfully, and fraudulently fail to timely file any such report. (2) Any candidate, treasurer, or chairman of a political committee, or any other person required to file reports under this Chapter who knowingly, wilfully, and fraudulently fails to file such report or knowingly, wilfully, and fraudulently fails to file such report timely shall, upon conviction, be sentenced to not more than six months in a parish jail or to pay a fine of not more than five hundred dollars, or both.

B.(1) It shall be unlawful for any candidate, treasurer, or chairman of a political committee, or any other person required to file reports under the Chapter knowingly, wilfully, and fraudulently to fail to disclose, or knowingly, wilfully, and fraudulently to disclose inaccurately, any information required to be disclosed in the reports required by this Chapter. (2)

Any candidate, treasurer, or chairman of a political committee, or any other person required to file such reports who knowingly, wilfully, and fraudulently fails to disclose any such information or who knowingly, wilfully, and fraudulently fails to accurately disclose such information shall, upon conviction, be sentenced to not in excess of six months in the parish jail or to pay a fine of not more than five hundred dollars, or both.

C. Any candidate, chairman of a political committee, treasurer, person required to file reports under this Chapter, or any other person who knowingly, wilfully, and fraudulently violates any provision of R.S. 18:1505.2 or R.S. 18:1505.3, or any other provision of this Chapter shall, upon conviction, be sentenced to not in excess of six months in the parish jail or to pay a fine of not more than five hundred dollars, or both.

D.(1) It shall be unlawful for any person to commit an intentional criminal violation of the provisions of R.S. 18:1501.1(A)(2). (2) Any person who commits an intentional criminal violation of R.S. 18:1501.1(A)(2) shall, upon conviction, be fined not more than twice the amount of such expenditure or compensation or imprisoned, with or without hard labor, for not more than five years, or both.

these laws. Their disclosures were vetted by the state of Louisiana, and no charges were ever filed. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Moreover, "any ambiguity in the meaning of the criminal statute should be resolved in favor of lenity. The doctrine of lenity is, of course, sound, for the citizen is entitled to fair notice of what sort of conduct may give rise to punishment." *McNally*, 483 U.S. at 375, Stevens, J., O'Connor, J., *dissenting*.

B. *McDonnell is Applicable to Petitioner's Case.*

The United States Fifth Circuit found *McDonnell* inapplicable to this case, noting that "to the extent that the prosecution pointed to Louisiana campaign finance law, it did so only to prove non-honest-services wire fraud and related offenses, a different context from *McDonnell*."[27] The Fifth Circuit continued, "our holding here is consistent with our fellow circuits' reluctance to extend McDonnell beyond the context of honest services fraud and the bribery statute, even where prosecutions involved local or state government officials."[28] However, the cases cited by the appellate court are clearly distinguishable from the case at bar. In *United States v. Maggio*, 862 F.2d 642 (8th Cir. 2017), the defendant pled guilty, and at issue was a missing nexus between the bribe and the accompanying benefits, rather than a disagreement as to an established definition of a statutory element. *United States v. Ferriero*, 866 F.3d 107, 128 (3rd Cir. 2017) did not believe *McDonnell*

[27] Ruling, pg.7.
[28] Ruling, pg. 10.

applied, but also noted that the bribery statute at issue in Ferriero's case was narrower than the broad interpretation rejected by this Court in *McDonnell. United States v. Jackson*, 688 Fed.Appx. 685 (11th Cir. 2017) declined to reconsider a different bribery statute than the one at issue in *McDonnell*, but there was no ambiguity as to the elements in that matter, unlike the Reeds.

Additionally, Petitioner would respectfully dispute the appellate court's "fellow circuits' reluctance to extend *McDonnell*', as the Fifth Circuit does not acknowledge the expansion of *McDonnell* by other circuits in differing cases.[29] In *United States vs. Silver*, 864 F. 3d 102 (2nd Cir. 2017), the Second Circuit reversed the conviction of New York Assemblyman Shelton Silver on charges of bribes and kickbacks (issues involving jury instructions) in the form of referral fees from third party law firms while working part time as a practicing attorney.

