No. 19-1000

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner submits this reply to the Brief for the United States in Opposition ("BIO"). This petition, in essence, raises two issues: (1) does "bribery of a public official" in 18 U.S.C. § 1956(c)(7)(B) mean *generic* bribery of a public official; and (2) if it does, did the Ninth Circuit correctly hold that the generic offense does *not* include the basic and widely accepted elements of a corruptly mens rea and an intent to be influenced (and also "official action"). As to the second question, which petitioner lost below, the government basically punts, essentially conceding that the Ninth Circuit incorrectly eliminated the corruptly and influence elements from the generic definition of bribery. This tacit concession is not surprising, as the Ninth Circuit's conclusion regarding the generic definition cannot possibly be squared with the understanding of bribery of a public official as it has been defined by federal statutory law, this Court's precedent, and the laws of numerous States.

Returning to the first question, which petitioner prevailed on below, the government contends that the Ninth Circuit got that wrong also. The Ninth Circuit agreed with petitioner that the generic definition applies, but the government maintains that the recent opinion in *Shular v. United States*, 140 S. Ct. 779 (2020) suggests that the generic definition does not control. The government misreads *Shular*, which actually confirms a generic definition in this instance, and ignores

Perrin v. United States, 444 U.S. 37, 49 (1979), which dictates that the generic definition applies. The government also misstates petitioner's position on how the generic approach applies in this context, conflating the categorical approach in the sentencing context with the generic approach in the federal substantive-offense context involved here.

The government's apparent position that the Ninth Circuit was *doubly* wrong demonstrates that these important issues are in need of this Court's guidance and therefore supports granting this petition, not denying it. At the very least, this Court should grant, vacate, and remand ("GVR") for reconsideration in light of *both* the Solicitor General's apparent concession that the Ninth Circuit erred in formulating the generic definition of bribery of a public official and the intervening opinion in *Shular*. That way, the Ninth Circuit can correct its flawed view on the issue that petitioner lost below, and the government can use *Shular* to take another shot at the issue that it lost below. Otherwise, a published opinion will stand as the law of the Ninth Circuit that both parties agree is wrong. Indeed, both parties apparently agree that the Ninth Circuit's generic definition of bribery of a public official is seriously flawed, and the opinion below undermines this Court's precedent, invites prosecutorial abuse, and poses significant risks for the many public officials in the largest circuit in the country.

ARGUMENT

1. As mentioned, this petition boils down to two issues: (1) does "bribery of a public official" in 18 U.S.C. § 1956(c)(7)(B) mean *generic* bribery of a public official; and (2) if it does, did the Ninth Circuit correctly hold that the generic offense does *not* include the basic and widely accepted elements of a corruptly mens rea and an intent to be influenced (and also "official action"). The government begins by addressing the first question and contends that, despite the Ninth Circuit's conclusion below, the generic approach does not apply. BIO 8-11.

The government's brief then suggests a transition to the second question, acknowledging that "[p]etitioner's primary contention" is that the generic definition articulated by the Ninth Circuit was wrong (and seriously so). BIO 11. But just when the reader thinks that the government is going to explain why the Ninth Circuit got the generic definition right, the BIO reverts back to arguing that the generic definition does not apply. BIO 11-18. To be clear, the government fails to defend in any way the Ninth Circuit's conclusion that generic bribery does not include a corruptly mens rea and an intent to be influenced.[1] As a result, it has

[1] The government ultimately and briefly defends the Ninth Circuit's conclusion that the definition of an "official act" in *McDonnell v. United States*, 136 S. Ct. 2355 (2016) is not required. BIO 16. The government's limited argument on *McDonnell* "official act" does not address the corruptly mens rea and the intent to be influenced, reinforcing that the concession as to the latter elements is intentional.

tacitly conceded that the Ninth Circuit erred in this regard and has waived any argument to the contrary. *See* S. Ct. R. 15; *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1491 n.1 (2019); *Baldwin v. Reese*, 541 U.S. 27, 34 (2004).

This concession is not surprising because, as explained in the petition, the Ninth Circuit's definition of generic bribery of a public official conflicts with federal statutory law, *see* 18 U.S.C. §§ 201, 666, this Court's precedent, *see United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999); *Evans v. United States*, 504 U.S. 255, 277 (1992) (Kennedy, J., concurring), and the laws of numerous States. *See* Pet. 13-14 and n.3. For this reason alone, the Court should grant this petition to correct the Ninth Circuit's significantly flawed view of the generic definition of bribery of a public official.

2. Returning to the first question, the government's arguments against a generic approach are incorrect, and demonstrate why this Court should grant review. Before addressing those arguments specifically, petitioner will clarify what the generic approach means in this context because the government's brief incorrectly and repeatedly suggests that he is advocating the essentially all-or-nothing approach that applies in the different context of federal sentencing-enhancement statutes. *See* BIO 11, 14.

