No. _____

In The

Supreme Court of the United States

HEON-CHEOL CHI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

A federal money laundering statute, 18 U.S.C. § 1957, applies to monetary transactions derived from "an offense against a foreign nation involving . . . bribery of a public official. . . ." 18 U.S.C. § 1956(c)(7)(B). Contrary to the government's position below and the view of the Second Circuit, the Ninth Circuit agreed with petitioner that this definition requires common or generic bribery of a public official. The Ninth Circuit, however, held that generic bribery of a public official does not require a corrupt intent, an intent to be influenced, or a limited definition of an "official act" under *McDonnell v. United States*, 136 S. Ct. 2355 (2016). The questions presented are:

1. Whether "an offense against a foreign nation involving . . . bribery of a public official" under 18 U.S.C. § 1956(c)(7)(B) requires generic bribery of a public official, which includes a corrupt intent and an intent to be influenced.

2. Whether "an offense against a foreign nation involving . . . bribery of a public official" under 18 U.S.C. § 1956(c)(7)(B) requires an "official act" as defined in 18 U.S.C. § 201(a) and *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

3. Whether this Court should grant, vacate, and remand for reconsideration in light of *Shular v. United States*, No. 18-6662.

STATEMENT OF RELATED CASES

- *United States v. Heon-Cheol Chi*, No. 16CR00824-JFW, U.S. District Court for the Central District of California. Judgment entered October 3, 2017.
- *United States v. Heon-Cheol Chi*, No. 17-50358, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 30, 2019, judgment amended and rehearing denied November 19, 2019.

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JURISDICTION

The Ninth Circuit filed its original opinion on August 30, 2019 and amended its opinion and denied rehearing and rehearing *en banc* on November 19, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 1956(c) provides:

* * *

(7) the term "specified unlawful activity" means –

* * *

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving –

* * *

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public

> funds by or for the benefit of a public official. . . .
>
> **18 U.S.C. § 1957(a) provides:**
>
> Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally deprived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

STATEMENT OF THE CASE

Petitioner is a citizen and resident of South Korea who was a principal researcher at the Korea Institute of Geoscience and Mineral Resources and had served as director of its earthquake research center. App. 3. The government charged him with six counts of engaging in monetary transactions in the United States derived from "specified unlawful activity." 18 U.S.C. § 1957. The specified unlawful activity was "an offense against a foreign nation involving . . . bribery of a public official," 18 U.S.C. § 1956(c)(7)(B), and the indictment alleged that petitioner had committed bribery under Article 129 of South Korea's Criminal Code by receiving payments from two seismometer manufacturers, Guralp Systems and Kinemetrics. App. 4-8. The case was close, as demonstrated by the fact that the

jury deadlocked on five of the counts and only convicted on a single § 1957 count. App. 9.[1]

"The legal question at the heart of this case" is the meaning of "bribery of a public official" in this context. App. 10. In the district court and in its answering brief on appeal, the government contended that the term simply means bribery as defined under the applicable foreign law, in this case Article 129. *See, e.g.*, Gov. C.A. Br. 19-31. Petitioner, on the other hand, contended that the term requires at least generic bribery of a public official as understood in the United States and that the indictment was flawed and the jury instructions were erroneous because they omitted several critical elements of the generic offense. App. 8-9. The jury instructions provided:

> In order to establish that the property involved in the monetary transaction was derived from bribery of a public official in violation of Article 129 of South Korea's Criminal Code, the Government must prove each of the following elements beyond a reasonable doubt:
>
> (1) The defendant is a public official for the purposes of Article 129; and
>
> (2) The defendant received, demanded, or promised to accept a payment in exchange for exercising his official duties, or in other words, as a quid pro quo for exercising his official duties.

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[1] The district court imposed a 14-month sentence, which petitioner has completed.

> I instruct you as a matter of law that a director or researcher at the Korea Institute of Geoscience and Mineral Resources ("KIGAM") is a public official for purposes of Article 129.
>
> "Official duties" include duties for which the public official is responsible under the law, acts closely related to such duties, acts that the public official is practically or customarily responsible for, and acts that may influence decision-makers.

