NO. _____

In The Supreme Court of the United States

TAMELA M. LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented

After *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016), can a county official constitutionally be convicted of Honest Services and Hobbs Act violations merely for agreeing to contact, and contacting, officials at the federal and municipal levels of government on behalf of constituents, without any allegations in the indictment or proof at trial that the official either (i) promised to pressure, had the ability to pressure, or did pressure those officials or (ii) promised to advise, was in a position to advise, or did advise those officials with the expectation that the advice be followed?

A List of All Directly Related Trial and Appellate Proceedings

1. This case arises out of trial proceedings in the United States District Court for the Northern District of Ohio, Eastern Division: *United States of America v. Tamela M. Lee*, Case No. 1:15CR445. The Judgment was entered on August 7, 2017 (App. 31a).

2. The judgment in the district court case was appealed to the United States Court of Appeals for the Sixth Circuit: *United States of America v. Tamela M. Lee*, No. 17-3868. Judgment was entered in this appeal on March 18, 2019 (App. 30a).

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In the Supreme Court of the United States

October Term, 2019

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No.

Tamela M. Lee, Petitioner

v.

United States of America, Respondent

_____

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

Petitioner Tamela M. Lee, through her Criminal Justice Act attorneys, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. 1a-29a) is reported at 919 F.3d 340. The opinion and order of the district court denying petitioner's motion to dismiss the Counts One through Four (App. 39a-47a) is reported at ____ F. Supp. 3d ____, 2016 WL 7336529.

Jurisdiction

The judgment of the court of appeals was entered on March 18, 2019 affirming Petitioner Lee's conviction for violations of the Honest Services and Hobbs Acts. (App. 50a) Lee's Petition for Rehearing or Rehearing En Banc was denied on

April 26, 2019. (App. 59a) On July 15, 2019, Justice Sotomayor extended the time to file this petition until September 23, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The United States District Court for the Northern District of Ohio had jurisdiction under 18 U.S.C. § 3231. This United States Court of Appeals for the Sixth Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254.

Statutory Provision Involved

Honest Services and Hobbs Act violations require an "official act" as defined in 18 U.S.C. § 201(a)(3):

> (a) For the purpose of this section— …
>
> (3) 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.

Introduction

The Court's review is necessary to (1) prevent a complete end-run of *McDonnell v. United States*[1] and (2) resolve a developing conflict among the circuits in identifying when a defendant official may be indicted and convicted for Honest Services and Hobbs Act violations for contacting other officials on behalf of a constituent. The Honest Services statutes and the Hobbs Act prohibit *quid pro quo* corruption, *i.e.* the *quid* being something of value received by a public official and the *quo* an "official act"

[1] 136 S. Ct. 2355 (2016).

that the official agrees to perform.[2] The Court in *McDonnell* adopted a narrow definition of "official act" (the *quo*) to avoid serious constitutional concerns, because the Court recognized that the *quid* can include "nearly anything a public official accepts—from a campaign contribution to lunch" to small gifts, loans, or favors from friends and family.[3] Relying on *United States v. Birdsall*,[4] the Court observed that the decision or action of the public official may include "using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official."[5] Of particular relevance here, the Court directed 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.'"[6]

If allowed to stand, the Sixth Circuit decision allows public officials to be indicted and ultimately convicted anytime they contact other officials on behalf of constituents from whom they have received something of value. In effect, the decision below negates *McDonnell*, allowing indictment and conviction of public officials for providing ordinary constituent services, and it is inconsistent with the post-*McDonnell* approach to such cases by the Second and Third Circuits.

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[2] *McDonnell*, 136 S. Ct. at 2372.
[3] *Id.*
[4] 233 U.S. 223, 234 (1914) (finding "official action" on the part of subordinates where their superiors "would necessarily rely largely upon the reports and advice of subordinates … who were more directly acquainted with" the "facts and circumstances of particular cases").
[5] *McDonnell*, 136 S. Ct. at 2370.
[6] *Id.* at 2372.

Nothing in Lee's pre-*McDonnell* Indictment alleges that the Summit County Councilwoman agreed to pressure, had the power to pressure, or did pressure federal or municipal officials. Nor does the Indictment allege that Lee told her constituents that she had the ability to advise these public officials under circumstances that these officials would be expected to follow her advice or that Lee did provide advice on how to decide matters before those officials. Nor did the Government at trial establish facts that varied from the insufficient allegations in the Indictment.

The Sixth Circuit decision sanctioned the indictment, conviction, and a five-year sentence because Lee agreed to contact and did contact a municipal judge about serving as a character witness, agreed to contact and did contact a municipal prosecutor about why a person involved in an altercation with a constituent's nephews also was not charged, and for agreeing to write and writing a supportive letter to the IRS about an investigation of a constituent's son—a letter in which she acknowledged she knew nothing about the merits of the investigation. As a result, the decision is infected with the constitutional vagueness and federalism shortcomings the Court sought to foreclose in *McDonnell*. Ohio statutory law already polices the conduct of its public officials and, here, the municipal officials contacted—a judge and a prosecutor—presumably were aware of Ohio law and yet testified that nothing in Lee's conduct was out of the ordinary.