In the sentencing context, a federal court is typically considering whether a

prior conviction under State law falls under the definition in an enhancement provision. If the State statute underlying the prior conviction is broader than the generic definition, then the prior conviction cannot satisfy the enhancement (except possibly if the statute is divisible allowing a modified approach). *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016). This inquiry is sometimes called the "categorical" approach because of its all-or-nothing nature. *See, e.g.*, *Descamps v. United States*, 570 U.S. 254, 257 (2013).

Unlike the "categorical" approach in the sentencing context, the generic approach here is not being used to assess a *prior* conviction under State or foreign law. Instead, a non-federal law is being used to support a substantive federal criminal offense. In this context, the government can rely on an underlying non-federal law to prosecute a case even if it is broader than the generic definition. In that situation, however, the government must also allege the elements of the generic definition in the indictment and prove those elements to the jury. By the same token, if the underlying non-federal offense is narrower than the generic definition, the government must also satisfy the additional elements required for the non-federal offense. The Fourth Circuit recently explained this distinction between the "categorical" approach in the sentencing context and the generic approach advocated by petitioner in the substantive-offense context. *See United States v. Keene*, 955 F.3d 391, 395-99 (4th Cir. 2020).

Thus, the generic approach does not hamstring the federal government's ability to prosecute money laundering offenses by potentially excluding non-conforming foreign "bribery" laws and thereby exempting the laundering of proceeds from "bribery" in those countries. Instead, under the generic approach, the government can prosecute money laundering arising from "bribery" in *all* foreign countries, but it must allege and prove at least generic bribery when it does so. For example, in this case, the parties disputed whether Article 129 was broader than the generic definition of bribery of a public official. Even if Article 129 is broader, as petitioner maintained given the lower courts' interpretation of the foreign law, that does not mean that the government could not prosecute; instead, the government could base this prosecution on Article 129, but it also had to allege and prove generic bribery in order to convict petitioner.[2]

With that clarification, petitioner will address the government's contention that the generic definition of bribery of a public official does not apply. The government concedes that the Ninth Circuit rejected its position and adopted a

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[2] The government incorrectly frames petitioner's argument as contending that Article 129 does not constitute bribery of a public official. BIO 7. His argument is that the indictment must allege and the jury must be instructed on at least generic bribery of a public official, regardless of the precise terms of Article 129. While petitioner maintains that the indictment did not allege the generic offense, it is at least abundantly clear that the jury instructions did not require a finding on generic bribery, and the government does not contend otherwise.

generic approach. BIO 8-9, 11. Likewise, the government does not really dispute that the Ninth Circuit's adoption of a generic approach conflicts with the Second Circuit, *see United States v. Thiam*, 934 F.3d 89, 94-95 (2d Cir.), *cert. denied*, 140 S. Ct. 654 (2019), and merely maintains that the two courts reached the same ultimate "result" (affirmance). BIO 16-17. Like the Second Circuit in *Thiam*, the government ignores *Perrin v. United States*, 444 U.S. 37, 49 (1979), which held that the generic definition of "bribery" applies in the similar context of the Travel Act, 18 U.S.C. § 1952, which also appears in Chapter 95 just four sections away from § 1956. In short, the government's position, rejected below, is inconsistent with *Perrin*, which should control in this context.

While the government evidently has no response to *Perrin*, its reliance on the post-petition opinion in *Shular v. United States*, 140 S. Ct. 779 (2020) is misplaced, as *Shular* actually supports petitioner's position. As an initial matter, *Shular* was a case involving consideration of a *prior* conviction under the "categorical" approach in the sentencing context, not the generic approach in the substantive-offense context. *Id.* at 783-84. The same distinction applies to the other main case relied upon by the government, which also assessed the qualifying nature of a *prior* conviction. *See Kawashima v. Holder*, 565 U.S. 478 (2012). This Court recognized this distinction in *Shular*, 140 S. Ct. at 783 n. 1, and even the government seems to recognize it too, acknowledging that *Shular* and

Kawashima considered *prior* convictions. BIO 9-10. The issue in this petition, however, should be controlled by *Perrin* and this Court's other similar opinions in the substantive-offense context, *see Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 409-10 (2003); *United States v. Nardello*, 393 U.S. 286, 296, (1969), additional cases that the government ignores.

In any event, *Shular* explained that when a statute uses "universal names of [an] offense[,]" the generic approach applies. *Shular*, 140 S. Ct. at 785. This Court gave an example of a statute that referred to "burglary, arson, or extortion," and explained that the "terms 'burglary,' 'arson,' and 'extortion' – given their common-law history and widespread usage – unambiguously name offenses" and therefore indicate the generic approach. *Id.* The offense of *bribery* of a public official is well-recognized and has a widespread usage and a rich common-law history. Indeed, the "name" used for § 201 is "Bribery of public officials . . . ." 18 U.S.C. § 201. The government points out that the laundering statute also applies to "the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official[,]" 18 U.S.C. § 1956(c)(7)(B)(iv), which it claims are not names of offenses. BIO 10. But these *are* traditional names of offenses; for example, this Court has used the generic approach for "theft." *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007). In any event, those other offenses are not before the Court, and *Perrin* controls the bribery offense at issue.