App. 9. Petitioner contended that these jury instructions did not even describe criminal conduct at all and would allow a jury to convict any government worker who accepts a legitimate paycheck, as they simply required a finding that a public official was paid in exchange for exercising his duties. Pet. C.A. Br. 25.

The Ninth Circuit rejected the government's position and agreed with petitioner that "bribery of a public official" is not simply defined by the foreign law at issue, holding that the "ordinary, contemporary, common meaning" of the offense must be proved. App. 4, 15-17. The Ninth Circuit, however, disagreed with petitioner's contention that the generic or common meaning of bribery of a public official requires a corrupt intent, an intent to be influenced, and a limited definition of an "official act," App. 17-23, as established by numerous jurisdictions throughout the country and the federal statute entitled, "[b]ribery of a public official[.]" 18 U.S.C. § 201. Instead, the Ninth Circuit relied on the definition of "bribery" in the 2001 edition of Black's Law Dictionary, which defined the term as "the

corrupt payment, receipt, or solicitation of a private favor for official action." App. 19-21. The Ninth Circuit also cited the Model Penal Code. *Id.*

Based on this "authority" (neither Black's nor the Model Penal Code has the force of law), the Ninth Circuit determined that common or generic bribery does not require a "corrupt intent to be influenced" or an "official act" as explained in *McDonnell v. United States*, 136 S. Ct. 2355 (2016). App. 22-23. Although the Ninth Circuit recognized that § 201(b) and this Court's precedent require those elements, *see, e.g.*, *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999), it held that they are not a part of ordinary bribery. App. 22-23. The Ninth Circuit did not cite any authority in support of its casual dismissal of this Court's precedent, *id.*, and its conclusion even conflicts with the definition from Black's that it had previously cited, which begins with the word "corrupt." App. 19.

The Ninth Circuit denied petitioner's request for rehearing. In doing so, the Ninth Circuit corrected a factual error in its opinion related to the sufficiency of the evidence but otherwise left its legal analysis regarding the meaning of "bribery of a public official" undisturbed. App. 25-26.

ARGUMENT

The Court should grant this petition to clarify the meaning of an offense involving bribery of a public official in this context. There is significant confusion

regarding whether a generic definition applies, and the Ninth Circuit's articulation of generic bribery utilizes a heavily watered-down standard that has alarming consequences for public officials throughout the western part of the United States. The Ninth Circuit's generic definition of bribery of a public official is not limited to foreign conduct and would presumably also apply to such so-called "bribery" committed by American officials who use a facility in interstate commerce, a virtually automatic jurisdictional fact in today's wired world. *See* 18 U.S.C. § 1952. Under the remarkable jury instructions approved by the Ninth Circuit, a public official, foreign or domestic, who accepts *any* payment, even a legitimate paycheck, is guilty of bribery because no corrupt intent or intent to be improperly influenced is required. Not only did the Ninth Circuit essentially eliminate any criminality whatsoever by scrapping the corruption component that stands as the linchpin of the bribery offense, it added insult to injury by expanding the "official act" requirement and practically nullifying this Court's recent opinion in *McDonnell*. This case is an excellent vehicle for review, and the Court should put a quick end to the Ninth Circuit's grossly distorted view of generic bribery of a public official. At the very least, this Court should grant, vacate, and remand ("GVR") for reconsideration in light of the pending opinion in *Shular v. United States*, No. 18-6662.

I. This Court should clarify that a generic definition of "bribery of a public official" applies, and it should correct the Ninth Circuit's flawed view of generic bribery, which is inconsistent with this Court's precedent in multiple respects and remarkably eliminates any criminal intent requirement or even any criminality whatsoever.

A. There is confusion as to whether a generic definition applies

The statutory scheme applies to monetary transactions derived from "an offense against a foreign nation involving . . . bribery of a public official. . . ." 18 U.S.C. § 1956(c)(7)(B). There is significant confusion regarding how to define "bribery of a public official" in this context.