Former Louisiana Congressman William Jefferson has now been released following resentencing after a federal judge in the Eastern District of Virginia threw out the majority of the 10 charges in his matter. *United States v. Jefferson*, 2017 WL 4423258 (E.D. Va. 10/04/2017). Specifically, that court found "in light of the Supreme Court's decision in *McDonnell*, it cannot be said that the erroneous *Birdsall* instruction that Jefferson received at trial was harmless with respect to his convictions for bribery in relations to the iGate scheme under Counts 3, 4, 6, 7, 12,

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[29] Petitioner would acknowledge that many of the other cases involve similar issues regarding definitions of official acts under bribery and other statutes. However, there are cases that have expanded McDonnell relative to principles of fair notice. *See, e.g., United States v. Jackson*, --- F.Supp.3d---, 2019 WL 1415451 *7 (E.D.Va. 3/27/2019), granting writ of coram nobis. While that case did discuss official acts, it also noted the issue of *intent* was central to the analysis, much like the issue of intent to defraud that is lacking in Petitioner's case.

13, and 14 of the indictment." *Id.* at *17.

On October 11, 2017 Former New Orleans Mayor Ray Nagin filed a motion to vacate under 28 USC §2255, presenting a similar challenge to his conviction and citing *McDonnell*. That matter is still pending in the Eastern District of Louisiana. *United States v. C. Ray Nagin*, EDLA 13-0011.

A witness tampering conviction was reversed in part in *United States v. Edwards*, 869 F.3d 490, 500 (7th Cir. 2017), citing *McDonnell* and noting that the jury instructions there "failed to inform the jury about an essential element of the witness tampering charges—the corrupt mental state that distinguishes unlawful from innocent interference with an investigation."

Principles of *McDonnell* are also used in discussing the dangers of unfettered prosecutorial discretion. *See, e.g., May v. Ryan*, 245 F.Supp.3d 1145, 1163 (D.Ariz. 2017), *affirmed in part and vacated in part* by *May v. Ryan*, ---Fed.Appx.---, 2019 WL 1376034 (9th Cir. 3/26/2019), where the court noted "discretionary enforcement assumes laws that by their terms and in good faith distinguish the prohibited wrongful conduct from innocent conduct. Just trusting the government to do the right thing is poor dressing for constitutional wounds."

See also United States v. Marinello, 855 F.3d 455, 456-457 (2nd Cir. 2017) (dissent mentioned *McDonnell* among other cases that raise "[s]imilar alarm about fair warning and overbreadth").

The dissent in *United States v. Nosal*, 844 F.3d 1024, 1056 (9th Cir. 2016)

also noted the dangers of indiscriminate prosecution:

> "It puts at risk behavior that is common. That is a recipe for giving the Justice Department and prosecutors enormous power over [individuals]." Transcript of Oral Argument at 38, *McDonnell v. United States*, 136 S.Ct. 891 (2016) (No. 15–474) (Breyer, J.). Indeed, as this opinion is being filed, the Supreme Court has issued its decision in *McDonnell* and reiterated that "we cannot construe a criminal statute on the assumption that the Government will use it responsibly." *McDonnell v. United States*, 579 U.S. ——, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016) (citation omitted). Here it is far worse. Broadly interpreted, the CFAA is a recipe for giving large corporations undue power over their rivals, their employees, and ordinary citizens, as well as affording such indiscriminate power to the Justice Department, should we have a president or attorney general who desires to do so.

See PHH Corporation v. Consumer Financial Protection Bureau[30], 839 F.3d 1, 55 (D.D.C. 2016), discussing prosecutorial discretion. "But "trust us" is ordinarily not good enough." *McDonnell* also has been cited in numerous other civil cases involving disputed terms (vagueness) and statutory construction (fair notice).[31]

More importantly, however, the Fifth Circuit's *McDonnell* jurisprudence is distinguishable from this case as well. The appellate court cites with approval its finding in *United States v. Hoffman*, 901 F.3d 523 (5th Cir. 2018)[32], a case involving

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[30]Reversed by *PHH Corporation v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.D.C. 2018).

[31]*Levorsen v. Octapharma Plasma, Inc. Eyeglasses*, 828 F.3d 1227, 1237 (10th Cir. 7/12/2016), dissent discussing statutory interpretation and the definition of specific terms; *Wisconsin Central Ltd. v. United States*, 194 F.Supp.3d 728, 735 (N.D.Ill. 7/8/2016), again discussing statutory interpretation; *Castle Mountain Coalition v. Office of Surface Mining Reclamation and Enforcement*, 2016 WL 3688424, fn. 80 (D.Alaska 7/7/2016), not reported in F.Supp.3d., discussing ambiguous statutory terms; *Dumont v. PepsiCo, Incorporated*, 192 F.Supp.3d 209, 220 (D.Me. 6/29/2016), argument regarding differing explanations for the term "ready access to the Federal Courts"; *Lair v. Motl*, 2016 WL 10637105 *2 (D.Mont. 2016) (slip copy), concerning the definition of quid pro quo. "I disagree with Montana's argument that McDonnell is limited since [it is] only a criminal case"; *Acri v. Bureau of Professional and Occupational Affairs, State Board of Osteopathic Medicine*, 856 C.D. 2017, 2018 WL 297087 *fn7 (Pa. Commw. Ct. Jan. 5, 2018), "we have no doubt that, in the future, the Board will fulfill its promise to interpret and apply its order in the way that it said it would, this Court nevertheless has an obligation to address the legal issue presented to it", citing *McDonnell*.