The concurrence recognized these concerns and wrote separately to explain why the decision troubled him.[7] The concurring opinion questioned *McDonnell*'s

[7] App. 27a-29a.

statement that the statutory definition of "official act" might include a public official exerting pressure on or advising another official regarding the latter's official act. The concurrence then observed that if "official act" was to be read that broadly, there must be some limiting principle to avoid criminalizing ordinary constituent services.[8] However, the concurrence felt that *McDonnell* provided no such limiting principle and thereby left these broader implications in place.[9]

The decision below is inconsistent with the post-*McDonnell* approach taken by the Second and Third Circuits to similar cases involving public officials who contacted other officials as their "official acts." In *United States v. Silver*[10] and *United States v. Fattah,*[11] the Second and Third Circuits considered convictions under pre-*McDonnell* instructions and held that certain actions taken by the defendants—analogous to Lee's actions here—do not support criminal liability after *McDonnell*. Unlike the Sixth Circuit, these courts found that, after *McDonnell*, a public official contacting other officials on official letterhead, by phone, or by email was insufficient to support a conviction because these actions fell on the ordinary constituent services side of the divide between permissible attempts to express support or impermissible attempts to pressure or advise another public official on a pending matter. These courts properly recognize that (1) evidence of actual pressure, threats to pressure, promise to pressure or (2) giving advice knowing it will be followed, or a promise to do the same, is required. The fact that these cases did not involve an indictment challenge

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[8] *Id.*
[9] *Id.*
[10] 864 F.3d 102 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018).
[11] 902 F.3d 197, 238-46 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1325 (2019).

does not undo the conflict in defining when a public official may be prosecuted for contacting another official on behalf of a constituent.

Statement

a. Procedural Background

Summit County Councilwoman Lee was indicted in December 2015—the year before this Court rendered its decision in *McDonnell*—and charged with four counts (Counts One through Four) of honest-services violations and conspiracy.[12]

1. Motion to Dismiss

In August 2016, Lee moved to dismiss these counts based on *McDonnell*, arguing that they must be dismissed because the Government failed to allege an "official act" under the Honest Services statutes and Hobbs Acts.[13] Specifically, Lee asserted that in order to satisfy the "pressure" prong of an "official act" the public official must be capable of applying leverage to coerce the other official to act in accordance with the contacting officials wishes.[14] As for the "provides advice" prong, Lee contended that this prong applies only where the official is operating in an advisory role or is in a position of authority such that the official knows or intends that such advice will form the basis of an "official act" of another official.[15]

In December 2016, the district court denied the motion to dismiss.[16] For the "leverage component" the district court reasoned that the *McDonnell* Court "did not

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[12] Docket Entry (DE) 3, PageID#9-53.
[13] DE 70.
[14] App. 44a.
[15] *Id.*
[16] App. 39a-48a.

require a finding of leverage and this Court declines to extend that decision to include a requirement of leverage."[17] On the "advise component," the district court rejected the contention that the official must be either in an advisory role or in a position of authority whereby the official would expect the advice to be followed.[18]

2. Denial of Motion for Acquittal and Lack of a Limiting Jury Instruction on "Pressure" and "Provides Advice"

In February 2017, after the Government presented its case at trial, Lee moved for Judgment of Acquittal on Counts One through Four because the Government had failed to establish beyond a reasonable doubt that Lee had committed official acts under the standards established in *McDonnell*, arguing that "[t]he kinds of contacts that she's making with these people are the sorts of routine constituent services that the Supreme Court has said are not a violation of the statutes under which she's indicted."[19] The court denied the motion, relying on its opinion denying Lee's motion to dismiss the Indictment for lack of official acts and noting that Lee had preserved the issue for appeal.[20]

The jury was given the Sixth Circuit Pattern Instructions, which do not define the terms "exerts pressure" or "provides advice." Because the district court twice rejected Lee's arguments that these factors are required to meet the statutory definition of "official act," and because the court had already informed Lee that she

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[17] *Id*. 45a.
[18] *Id.*
[19] Trial Tr., DE 132, PageID#1469:03-15. Lee also argued for acquittal on Counts Five and Six because the Government had failed to establish beyond a reasonable doubt that Lee had intentionally obstructed justice or made false statements since the things she said to the FBI could be characterized in any number of ways, some of which the testifying agent acknowledged would be truthful. *Id.*, PageID#1466:01-05.
[20] *Id.*, PageID#1469:20-1470:02, 1470:05-15.

had preserved the issue for appeal, a request for a jury instruction would have been futile.

3. Government's Closing Argument

The Government told the jury in closing that Lee's official acts were "her using her political influence to reach out to the people that she knew, the folks in her cell phone, the people who knew her name and her title, and her influence and her power."[21] Regarding the IRS letter, her "official act" was that she "used Summit County stationery, her official letterhead, her official title, and wrote a letter on behalf of someone who she didn't know."[22]

These comments during closing argument demonstrate the Government's disregard of the constitutional limitations identified in *McDonnell*. In its view, Lee committed an official act sufficient to violate the Honest Services statutes and the Hobbs Act when: (a) she made an attempt or tried to influence other officials;[23] and (b) she wanted to be a character witness for a nephew of a constituent, and (c) wrote a reference letter to the IRS for the son of a constituent, when she did not know them personally, but only knew their families.[24] The Government explained that the jury need not find that Lee had any authority, control, or leverage over the other officials because it was enough if "[t]he goal was to try to influence,"[25] and it was enough for

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[21] DE 164, PageID#1726:10-14, 1728:09-11 (Lee used her personal contacts and her influence and her office to help affect the outcome of the assault cases).
[22] *Id.*, PageID#1728:14-16.
[23] *Id.*, PageID#1734:24, 1739:10.
[24] *Id.*, PageID#1736:03-05, 1736:21-25.
[25] *Id.*, PageID#1737:22-23.