Below, the government argued that the offense is simply defined by the foreign bribery law that was allegedly violated. Gov. C.A. Br. 19-31. The Second Circuit has recently adopted the government's view. *See United States v. Thiam*, 934 F.3d 89, 94-95 (2d Cir.), *cert. denied*, ___ S. Ct. ___, No. 19-594, 2019 WL 6689707 (Dec. 9, 2019). Citing principles of "international comity," the Second Circuit reasoned that "United States courts ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States." *Id.* at 94. The Second Circuit therefore concluded that although the defendant was not prosecuted in the foreign country for his actions, "presumably he

could have been, and [the] interpretation of the [foreign] statutes at issue here should not vary depending on that event." *Id.*

The Ninth Circuit disagreed, holding that "bribery of a public official" for these purposes requires proof of the "ordinary, contemporary, common meaning." App. 4, 15-17. Although the Ninth Circuit couched the definition in that phraseology, it is the same thing as the "generic" federal definition, or the offense as generally understood in the United States. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575, 598 (1990) (citing *Perrin v. United States*, 444 U.S. 37, 45 (1979)). The Ninth Circuit relied on this Court's opinions in *Taylor*, *Perrin*, and *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 409-10 (2003) in reaching its conclusion. App. 15-17. At least as to this threshold part of the analysis, the Ninth Circuit was correct, as the contrary view of the Second Circuit and the government below is inconsistent with a long line of this Court's precedent.

This Court begins with the language of the statute, *see Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004), which applies to "an offense against a foreign nation involving . . . bribery of a public official. . . ." 18 U.S.C. § 1956(c)(7)(B)(iv). As explained in *Leocal*, the use of the word "offense" signals the elements of a generic definition of a crime. *See Leocal*, 541 U.S. at 7; *see also Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 570 U.S. 254, 257 (2013). Indeed, over the course of several decades, this Court has confirmed this approach when interpreting related statutes that have

used non-federal offenses as underlying criminal activity.

In *United States v. Nardello*, 393 U.S. 286 (1969), this Court considered the Travel Act, 18 U.S.C. § 1952, which, like the money laundering statutes, is contained in Chapter 95 of Title 18. This Court concluded that the underlying offense of "extortion" under state law required "generic" extortion, which was the *government's* interpretation of the statute. *Nardello*, 393 U.S. at 290, 296. Ten years later, this Court relied on *Nardello* to reach a similar conclusion that an underlying state offense of "bribery" under the Travel Act required "the generic definition of bribery. . . ." *Perrin*, 444 U.S. at 49. More recently, in *Scheidler*, 537 U.S. at 409-10, this Court followed cases like *Nardello* and *Taylor* and held that "extortion" under state law for purposes of the RICO statutes required "generic" extortion.

These cases make it clear that if § 1956(c)(7)(B) were worded, "an offense against a [State] involving bribery of a public official," the relevant definition would require generic bribery of a public official, not simply the definition of bribery in that individual State. *See, e.g.*, *Taylor*, 495 U.S. at 590-92. The fact that "foreign nation" is what appears in the brackets should not in any way alter the reading of the language of the statutes. Other similarly worded statutes also include foreign offenses, *see* 8 U.S.C. § 1101(a)(43); *Torres v. Lynch*, 136 S. Ct. 1619, 1623 (2016), and yet the generic definition is still required. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). The fact that

a foreign offense is involved would seem to be all the more reason to require a generic crime given the greater potential for substantial deviations by foreign criminal justice systems.

The authority cited by the Second Circuit in support of its reliance on "[p]rinciples of international comity" considered whether civil lawsuits brought by private plaintiffs should be dismissed, not the interpretation of a federal criminal statute charged in an American prosecution. *See Thiam*, 934 F.3d at 94 nn. 8 and 9 (citing *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l B.V.*, 809 F.3d 737, 742-43 (2d Cir. 2016); *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998)). The Second Circuit should have analyzed this Court's relevant precedent governing similar federal criminal statutes, as the Ninth Circuit did, not its own inapplicable precedent in the civil context. Indeed, the Second Circuit completely ignored *Nardello*, *Perrin*, *Taylor*, *Scheidler*, and a wealth of this Court's similar precedent.

This Court should grant review to resolve the conflict, and it should adopt the Ninth Circuit's approach as to this initial step in the analysis. As set forth below, however, the Ninth Circuit seriously erred in its conclusion regarding what constitutes generic bribery of a public official. For this additional reason, review is warranted.