[32] The *Hoffman* case is currently on cert petition to this Court. 18-1049.

convictions for wire and mail fraud related to filings and reports involving state tax credits for film production. "We concluded that prosecution for those offenses did not raise vagueness concerns—"lying to cheat another party of money has been a crime since long before Congress passed the first mail fraud statute making it a federal offense in 1872."[33] *Hoffman*, however, is clearly distinguishable, as no law made the actions of the defendants in that case legal, which directly contrasts to the facts of the Reed case. Moreover, there the defendants created false invoices and used circular transactions to avoid discovery, unlike the Petitioners herein who reported all of their expenditures on state campaign finance reports. Petitioners herein did not *lie* or hide any of the expenditures or payments, which seems to be a fundamental aspect of the *Hoffman* ruling. The federal government in the instant matter prosecuted using state law, and has overstepped its bounds.

C. *The Appellate Court Opinion Endorses An Expansion Of Federal Power Over The States.*

Petitioner would argue that this decision now means the federal government can prosecute state officials for "fraud" based on conduct that the state has specifically detailed as permissible and lawful. The Fifth Circuit opinion stated, "[w]hile the Supreme Court's narrow reading [in *McDonnell*] was informed by a broader reading's challenge to principles of federalism, it did not suggest that federal criminal law may never overlap with state regulation of governmental activity."[34] And Petitioner does not disagree with this statement, but in *this* case as applied to *this* particular set of facts, W.Reed used his campaign funds

[33] Ruling, pg. 8.
[34] Ruling, pg. 9.

appropriately, and Petitioners' prosecutions are a prime example of the federal government overreaching, which goes to the heart of *McDonnell* and does trigger federalism principles. Specifically, at no point did Petitioner (or W.Reed) devise or intend to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

Moreover, the appellate court opinion does not credit the line of Supreme Court cases evidencing a jurisprudential shift toward curtailing federal abuses, which were strengthened by *McDonnell*. *See Cleveland v. United States*, 531 U.S. 12 (2000); *Bond v. United States*, 572 U.S. 844, 854-866 (2014); *United States v. Ratcliff*, 488 F.3d 639 (2007). These cases warn against the expansion of federal prosecutions, and note that allowing the government unfettered discretion to prosecute vague crimes "invites [the court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." Ratcliff, 488 F.3d at 649. Here, the federal prosecution of both Petitioners allowed the government to "subject to federal ... prosecution a wide range of conduct traditionally regulated by state and local authorities." *Id. See also Skilling v. United States*, *supra*. Notably, in denying the Petitioners' post trial motions, the district court pointed out that:

> A strong argument can be made, as Defendants have done, for the proposition that allowing a federal prosecutor to pursue state officeholders on any campaign fund issue will have a chilling effect on those who seek state elective office in the future, and should not be permitted...Perhaps the appellate court, in the future, may conclude that the federal fraud statutes have no place in any campaign activity of state officeholders as urged by Defendants. This is a result, however,

> that it is beyond the power and scope of a federal district court, and is better determined by a more policy-based court such as the Fifth Circuit Court of Appeals or the Supreme Court.[35]

Every politician in the state of Louisiana uses campaign funds for the two stated purposes provided for in the statute, but no specific designation is ever made when seeking those campaign contributions. To allow this conviction to stand would now make all of this routine conduct criminal. Having just sat through the trial, the district court clearly recognized the dangers of this expansive prosecution, and even cited *McDonnell* as one of the reasons in its decision to grant an appeal bond in this matter.

And this violative expansive prosecution is specifically prohibited by U.S. Const. Amend. X, which provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Importantly, "[s]overeignty of states within boundaries reserved to them by Constitution is one of keystones upon which our government was founded and is of vital importance to its preservation. *National Ass'n for Advancement of Colored People v. Thompson*, 57 F.2d 831, 832-833 (5th Cir. 1966). In *City of El Paso v. Simmons*, 379 U.S. 497, 508-509 (1965), this Court recognized that a state "has the 'sovereign right * * * to protect the * * * general welfare of the people * * *. Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary." The courts have consistently made clear that "every exercise of congressional power must find its justification in some

[35] ROA.2026-2027. App.36a-127a.

authority delegated by the Constitution. If such authority is lacking, then it matters not how impotent or unwilling the states may be, or may appear to be, with respect to the accomplishment of desired ends. Congress may not interfere." *In re American States Public Service Co.*, 12 F.Supp. 667, 710 (D.C.Md. 1935).