her to "attempt to influence another public official by using her title, her office, and everything that goes with it."[26]

4. Conviction and Sentencing

On February 10, 2017, the jury rendered a verdict, finding Lee guilty on all counts.[27] The signed verdict form was entered that same day.[28] The court sentenced Lee to sixty months with each count to be served concurrently.[29]

b. "Official Acts" Allegations in the Indictment and Evidence at Trial

1. Evidence of Lee's Long-Time Friendship With Abdelqader

The allegations in the Indictment and trial evidence centered on Lee's relationship with Omar Abdelqader, her long-time family friend and constituent. The evidence at trial established that Abdelqader owned and ran a convenience store near where Lee lived; Lee had known Abdelqader for many years, since she dated her husband who was Abdelqader's longtime close friend; and Lee kept a tab at Abdelqader's store as did many of his other customers.[30] During the time at issue, Lee's husband had departed for Yemen with no word, and she often cried on Abdelqader's shoulder about her husband's apparent desertion and her resulting financial problems.[31] Abdelqader comforted her, let her take cigarettes, chips, and candy from his store, and gave her money when she asked to borrow it – $40 here or

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[26] *Id.*, PageID#1738:02-04.
[27] *Id.*, PageID#1789-743.
[28] DE 117, PageID#696-697.
[29] App 33a.
[30] DE 127, PageID#1194:11-1195:04.
[31] DE 126, PageID#908:08-909:20, 911:16-24, 913:02-914:12.

$100 there – to pay electric bills, for gas, or for veterinarian services.[32] The store items and money that Lee received from Abdelqader were kept on her tab at his store.[33]

Lee and Abdelqader treated each other as family – each was concerned when the other was sick, offering to bring over food or making suggestions for treatments to feel better,[34] and they sometimes had emotionally charged phone conversations.[35] Lee knew Samir Abdelqader, who worked at the corner store of his uncle, Omar Abdelqader, and knows by sight Abdelqader's family members working at other area convenience stores, but is not familiar with their names.[36]

2. The Alleged "Official Acts" and Related Evidence at Trial

The Government alleged in the Indictment, and sought to establish at trial, that Lee committed honest-services violations by accepting things of value from Abdelqader in exchange for doing official acts. The first three of four alleged "official acts" relate to an altercation that took place between Abdelqader's nephews—Samir seventeen years old and Sharif eighteen-years old—and an unidentified man, twenty-eight years of age.[37] The altercation began with a fist fight at a local barbershop when the unidentified man entered the business and confronted Sharif and Samir.[38] In the parking lot, Sharif and the unidentified man got into a fist fight after which

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[32] *Id.*, PageID#911:16-24, 913:02-914:12, 957:06-17, 961:14-963:06, 1018:19-1019:22, 1023:13-16, 1036:12-1037:04; DE 127, PageID#1094:06-26, 1171:08-1172:08, 1192:19-1194:01.
[33] DE 127, PageID#1194:11-1195:04, 1211:08-1212:06, 1129:05-23.
[34] DE 127, PageID#1081:24-1082:20, 1094:06-26.
[35] DE 126, PageID#1051:04-1053:11; DE 127, PageID#1195:10-1196:20, 1214:10-18.
[36] *Id.*, PageID#990:05-08, 1000:04-17.
[37] Indictment ¶17, DE 3, PageID#11.
[38] *Id.*

the unidentified man left in his car.[39] Sharif and Samir followed the unidentified man in a separate car and cut off the other car.[40] Sharif exited his car and punched the unidentified person through his car window.[41] The unidentified man got out of his car and the two exchanged punches in the street.[42] After Sharif was knocked down and a police officer who was witnessing the altercation down the street began to approach, Samir got in the car and made physical contact with the unidentified man as he was trying to flee.[43] Samir was sent to the Summit County Juvenile Detention Center and charged with felonious assault. Sharif was charged with assault in the Akron Municipal Court.[44] The unidentified male involved in the altercation was not charged.

The fourth alleged "official act" relates to a character letter Lee wrote on Summit County Council letterhead to the IRS on behalf of another constituent whose son was under investigation.[45]

i. Lee's Contact with the Juvenile Court

The Indictment. The Indictment alleged that Abdelqader asked Lee to talk to or email the juvenile judge about the charges against Samir.[46] Lee allegedly called a court employee who worked for the judge.[47] Lee also allegedly emailed the judge's

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* ¶¶19-20, PageID#12.
[46] *Id.* ¶ 41, PageID#15-16.
[47] *Id.*

bailiff who told her he would not relay any information to the judge.[48] There are no other allegations in the Indictment regarding further contact between Lee and the juvenile judge.