B. The Ninth Circuit's generic definition is alarming and conflicts with this Court's precedent

While the Ninth Circuit correctly concluded that a generic definition is required, its formulation of the generic definition was fundamentally flawed. Relying on Black's Law Dictionary and the Model Penal Code, the Ninth Circuit determined that the generic definition did not include a corrupt intent and an intent to be influenced, App. 22, essential elements for federal bribery of a public official. *See* 18 U.S.C. § 201(b); *Sun-Diamond*, 526 U.S. at 404. The Ninth Circuit even approved of jury instructions that simply required payment for an official act and did not require any criminal intent or criminality whatsoever. App. 9. The Ninth Circuit reached this troubling conclusion by ignoring the relevant federal bribery statutes requiring an intent to be corruptly influenced, numerous state bribery laws with similar intent requirements, and this Court's precedent, including the 2017 opinion in *Esquivel-Quintana*.

In *Esquivel-Quintana*, this Court granted review to determine the generic meaning of "sexual abuse of a minor." In defining the term, this Court relied on the federal statute, 18 U.S.C. § 2243, similarly entitled "Sexual abuse of a minor or ward." *See Esquivel-Quintana*, 137 S. Ct. at 1570. The Ninth Circuit below ignored that the heading of § 201, "Bribery of public official[,]" corresponds with the relevant statutory language here, "bribery of a public official." 18 U.S.C. § 1956(c)(7)(B). Indeed, the Ninth Circuit often mistakenly framed the

question as the ordinary meaning of "bribery," rather than the generic meaning of "bribery *of a public official*." The Ninth Circuit stated that other federal criminal statutes apply to officials with conflicts of interest or improper financial interests. App. 18-19 (citing 18 U.S.C. §§ 208, 209, and 5 U.S.C. § 7353). But unlike § 201, none of those statutes is entitled "Bribery of public official[,]" which is the exact language used in § 1956(c)(7)(B).[2] Despite the Ninth Circuit's assertion, App. 18, the symmetry between the statutory language in § 1956(c)(7)(B) and the heading of § 201 confirms that § 201 is the federal law establishing the relevant meaning, as explained in *Esquivel-Quintana*.

The Ninth Circuit's mode of analysis conflicted with *Esquivel-Quintana* in other respects, and therefore it reached the wrong conclusions. The Ninth Circuit relied on the definition of "bribery" from Black's Law Dictionary. App. 19, 21. This Court rejected the government's similar reliance on Black's in *Esquivel-Quintana*. *See Esquivel-Quintana*, 137 S. Ct. at 1569-70. Furthermore, like the government's flawed reliance on Black's in *Esquivel-Quintana*, the Ninth Circuit's conclusion was inconsistent with the very definition that it cited. *Id.* at 1569 ("the Government's proposed definition is flatly inconsistent with the definition of sexual abuse contained in the very dictionary on which it relies"). The Ninth Circuit concluded that bribery in

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[2] The § 208 offense is entitled, "Acts affecting a personal financial interest[,]" the § 209 offense is entitled, "Salary of Government officials and employees payable only by United States[,]" and the § 7353 offense is entitled, "Gifts to Federal employees."

this context does not require a "corruptly" element, App. 22, but the definition it cited from Black's is "the *corrupt* payment, receipt, or solicitation of a private favor for official action." App. 19 (emphasis added). Likewise, the Ninth Circuit cited the definition of a "bribe" in Black's, but that definition discusses a payment made "with a view to *pervert* the judgment of or *influence* the action of a person in a position of trust." App. 21 (emphases added). The Ninth Circuit never explained how eliminating the corruptly and influence mens rea element, which is the cornerstone of the bribery offense, is consistent with its own dictionary definition.