"Congress cannot, without violating the Tenth Amendment, employ federal personnel to enforce state and local ordinances". *United States v. Philip Morris USA*, 316 F.Supp.2d 19, 26 (DC.DC 2004). And that is exactly what has happened in S.Reed's case—the government chose to step in and prosecute what the state would not. Governing campaign laws are those of the state of Louisiana, *not* the federal government.

D. *This Constitutional Violation Occurred Because The Lower Court Relied Upon An Incomplete Reading Of Louisiana Law And An Inapposite Opinion Of Campaign Donors To Determine A Crime Had Been Committed.*

As noted above, the money donated for W.Reed's campaign may specifically be used for *either* reelection purposes *or* the holding of public office, but the only argument made by the federal government at trial was that W.Reed could not prove these expenditures were related to the campaign, which ignores the second prong entirely. The government used the phrase "unrelated to the/his campaign" thirteen (13) times in the Indictment, even though using campaign funds on an item unrelated to a campaign is not illegal nor prohibited by the Campaign Finance Disclosure Act (CFDA). The phrase "or the holding of public office or party position" is only mentioned one time in the entire Indictment (Count 1(A), ¶13), despite the

fact that Louisiana campaign finance law explicitly provides for same.[36]

The Fifth Circuit found no problem with this tack, deciding that "the jury was not called upon to interpret technical federal statutes or even elements of Louisiana's campaign finance law—it was asked to determine whether the Reeds had committed fraud."[37] But that fraud definition was based on what a handful of state campaign donors believed should have been done with those funds, and it failed to give defendants notice of the alleged illegality of their actions. Moreover, the appellate court appears to rely on the views of these campaign donors to determine what that fraud is as well, which is exactly the danger warned of in *McDonnell*—a vague notion of fraud that can change depending on which donor you question. Petitioner would again reiterate that at no point did the government prove specific intent to defraud, as the regulatory scheme governing his actions permitted his conduct, and none of these transactions were hidden from public purview or misrepresented.

The appellate court also quoted "testimony from Walter Reed's campaign contributors—alleged victims of the wire fraud—stating that they had expected their contributions to be spent on reelection activities."[38] But it is entirely irrelevant what the campaign donors believed, as state law provides two uses for campaign funds. While the Fifth Circuit appears to utilize "donor expectations" to define this fraud, it does not consider that at no point was it made clear to the jury dual

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[36] *See* Superseding Indictment, Count 1(C), ¶¶2, 5, 7, 8; Count 1(D), ¶¶7, 8; Counts 2 – 8, ¶B, ROA.10572-10603.

[37] Ruling, pg. 9.

[38] Ruling, pg. 7.

purpose of campaign funds, or clarified the definitions of same. In the approximately 42 pages of jury instructions provided to the jury[39], the district court mentions related to the campaign or the holding of public office, which is the crux of the government's failure to prove its case against the Reeds, only four (4) times, and nowhere is a definition or description offered of what that entails.

In fact, while the government attempted to argue that this was not a state prosecution, and not based on state laws, it presented the testimony of Kathleen Allen, ethics administrator for the *state* Board of Ethics. This conflicts with the appellate court's finding that it "agree[s] with the district court that "the federal government, in this case, enforced federal law—namely the federal fraud statute—and used state law only to prove *mens rea* and donor expectations.""[40] Despite the fact that several motions to dismiss counts were filed prior to trial, the government argued, and the district court erroneously agreed, that the government was not in fact invoking state campaign law as the basis for its conviction, even though they argued just the opposite extensively at trial. Notably, Allen testified broadly on state campaign finance law, as well as the state's power to identify, evaluate, and enforce campaign finance violations.[41] To balance this prejudice, the defense attempted to call Grey Sexton as an expert witness, which the district court initially denied. Sexton, former ethics administrator for the Louisiana Board of Ethics, would have rebutted Allen's testimony, and was proffered to discuss same.[42] The

[39] ROA.6336-6378.
[40] Ruling, pg. 9.
[41] ROA.3248-3254.
[42] ROA.6178-6179.