Evidence at Trial. At trial much of the evidence introduced was transcripts of phone conversations obtained from wiretaps on the cell phones of Lee and Abdelqader. Abdelqader asked Lee to accompany him to Samir's bond hearing.[49] Lee declined due to a schedule conflict but offered to call or email the court.[50] Omar asked for a character reference for Samir: "Just tell [the judge] he's a good kid and I know the family."[51] He also told Lee that Samir had not been part of the fight but was trying to drive away after he saw the police and contacted but did not seriously injure the unidentified adult as they both tried to escape.[52] Lee said she had to think about what to say in the email. The Government found no evidence that Lee ever emailed but presented Lee's phone pen register records showing that about ten minutes before the scheduled hearing a 51-second call was placed from Lee's phone to a number associated with the bailiff and then a 5-minute, 44-second call was placed from Lee's phone to a phone associated with the juvenile court judicial assistant.[53] The Government presented no evidence regarding the nature or content of the calls.[54]

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[48] *Id.* ¶¶43-44, PageID#45.
[49] DE 127, PageID#909:20-23.
[50] *Id.*, PageID#910:05-07.
[51] *Id.*, PageID#910:08-09; *id.*, PageID#911:02-05.
[52] *Id.*, Page#910:10-25.
[53] *Id.*, PageID#911:06-07, 912:2-913:01; *id.*, PageID#923:20-924:04.
[54] *Id.*, PageID#924:04-07.

ii. Lee's Contact with a Municipal Judge

Indictment. At Adbelqader's behest, Lee called the municipal judge several times shortly before a scheduled hearing for Sharif but did not speak to the judge.[55] She was told the hearing had been rescheduled.[56] On the date of the rescheduled hearing, approximately fifteen minutes before the hearing, Lee briefly spoke to the municipal judge in a public hallway near his chambers.[57] Lee asked how she could be a character witness and indicated she was asking because "you've got one of my relatives in your court."[58] She mistakenly identified the relative as Samir instead of Sharif. The conversation lasted less than a minute.[59] Lee had no other contacts with the municipal court.

Evidence at Trial. In a telephone conversation Abdelqader asked Lee to give a character reference for Sharif: "And just mention that, you know, He's a good kid, I know him, I know his family,' and whatever."[60] Lee traded phone messages with no content with the municipal judge and bailiff but never spoke to either.[61] On the day of the hearing, Lee went to the judge's courtroom and was standing in the public area of the courtroom, where people stood to sign in or check with the bailiff, when the judge returned from lunch with his bailiff and clerk.[62] A transcript of a court "hot mic" recording a portion of their brief conversation in which Lee explained that she

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[55] Indictment ¶¶58-65, PageID#21-23.
[56] *Id.* ¶¶58-65, PageID#21-23.
[57] *Id.* ¶¶65, PageID#22-23.
[58] *Id.* ¶ 66, PageID#23
[59] *Id.*
[60] *Id.*, PageID#940:02-03.
[61] *Id.*, PageID#940:24-941:02, 960:08-14; DE 132, PageID#1337:03-1338:18 (testimony of bailiff), 1342:08-1343:02 and 1354:01-15 (testimony of judge).
[62] DE 132, PageID#1353:02-07.

had called and come down because she wanted to ask what she needed to do to be a character witness for Sharif.[63] Lee was directed to the prosecutor's office to give her character reference.[64] Lee had no follow-up contact with the judge.

The municipal judge testified that: his conversation with Lee lasted thirty to forty-five seconds; he stopped to ask if he could help her because he generally did so when anyone was standing in this portion of his courtroom;[65] Lee did not try and plead Sharif's case to him or even discuss the case at all;[66] she said nothing about Sharif or his character;[67] Lee offered nothing to sway him to give any particular sentence or come to any ruling;[68] she requested no special treatment;[69] Lee never tried to offer the judge anything of value;[70] Lee did not follow him or have any private conversation when he walked into his chambers;[71] and other than this brief conversation, she had no discussions with the judge about Sharif's case.[72]

The bailiff's testimony corroborated that of municipal judge: the conversation was very brief, during the period of walking into the courtroom from lunch and then sitting down;[73] she did not discuss the case, only telling the judge she was there to be a character witness;[74] and Lee was directed and then went to the office of the

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[63] DE 126, PageID#969:06-12, PageID#501:07-13.
[64] DE 126, PageID#969:15-24; DE 132, PageID#1345:16-25.
[65] *Id.*, PageID#1364:02-08.
[66] *Id.*, PageID#1354:16-22, 1355:20-22.
[67] *Id.*, PageID#1359:14-20.
[68] *Id.*, PageID#1359:08-13.
[69] *Id.*, PageID#1361:14-21.
[70] *Id.*, PageID#1354:23-1355:01, 1355:23-25.
[71] *Id.*, PageID#1366:25-1377:06.
[72] *Id.*, PageID#1351:02-19.
[73] *Id.*, PageID#1334:05-23.
[74] *Id.,* PageID#1339:02-25.

prosecutor.[75] The bailiff also testified that part of his job is to field calls for the judge and he spends a fair amount of time doing so because many citizens call the judge.[76]

iii. Lee's Contact with a City of Akron Prosecutor.

The Indictment. The Indictment alleges that Abdelqader and his nephew's parents wanted to press charges against the unidentified adult involved in the altercation.[77] The Indictment further alleges that they believed doing so might get the felonious assault charge against Samir reduced to a misdemeanor and mitigate the both boys' sentences.[78] Abdelqader told Lee that his nephew's parents filed a complaint against the unidentified man but the prosecutor's office was uncertain that he would be charged.[79] Lee allegedly told Abdelqader that she knows the supervising prosecutor and would send her a text message and ask the supervising prosecutor to call her.[80] Lee allegedly sent a text asking the prosecutor to call her.[81]

The next day Lee and the supervising prosecutor allegedly spoke by telephone.[82] According to the Indictment, Lee said she was calling "because um, when they had, first had that incident."[83] The prosecutor told Lee she did not understand what Lee was saying.[84] Lee tried to explain the assault, stating that she knows Samir but not Sharif and that she knew their parents filed a complaint against the