The Ninth Circuit's analysis was also inconsistent with *Esquivel-Quintana* because it failed to assess the relevant federal and state statutes. *See Esquivel-Quintana*, 137 S. Ct. at 1570-72. Like § 201(b), other federal statutes, *see, e.g.*, 18 U.S.C. § 666, and numerous jurisdictions in the country require the basic element of a corrupt intent to be influenced that stands as the foundation of the bribery offense. *See Agan v. Vaughn*, 119 F.3d 1538, 1542-43 (11th Cir. 1997) (collecting state bribery statutes and cases).[3] The most

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[3] *See, e.g.*, Ala. Code § 13A-10-61(a); Ariz. Rev. Stat. § 13-2602; Fla. Stat. Ann. § 838.015(1); Ill. Comp. Stat. 33-1; Ind. Code 35-44-1-1; Ky. Rev. Stat. 521-020; La. Rev. Stat. 14:118; Md. C.L. § 9-201; Mass. Gen. Law Ann. 268A § 2; Mich. Comp. Laws Ann. § 750.117; Minn. Stat. Ann. § 609.42; Neb. Rev. Stat. § 28-917; Ohio Rev. Code Ann. § 2921.02(A); Okla. Stat. tit. 21, § 381; R.I. Pub. Laws § 11-7-4(a); S.C. Code Ann. § 16-9-210; Tenn. Code Ann. § 39-16-102; *King v. State*, 271 S.E.2d 630, 632 (Ga. 1980);

populated State in the Ninth Circuit is a good example. Under California law, bribery requires "a corrupt intent to influence, unlawfully," Cal. Penal Code § 7(6), and California jury instructions require the jury to find that the "defendant acted with the corrupt intent that his public or official duty would be unlawfully influenced." CALCRIM 2603. Similarly, the California pattern instruction defines a bribe as requiring that the public official "will be unlawfully influenced" and specifies that a "person acts with corrupt intent when he or she acts to wrongfully gain a financial or other advantage for himself, herself, or someone else." *Id.*

Rather than analyzing the relevant federal and state bribery offenses, the Ninth Circuit cited the Model Penal Code in support of its rejection of the commonly accepted corrupt intent requirement. But the Model Penal Code definition requires an official to accept a "benefit as consideration for a violation of a known legal duty as a public servant or party official." App. 20 (citing Model Penal Code § 240.1). A violation of a known legal duty is similar to a corrupt intent. *See Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018); *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704-06 (2005). Thus, the Model Penal Code did not support the Ninth Circuit's position. If anything, it supported petitioner's view of the generic definition.

The Ninth Circuit asserted that the "contemporary" meaning, or at least the meaning in 2001 when

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State v. Greer, 77 S.E.2d 917, 920 (N.C. 1953); *State v. Greco*, 787 P.2d 940, 943-44 (Wash. 1990).

the "bribery of a public official" language was added to § 1956(c)(7), is required. App. 19. However, it ignored that "modern jurisprudence" requires a corrupt intent because "a public official who labors under the good-faith but erroneous belief that he is entitled to payment for an official act does not" commit bribery. *Evans v. United States*, 504 U.S. 255, 277 (1992) (Kennedy, J., concurring). Likewise, the influence element that distinguishes bribery from a gratuity offense was explained in *Sun-Diamond*, 526 U.S. at 404, which was "contemporary" precedent decided two years before the 2001 amendment.

In sum, the generic definition of "bribery of a public official" at least requires the mens rea set forth in § 201, the federal statute with the same name. Indeed, the corrupt intent and intent to be influenced elements set forth in § 201 are consistent with the elements of the bribery offense as it is generally understood in jurisdictions throughout the country. The Ninth Circuit's elimination of this basic mens rea requirement was blatantly inconsistent with traditional principles of criminal liability. *See Rehaif v. United States*, 139 S. Ct. 2191, 2195-97 (2019); *Arthur Andersen*, 544 U.S. at 706.

C. This case is a good vehicle to review these important issues

This petition is an excellent vehicle to review whether a generic definition of bribery of a public official applies and, if so, what that generic definition

entails. This case arises from a published opinion. The issues are also preserved, as petitioner challenged both the indictment and the jury instructions in the district court and on appeal. App. 4-5, 8-10. If petitioner's indictment challenge prevails, it would result in automatic reversal. *See United States v. Hess*, 124 U.S. 483 (1888); *United States v. Carll*, 105 U.S. 611 (1881); *see also United States v. Resendiz-Ponce*, 549 U.S. 102, 117 (2007) (Scalia, J., dissenting). In any event, the jury instructions' omission of the essential mens rea and corruption elements of the bribery offense was certainly not harmless beyond a reasonable doubt in this close case where the jury deadlocked on five of the six counts. *See McDonnell*, 136 S. Ct. at 2375.