district court later amended this decision and ruled that it would allow Sexton to testify after all.[43] The district court commented:

> you make the point by the witness that it can be used for campaign and/or the holding of public office. But then you go to material that the jury can say, "Well, that has nothing to do with campaigning." So it concerns me when you package it like that. It's misleading to the jury, and it prevents the defendant from rebutting that.[44]

As noted above, prior to trial the district court granted a motion to strike surplusage from the indictment, finding that it "strongly implies that campaign expenditures must be solely for campaign purposes when, in fact, expenditures related to the holding of public office are permissible and legitimate. Furthermore, such an implication obscures the standards related to a critical issue in this prosecution i.e., the propriety of Walter Reed's campaign expenditures."[45]

At trial, government witness Kenneth Waters (a random campaign donor) testified that he expected his funds to be used for reelection purposes[46], and when asked about spending on friends and family said "I don't think that has anything to do with campaign funds, so the answer I guess would be, no, I didn't think it would be used for that."[47] At no point did the government clarify those funds could be used for campaigning *or* holding public office. On cross, Waters testified that he did not come forward, but was in fact approached by the government to testify. "I mean, I don't see where .. doing a good job as a politician and spending money is two

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[43] ROA.3289-3291.

[44] ROA.3290.

[45] ROA.10699-10701. "We apply the rule against surplusage, that is, we "'give effect, if possible, to every clause and word of statute.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)(quoting *Montclair v. Ramsdell*, 107 U.S. 147 (1883).

[46] ROA.3964.

[47] ROA.3965.

different things. So I wouldn't have asked for money back."[48] When asked by defense counsel "And is it fair to say, Mr. Waters, all you would expect is the candidate to follow the campaign laws and spend the funds in accordance with those laws? Isn't that your expectation?", he replied "That's right, and I don't know what those laws are."[49]

Cynthia Schenck, another random donor, was asked by the government "how did you expect the donated money to be used?", and she replied "what campaigns usually do, and my knowledge of a campaign is you buy maybe TV time or thousands of yard signs, maybe some ads in papers, things like that."[50] At no point did the government inform or question her about the *two prongs* of permissible campaign expenditures.

Richard Lanasa, yet another random campaign donor, also testified that he expected his money to be used for "campaigns, advertisements."[51] He also confirmed that the federal government contacted him to be a witness.[52] Because the government of course did not ask, Lanasa confirmed on cross that he would expect whatever campaign funds donated to be spent in accordance with Louisiana campaign laws.

Yet the Fifth Circuit relied on the inappropriate beliefs of ill-informed voters, despite the fact that there are *two* prongs for the use of campaign funds. At no point did any of the evidence in this case demonstrate that Petitioner devised or intended

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[48] ROA.3967-3968.
[49] ROA.3968.
[50] ROA.4332.
[51] ROA.4401.
[52] ROA.4402.

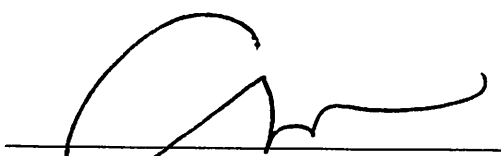
to devise any scheme or artifice to defraud, or obtained money or property by means of false or fraudulent pretenses, representations, or promises.

CONCLUSION

Because there are no federal laws governing the campaign expenditures of state level elected officials, Petitioner S.Reed's prosecution for the campaign expenditures of his father (which were all disclosed and deemed proper) is violative of his due process rights of fair notice and a clear example of federal overreaching. This conviction cannot stand in light of *McDonnell v. United States*, 136 S.Ct. 2355 (June 27, 2016) and other existing federal jurisprudence.

For the foregoing reasons, this Honorable Court should grant the writ of certiorari, vacate the judgment of the United States Court of Appeals for the Fifth Circuit, and either set this case for review or summarily reverse the opinion of the lower court.

LAW OFFICE OF AUTUMN TOWN, LLC



Autumn Town
700 Camp Street
New Orleans, Louisiana 70130
Telephone: (504) 507-0832
Fax: (504) 324-0216
Email: autumn@town-law.com
Counsel for Steven Reed

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN REED,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

A. Order of the United States Fifth Circuit Court of Appeals Denying Rehearing (January 23, 2019) 1a-2a

B. Opinion of the United States Fifth Circuit Court of Appeals (November 5, 2018) Affirming Petitioner's Conviction but Remanding on the Forfeiture Issue 3a-35a

C. Order of the United States District Court for the Eastern District of Louisiana Denying Petitioner's Post Trial Motions 36a-127a