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[75] *Id.*, PageID#1336:02-25.
[76] *Id.*, PageID#1337:03-14.
[77] Indictment, ¶¶18, 48, DE 3, PageID#12.
[78] *Id.*
[79] *Id.* ¶, PageID#27-28.
[80] *Id.*
[81] *Id.* ¶86, PageID#29.
[82] *Id.* ¶87, PageID#29-30.
[83] *Id.*
[84] *Id.*

unidentified adult involved in the incident.[85] The Indictment alleges that Lee said she told the parents: "Well look, I'll call [her], and I'll just tell her what I know."[86] Lee allegedly told the prosecutor she was not trying to influence any decisions the prosecutor had to make.[87] The prosecutor told Lee she was "having a hard time understanding," and asked Lee "Who actually was charged? and "What was the charge?"[88] Lee allegedly spelled Samir's name for the prosecutor who then responded "Alright, I'm going to have to look at this stuff and call you back."[89] Lee said: "Okay honey and then maybe I'll make more sense when you know what I'm talking about."[90] No allegations are made about further contact with the prosecutor.

Evidence at Trial. Prosecutor Gertrude Wilms testified that she called Lee in response to Lee's earlier text request for a call.[91] Wilms is the Chief Prosecutor for the City of Akron, where she oversees the daily operations of the city prosecutor's office, which handles all misdemeanor cases and initiates felony investigations before handing them to the county prosecutor's office for felony prosecution.[92] The transcript of Lee's call with Wilms states that Lee stated to Wilms that she told Sharif's parents that "Well look I'll call Gert, and I'll just tell her what I know."[93] It also records Lee stating that "I'm not trying to influence you, you can't say I'm trying to influence you. I'm trying to make you think. That's all I'm trying to do; just trying

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[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] DE 132, PageID#1337:01-05, 1381:24-1382:03.
[92] *Id.*, PageID#1370:02-1372:10.
[93] *Id.*, PageID#1378:06-18.

to make you think."[94] After discussing the altercation, Wilms said she would have to pull the reports and check into it, but it was unlikely there would be charges, because the prosecutor's office does not second guess the police at the scene.[95] The transcript demonstrates that Wilms understood that Lee had called about why the unidentified adult had not been charged; not about the assault charges against Samir and Sharif.[96] The transcript also shows that: Wilms saw nothing unusual in Lee's call;[97] members of the public call the prosecutor's office to ask about cases;[98] she receives calls from the public advocating that she reconsider charges, or saying that the defendant is a nice guy and should not have been charged;[99] she has received such calls from other city council members,[100] raising either their or their constituents' concerns about what was happening in a particular case.[101]

Subsequently, after reviewing the file and talking to the assigned prosecutor, Wilms left a voicemail message conveying her decisions that the altercation had been properly handled.[102]

iv. Lee's Letter of Recommendation to IRS

The Indictment. The Indictment alleges that Malik Albanna was an acquaintance of Abdelqader.[103] Albanna told Abdelqader that his son George was

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[94] *Id.*
[95] *Id.*, PageID#1381:03-07.
[96] *Id.*, PageID#1386:15-25, 1389:16-23.
[97] *Id.*, PageID#1382:10-12, 1389:05-15, 1391:25-1392:09.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*, PageID#1388:22-24, 1389:08-11.
[103] Indictment ¶¶19-20, DE 3, PageID#12.

being investigated by the Internal Revenue Service and it could result in jail and significant penalties.[104] Abdelqader told Albanna he could help George with the IRS investigation by enlisting Lee to help.[105]

Almost a year later, Abdelqader and Albanna discussed a letter from Lee to the IRS.[106] Lee eventually drafted the letter to IRS on Summit County Council letterhead, signed by Lee as Summit County Council District 5 Representative: "I have known George and his family for 10 years. I have had numerous opportunities to work with and engage the family in the community on various issues related to the conduction of business."[107]

Evidence at Trial. In addition to the parts of the letter quoted or discussed in the Indictment, Lee's letter to the IRS stated: "I am not privy to the facts in this case but I want to state with surety that whatever has prompted this is a sort of aberration and not business as usual for this family. George is young and possibly naive but I am certain that his father and family will be diligent in future oversight."[108] Lee concluded the letter by stating: "I ask that you consider this letter and my confidence in the credibility of the family as you resolve this case."[109]

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[104] *Id.*
[105] *Id.* ¶21, PageID#12.
[106] *Id.* ¶¶36-37, PageID#15.
[107] *Id.* ¶123, PageID#38.
[108] Sixth Circuit Appendix 16.
[109] *Id.*

c. The Court of Appeals Decision

1. Majority Opinion

Sufficiency of the Indictment. The Majority Opinion cites *Hamling v. United States*[110] for the proposition that the language of a statute may be used in the general description of an offense so long as it is accompanied with such statements of the facts and circumstances as will inform the accused of the specific offense.[111] The Opinion rejected Lee's contention that (i) the Indictment was insufficient because nothing in the language of the Honest Services statutes and Hobbs Acts addresses that an essential element of culpable conduct is that a public officer "pressured" another public official about a pending matter or "provided advice" knowing or intending that such advice form the basis of an official act by another official and (ii) not only are the statutes silent but there are no allegations in the Indictment that Lee pressured other public officials or provided advice with the expectation that her advice would form the basis of the officials' decisions.[112]

The Majority Opinion characterized Lee's position as advocating that *McDonnell* should be read to create an unspoken new standard for determining when an official has "exerted pressure" on, or "provided advise" to, another official about a matter pending before that official,[113] stating that nowhere in *McDonnell* or *United*