Moreover, the particular jury instructions in this case starkly present the question. Under the instructions given at petitioner's trial, which were approved by the Ninth Circuit, a public official commits bribery if he receives "a payment in exchange for exercising his official duties," without any other requisite proof. App. 9. Under these instructions, a public official who accepts *any* payment, even a legitimate paycheck, is guilty of bribery because no corrupt intent or intent to be improperly influenced is required. For example, a prosecutor who collects a paycheck for writing an appellate brief urging affirmance of a conviction commits bribery under the jury instructions in this case, as all that is required is an acceptance of payment in exchange for exercising official duties. The jury instructions' explanation of bribery was woefully deficient and demonstrates how far afield the Ninth Circuit's

opinion strayed. *See Arthur Andersen*, 544 U.S. at 706 ("[T]he jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing. Indeed, it is striking how little culpability the instructions required.").

The Ninth Circuit stated that the foreign bribery law at issue, Article 129, satisfied the elements of generic bribery, App. 21, but even if that were correct and the indictment were sufficient, the actual jury instructions given by the district court did not require any mens rea and significantly deviated from generic bribery of a public official as properly understood. The fact that the Latin phrase "quid pro quo" was mentioned in the instructions did not ameliorate these fundamental defects, App. 9, as the phrase was not linked to *corruption*. *See McDonnell*, 136 S. Ct. at 2372 (bribery is "quid pro quo *corruption*"). Under the instructions given, "nearly anything a public official accepts . . . counts as a quid; and nearly anything a public official does . . . counts as a quo." *Id.* Without the corruptly and influence elements, the Latin phrase failed to do enough work, as its definition contains no element of corruption: "What for what; something for something. Used in law for the giving one valuable thing for another. It is nothing more than the mutual consideration which passes between the parties to a contract, and which renders it valid and binding." Black's Law Dictionary, at 1248 (6th ed.).

Likewise, the fact that the instructions mentioned the term "bribery" did not cure the defective description of the elements of the offense. *See Sun-Diamond*,

526 U.S. at 412-14 (rejecting argument that incorrect explanation of the elements was cured by the instructions' recitation of the statutory language). A juror could not be expected to read the corrupt and influence elements into the instructions. *See McDonnell*, 136 S. Ct. at 2373-75. At the very least, the instructions were unconstitutionally ambiguous. *See, e.g.*, *Waddington v. Sarausad*, 555 U.S. 179, 190-91 (2009).

Finally, as mentioned earlier, the generic definition of bribery adopted by the Ninth Circuit and set forth in the jury instructions in this case has alarming consequences for public officials throughout the western part of the United States. The Ninth Circuit's generic definition is presumably not limited to foreign bribery in the money laundering context, as it would also apply, for example, to domestic bribery in the Travel Act context. *See* 18 U.S.C. § 1952; *Perrin*, 444 U.S. at 49. A Travel Act violation simply requires the use of a facility in interstate commerce in connection with "bribery," 18 U.S.C. § 1952, and therefore all federal and local officials in the Ninth Circuit must be wary of the expansive view of generic "bribery" articulated below given the essentially automatic nature of the statute's jurisdictional hook. In sum, the Ninth Circuit's view that bribery of a public official does not require criminal intent represents an astounding departure from the offense as it is widely understood, and this Court should intervene to undo the chilling effect of the lower court's published opinion.

II. This Court should grant review to determine whether generic "bribery of a public official" requires an "official act" as defined in § 201(a) and *McDonnell*, particularly because the Ninth Circuit's opinion in this case has the practical effect of nullifying *McDonnell*.

For the same reasons articulated above, this Court should also grant review to determine whether the generic definition of "bribery of a public official" includes the definition of an "official act" in § 201(a) and *McDonnell*.[4] In *McDonnell*, this Court held that the definition of an "official act" in § 201(a) requires: (1) a formal exercise of governmental power that is similar in nature to a lawsuit or a hearing; (2) "something specific and focused that is 'pending' or 'may by law be brought' before a public official[;]" and (3) a decision or action *on* that matter. *McDonnell*, 136 S. Ct. at 2372. Relying on *Sun-Diamond*, *id.* at 2370, this Court held that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so) – without more – does not fit that definition of 'official act.'" *Id.* at 2372.