The government also relies on language in *Shular* stating that the use of the word "involving," which appears in § 1956(c)(7)(B), can sometimes cut against a generic approach. BIO 10. But *Shular* cited *Scheidler* in acknowledging that the generic approach can still apply to statutes using the term "involving." *Shular*, 140 S. Ct. at 786. Again, the government has no response to cases like *Scheidler*, *Perrin*, and *Nardello*, which control in the substantive-offense context.

The government misstates petitioner's position, erroneously suggesting that he has maintained that the generic definition must be "identical" or strictly tethered to § 201 and pointing out that § 201 applies to *federal* officials, an element that obviously cannot be incorporated into foreign-law violations. BIO 11-14. The latter point was addressed in *Torres v. Lynch*, 136 S. Ct. 1619 (2016), which held that jurisdictional elements are not part of the generic approach. In any event, petitioner has never contended that the generic definition must be identical to § 201. Instead, he has contended that § 201 is a very good source for determining the generic definition, *see Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017), and that the § 201 definition is consistent with the bribery laws of numerous States. Thus, the fact that the statute does not expressly reference § 201 (although it does reference its title), BIO 12, does not undermine petitioner's argument, which is based on both § 201 and the laws of the States. It is clear that *both* § 201 and the laws of the States establish that generic bribery of a public

official requires a corruptly mens rea and an intent to be influenced. Once again, the government does not even attempt to defend the Ninth Circuit's contrary conclusion. In other words, even if generic bribery does "not incorporate every aspect" of § 201, BIO 16, the government does not dispute that it at least requires the fundamental elements of a corruptly mens rea and an intent to be influenced.

The government also maintains that, given the "heterogeneity" of foreign laws, "it is unlikely that Congress intended . . . to cover only offenses under foreign bribery laws that happen to match (or be subsumed by) each of the elements set forth in the reticulated terms of a statute establishing a particular bribery offense under U.S. law." BIO 14. Again, the government has misstated petitioner's argument. As mentioned, petitioner is not contending that the foreign bribery law at issue must "match" or be "subsumed by" generic bribery; instead, all foreign bribery offenses can be utilized, so long as the government simultaneously alleges and proves generic bribery. *See, e.g.*, *Keene*, 955 F.3d at 398-99. It is precisely because of the "heterogeneity" of the laws of the countries around the world that Congress would have intended a generic definition.

3. This petition is a superb vehicle for review. The questions presented are well preserved, the jury instructions tee up the issues, and the government does not argue harmless error. Importantly, the opinion below is published. *United States v. Chi*, 936 F.3d 888 (9th Cir.), *amended*, 942 F.3d 1159 (9th Cir. 2019).

It is this last point that undermines the government's vehicle position. The government disagrees with the Ninth Circuit's adoption of a generic approach and only contends that review of this threshold issue is not appropriate because petitioner won that issue below. BIO 11, 18. At the same time, the government concedes that the Ninth Circuit erred in concluding that the generic definition does not include a corruptly mens rea and an intent to be influenced. Thus, it is undisputed that the published opinion below is incorrect in at least one if not two respects. The government's vehicle position essentially amounts to "two wrongs make a right."

And the undisputed error about the generic bribery definition is extremely important. The published opinion below subjects public officials in the Ninth Circuit to bribery prosecutions under the jurisdictionally expansive Travel Act, which clearly utilizes the generic definition under *Perrin*, where the government is not required to prove criminal intent or any criminality whatsoever. Perhaps that is why the government is content to let the opinion stand, as it provides an end-run around *McDonnell* and eviscerates the heightened mens rea for bribery, which serves as a fundamental check on political corruption prosecutions. In short, the Ninth Circuit's interpretation of generic bribery of a public official opens the floodgates to prosecutorial abuse. *See Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of *certiorari*).

These factors make this case an excellent and indeed much-needed vehicle for review, and this Court should therefore grant the petition. At the very least, this Court should GVR so that the Ninth Circuit can consider the government's tacit concession of error as to the meaning of generic bribery of a public official. Furthermore, a GVR will give the government an opportunity to argue *Shular* below, although, as mentioned, *Shular* does not undermine the generic approach, particularly in this context of a substantive offense.

CONCLUSION

It is undisputed that the Ninth Circuit's published opinion in this case is wrong. The Court should therefore grant this petition for a writ of *certiorari*. Alternatively, it should GVR for reconsideration in light of the government's tacit concessions and *Shular*.

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Respectfully submitted,

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