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[110] 428 U.S. 87, 117-18 (1974) (challenging (i) the sufficiency of indictment on constitutional vagueness grounds because it charged the defendants in statutory language only and (ii) that the indictment failed to provide adequate notice of the charges against them).
[111] App. 12a.
[112] *Id.*
[113] *Id.*

States v. Birdsall,[114] discussed in *McDonnell*, did this Court state that it was creating such a rule.[115]

The Majority Opinion found Lee's reliance on the Second Circuit's decision in *United States v. Silver* to be unpersuasive.[116] There, the Second Circuit vacated and remanded the conviction of the Speaker of the New York Assembly concluding that the pre-*McDonnell* jury instructions were improper. The court observed that the jury *could* have found that the defendant's "letter offering general assistance with an event occurring in his district—absent any 'exertion of pressure' on the other officials regarding a particular matter under consideration—did not satisfy the standards for an official act as defined in *McDonnell*."[117] The court dismissed Lee's reliance on *Silver* stating that "[t]he *Silver* court never indicated that it was reversing based on a finding that the defendant was unable to exert pressure on other officials because he lacked professional leverage over them."[118]

The Majority Opinion also rejected Lee's reliance on the Third Circuit's recent decision in *United States v. Fattah*,[119] where a U.S. Congressman was convicted under pre-*McDonnell* jury instructions because he could have been convicted for sending email, letters, and making phone calls to government officials in support of

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[114] 233 U.S. 223 (1914).
[115] App. 16a.
[116] 864 F.3 102 (2d Cir. 2017); *id.*
[117] App. 17a (emphasis original).
[118] *Id.* The Majority Opinion ignored the fact that the ability to pressure was assumed in *Silver* because of the Silver's position as the Speaker of the New York Assembly and that the question was whether his contacts were permissible under *McDonnell* or whether he crossed the culpability line by pressuring them to decide matters a certain way. Consequently, the Majority Opinion recognized that in *Silver* pressure was assumed but did not address the significance of Lee's ability to pressure; something that could not be assumed from the facts and circumstances alleged in the Indictment.
[119] 902 F.3d 197, 238-46 (3d Cir. 2018). App. at 16a.

an ambassadorship for a constituent without any consideration of whether they were merely contacts offering support or impermissible attempts to exert pressure or advice on a pending matter.[120]

The Majority Opinion also noted that nothing in the Third Circuit's decision in *United States v. Repak* supports Lee's view of the law regarding the "provides advice" component.[121] In *Repak*, the Third Circuit upheld the conviction of an executive director of a regional redevelopment corporation for taking money from contractors to recommend that the board of directors approve the contractors' contract proposals. The Majority Opinion stated that just because those facts meet the paradigm advocated by Lee did not mean the Third Circuit agreed with Lee's view of *McDonnell* on the advice component in this case.[122]

Sufficiency of the Evidence. The Majority Opinion rejected Lee's acquittal argument that the Government failed to establish facts that prove honest-services violations.[123] Lee argued that the jury could have reached a verdict for improper reasons because the district court did not instruct the jury that in order to convict the jury was required to find that Lee possessed leverage over the officials with whom she communicated or was in an advisory role whereby she could expect that her advice would form the basis of the contacted officials' decisions on pending matters.[124]

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[120] App. 17a. The Majority Opinion ignored the fact that the Congressman was obviously capable of pressuring administration officials and did not address the absence of allegations that Lee had the ability to pressure officials in other levels of government.
[121] 852 F.3d 230 (3d Cir. 2017).
[122] *Id.*
[123] App. 22a-23a.
[124] App. 20a-21a.

The Opinion stated that "we do not adopt Defendant's additional constraints or the requirements for an official to "provide advice" or "exert pressure" on another official."[125]

The Majority Opinion then found that there was sufficient evidence that Lee wrongfully "pressured" the city prosecutor because Lee was recorded in a telephone conversation saying that she was not trying to influence the prosecutor but only trying to make her think about whether the unidentified twenty-eight-year-old adult also should be charged.[126] The Opinion also relied on evidence that Lee's constituent, Abdelqader, told his brother that he gave Lee $200 to contact the courts and prosecutor and would give her more money later.[127]

2. Concurring Opinion: "*I Am Troubled by This Decision and Write Separately to Explain Why.*"

The Concurring Opinion "express[ed] two specific concerns."[128] ***First***, the opinion questioned whether the definition of "official acts" encompasses a public official's actions outside of the official's official duties, observing that "trying to influence someone else's official acts and performing one's own official acts would seem to be entirely different."[129] The opinion noted that the Court based its decision in *McDonnell* upon its decision in *United States v. Birdsall* but added: [130] "I question

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[125] App. 21a.
[126] App. 23a. The Majority Opinion did not address the fact that *McDonnell* held that trying to have some influence over a decision of another public official is not—without more—a crime.
[127] *Id.* The Majority Opinion did not address the fact that providing funds to a political figure is not, in and of itself, illegal although it may implicate campaign-finance-reporting obligations (something for which Lee was not charged).
[128] App. 27a.
[129] *Id.*
[130] 233 U.S. 223 (1914).