Importantly, the bribery offenses charged in *McDonnell* were not violations of § 201 but instead

[4] The statutory definition provides: "the term 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

were violations of the honest services fraud statutes, 18 U.S.C. §§ 1343, 1346, 1349, and the Hobbs Act, 18 U.S.C. § 1591, which, like the money laundering statutes, is also contained in Chapter 95. *See McDonnell*, 136 S. Ct. at 2365. In other words, *McDonnell* set forth the definition of an "official act" for generic federal bribery of a public official.

Because the Ninth Circuit ignored this Court's precedent relying on the applicable federal statute to determine the generic meaning, it failed to give sufficient weight to the definition in § 201(a). *See Esquivel-Quintana*, 137 S. Ct. at 1570. Likewise, because the Ninth Circuit failed to recognize that *McDonnell* set forth a generic federal definition, not simply a definition under § 201, it was far too dismissive of this Court's precedent. Without citing any authority, the Ninth Circuit simply declared that the "official act" definition in § 201(a), as explained in *McDonnell*, was not a part of generic bribery and noted that the constitutional and federalism concerns mentioned in *McDonnell* were not implicated in this particular case. App. 22-23. The Ninth Circuit was wrong and also missed the point.[5]

The whole point of a generic definition is that it applies consistently; a generic definition does not change depending upon the circumstances of each case. Thus, because *McDonnell* supplies the generic federal

[5] In *Thiam*, 934 F.3d at 94-95, the Second Circuit reached a similar conclusion, but, as explained, it erred in failing to apply the generic inquiry, and therefore its rejection of the "official act" definition in § 201(a) and *McDonnell* was doomed from the beginning.

definition, that definition applies regardless of the particular facts. In any event, the constitutional vagueness concerns raised by a broad definition of an "official act," *see McDonnell*, 136 S. Ct. at 2372-73, were implicated in this case, as the evidence did not show what specific "official act" petitioner took for the single count of conviction. Even if petitioner was not an elected official, App. 23, he had a constitutional right to sufficient notice of whether his conduct was criminal. This prosecution was brought in the United States, and therefore the same constitutional vagueness concerns discussed in *McDonnell* were applicable in this American prosecution. *See United States v. McClain*, 593 F.2d 658, 671 (5th Cir. 1979).

Furthermore, despite the Ninth Circuit's unexplained conclusion, its articulation of an alarmingly expansive generic definition of bribery of a public official raises the same federalism concerns articulated in *McDonnell*. *See McDonnell*, 136 S. Ct. at 2373. In *McDonnell*, this Court emphasized restraint in construing federal bribery "statute[s] in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards of good government for local and state officials." *Id*. at 2373 (quotation marks and citation omitted).

As mentioned, the generic definition of "bribery" also applies, for example, to Travel Act violations. *See* 18 U.S.C. § 1952; *Perrin*, 444 U.S. at 49. Based on the Ninth Circuit's opinion in this case, *McDonnell* is practically meaningless, as federal prosecutors can simply do an end-run around this Court's opinion by charging

the Ninth Circuit's version of generic bribery under the Travel Act. If generic bribery of a public official does not require the same limited definition of an "official act," then this Court's work in the context of honest services fraud and the Hobbs Act in *McDonnell* has essentially been undone given the broad jurisdictional nature of the Travel Act. Thus, the practical effect of the Ninth Circuit's opinion has significant federalism implications. This Court should not allow its opinions to be subverted in this manner, and, for this additional reason, this Court should grant review.

III. This Court should GVR for reconsideration in light of *Shular*.

In *Shular v. United States*, No. 18-6662, this Court is currently considering a statute that defines a "serious drug offense" as "an *offense under State law, involving* manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added). Thus, in *Shular*, this Court may clarify how statutory definitions using the words "offense" and "involving" should be interpreted. While this Court should grant this petition for the reasons stated above, it should at least GVR in light of *Shular*.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari* or it should GVR in light of *Shular*.

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Respectfully submitted,

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