whether *Birdsall* should be read so broadly."[131] The concurrence explained that in *Birdsall* the official duties of the two defendant public officials required them to make recommendations to the Commissioner of Indian Affairs on certain decisions the Commissioner was required to make and that defendants "had been charged with receiving money 'with the intent that *their official action* should thus be influenced.' *Id.* at 230 (emphasis added)."[132] The concurrence drew a distinction between *Birdsall* and this case stating that in *Birdsall* the defendants were required to advise the Commissioner as part of their official duties and in doing so they were performing "official acts" and, here, where it was not part of Lee's official duties to reach out to public officials at different levels of government.[133] The concurrence then concluded that "[t]o say that Lee is positioned with respect to the IRS, for example, in the same way that the officials in *Birdsall* were positioned with respect to the Commissioner of Indian Affairs, is a stretch."[134]

Second, the Concurring Opinion stated that "[a]ssuming that one reads the federal bribery statute broadly to encompass attempts to influence that are outside of a defendant's official responsibilities, it would make sense to look for a limiting principle;" noting Lee's suggestion that to be culpable a public official must have some leverage over the public official she is attempting to influence.[135] It added that "there is nothing in the federal bribery statute that would require such leverage, but the

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[131] App. 27a.
[132] App. 28a.
[133] *Id.*
[134] *Id.*
[135] *Id.*

statute does not seem to strictly prohibit one public official's attempts to pressure another public official into taking an official act, either."[136] The concurrence understood that "Lee's proposed leverage requirement would cabin the broad implications of the 'influence' or 'advice' theories generally."[137]

In the end, however, the Concurring Opinion found that "[t]he government's theory, though arguably inconsistent with what the statute actually says, is consistent with what the Supreme Court said in *McDonnell* …"[138] The concurrence agreed with the Majority Opinion that "the Supreme Court [in *McDonnell*] does not recognize a leverage requirement, leaving the broader implications of *McDonnell* in place" and concluded:[139] "To be sure, the *McDonnell* Court rejected the even broader theories that the government tried to proffer with regard to the meaning of 'official act.' But in so doing, I believe, the Court left in place equally broad (and questionable) theories in the particular influence scenarios that this case addresses."[140]

In sum, although the Concurring Opinion approached the edge of the constitutional vagueness concerns that drove the Court's *McDonnell* decision, in the end it backed away from taking the next step of—finding that *McDonnell necessarily* recognized leverage as a limiting principle and that provides advice requires proof of a position of the public officer in relation to the contacted official such that it can be expected that the advice would be followed.

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[136] *Id.*
[137] *Id.*
[138] App. 27a.
[139] App. 28a.
[140] App. 28a-29a.

Reasons for Granting the Petition

1. The Decision Below Eviscerates *McDonnell* and Its Constitutional Limits on the Term "Official Act"

McDonnell limited the definition of "official act" because of constitutional and federalism concerns over potentially criminalizing ordinary constituent services by public officials.[141] The decision below ignores these concerns and effectively eviscerates *McDonnell* by allowing Lee's Indictment (and ultimately her conviction) to stand, where the asserted official acts were that Lee contacted other officials on behalf of constituents, which is an ordinary constituent service, without requiring any allegation or evidence of (1) actual pressure, leverage, ability, or promise to pressure, or (2) any advisory or other relationship such that the other officials could be expected to follow Lee's advice.

a. The *McDonnell* Decision

In *McDonnell*, because of constitutional vagueness and federalism considerations, the Court narrowed the reach of Honest Services and Hobbs Act violations. The indictment of Governor McDonnell alleged that he participated in a scheme to use his office to enrich himself and his family by soliciting and obtaining

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[141] In addition to constitutional vagueness infirmities, Lee's Fifth Amendment rights were violated in two additional ways. First, the failure of the Indictment to contain allegations that she pressured or gave the kind of advice that would support criminal liability violated the Grand Jury Clause. *See United States v. Thomas,* 274 F.3d 655, 670 (2d Cir. 2001) (en banc) (quoting *United States v. Williams*, 504 U.S. 36, 47 (1992)); *United States v. Camp*, 541 F.2d 795, 799 (8th Cir. 2001) (citing *Russell v. United Stat*es, 369 U.S. 749, 770 (1962)). The Government's misleading arguments at closing also violated Lees rights to due process. *Parker v. Matthews*, 567 U.S. 37 (2012) (holding that a prosecutor's improper comments will be held to violate the Constitution were they "so infected the trial with unfairness as to make the resulting conviction a denial of due process").

things of value for Jonnie Williams, a constituent, who was the CEO of Star Scientific.[142] The evidence showed that McDonnell received approximately $175,000 in benefits and, in return, McDonnell (i) arranged meetings for Williams with other Virginia officials to discuss a health supplement owned by Star Scientific, (ii) hosted a reception for Star Scientific at the Governor's Mansion attended by Virginia officials who could advance Williams's agenda, and (iii) contacted other Virginia government officials who could help Williams.[143] The jury found McDonnell guilty and the Fourth Circuit affirmed. The Court vacated the judgment and remanded.

The Court concluded that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—*without more*—does not fit [the] definition of an official act."[144] The Court explained that an "official act" requires that a public official used their position to "*exert pressure* on another official to perform an 'official act,'" or that the official "*provide[d] advice to another official, knowing or intending that such advice form the basis for an 'official act' by another official.*"[145] The Court noted that a public official did not actually have to perform an official act, or even intend to perform an "official act," so long as the official agreed to do so.[146]

The Court then observed that "[c]onscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events *all the time*" and that "[t]he basic compact underlying representative government

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[142] 136 S. Ct. at 2361.
[143] 136 S. Ct. at 2361.
[144] *Id.* at 2372 (emphasis added).
[145] *Id.* at 2370. 2372 (emphasis added).
[146] *Id.*

assumes [emphasis original] that public officials will hear from their constituents and act appropriately on their concerns….”[147] The Court observed that “[u]nder the ‘standardless sweep’ of the Government’s reading … public officials could be subject to prosecution, without fair notice, for the most prosaic of interactions.”[148] Court “decline[d] 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.’”[149]

Following remand, the Government dismissed the charges against McDonnell.[150]

b. The Sixth Circuit Decision Allows Ordinary Constituent Services to Be Swept into the Definition of “Official Act.”

Whenever a public official on behalf of a constituent contacts another public official about a pending matter, the official hopes to have some influence on that decision. Otherwise, there would be no point. *McDonnell* held criminal liability does not attach for such contacts and, indeed, public officials are expected to contact other public officials about public matters. And, under *McDonnell*, such contacts—without “more”—do not constitute criminal conduct regardless of whether the Government characterizes the substance of the contact as attempting to influence or providing advice. Rare indeed is advice offered without any thought of having some influence

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[147] *Id.* at 2359.
[148] *Id.* at 2373 (citation omitted).
[149] *Id.* (citation omitted).
[150] Even though the Lee Indictment was pre-*McDonnell* and, therefore, drafted under the government’s overly broad view of the law, the government chose to proceed, serving to highlight how prosecutorial discretion can be employed unevenly when the law is not sufficiently clear. Arbitrary and discriminatory enforcement was a concern raised by the Court in McDonnell. *Id.* at 2373.

over a decision. As a result, something "more" than attempting to influence or providing advice is necessary for criminal liability to attach under either the "pressure" or "provides advice" components identified in *McDonnell*.

McDonnell addresses both components because both applied to the conduct of Governor McDonnell. As for "pressure," the ability of a governor to exert undue pressure on officials of state government was a given, so much so it was unstated in the opinion. The Court recognized the potential for improper leverage on the part of the chief executive over other state officials but vacated and remanded because the Government in the indictment and at trial did not make a distinction between subtly attempting to influence a decision—which is not a crime—and outright coercive conduct, which is. As for "provides advice," again, there was little question that the Governor was in a position to provide advice with the expectation that those state officials so advised would be expected to act on that advice. The Court recognized that reality by relying on its decision in *Birdsall* where two public officials were also so situated that their advice was expected to be followed in almost every case. Otherwise, there was no connection between the conduct in *McDonnell* and *Birdsall* and no reason for the Court to state that its decision was fully consistent with *Birdsall*.[151]

The Sixth Circuit did not make these distinctions in *Lee*. The court of appeals concluded—contrary to *McDonnell*—that attempting to "influence" was tantamount to attempting to "pressure." This misapplication of *McDonnell* enabled the court of

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[151] 136 S. Ct. 2371.

appeals to turn Lee's statement in a recorded conversation to the municipal prosecutor that "I'm *not* trying to influence you" (emphasis added) into proof of criminal conduct ("I *am* trying to influence you."). Leaving aside the irony, even if Lee had said "I'm trying to influence you," such a statement—without "more"—would not constitute a crime. As for the "provides advice" component, the court of appeals simply equated an attempt to influence with an attempt to provide advice, neither of which, without more, constitutes criminal conduct under *McDonnell*.

The Sixth Circuit decision ignores these concerns and allows prosecution (and ultimately conviction) of public officials for providing ordinary constituent services. The court below gave no limiting principles to either the "exerts pressure" or "provides advice" components. Instead, the Sixth Circuit interpreted the "exerts pressure" language of *McDonnell* to mean that a public official can be held criminally liable any time the official receives something of value from a constituent related to contacting another official to discuss a matter of concern to that constituent.[152] Similarly, it interprets the "provide advice"[153] language to mean the same. The

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[152] The Sixth Circuit rejected the pre-*McDonnell* approach of the Eighth Circuit, requiring that the government show that the constituent reasonably believed that the public official had the necessary leverage over the other official he contacted. *United States v. Rabbitt*, 583 F.2d 10-14 (8th Cir. 1978), *abrogated on other grounds by , superseded by statute,* 18 U.S.C. § 1346). The Sixth Circuit recognized that *Rabbitt* supports Lee's position but noted that the validity of the opinion had been called into question by *United States v. Holzer,* 816 F.2d 304, 308-309 (7th Cir. 1987) (stating that "[t]he fact that the defendant did not control the award of contracts should not be decisive if his position as a state legislator gives his recommendation a weight independent of their intrinsic merit"). Here, however, Lee neither had control over the decisions of municipal or federal officials nor the ability to impart "weight independent" of the merit of her influence or advice and, therefore, criticism of *Rabbitt* in *Holzer* is inapposite.

[153] 136 S. Ct. at 2372 (stating that an "official act" occurs where an official "provides advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official").

court's failure to discuss much less define where the line between routine constituent services and criminal pressure or advice can be drawn creates the very constitutional concerns that *McDonnell* sought to prevent. In failing to make these distinctions, the Sixth Circuit ignores—and thereby annuls—the constitutional concerns that underpin *McDonnell*.

In rejecting Lee's argument that the lack of any showing beyond contacting other officials requires dismissal of the Indictment and vacation of the judgment, the court below simply noted that "[n]owhere in *McDonnell* or *Birdsall* did the Court state that officials not holding advisory roles over other officials could not be convicted of Honest Services fraud or Hobbs Act extortion."[154] But the lack of such a statement does not mean that either case sanctions criminal prosecution for merely contacting another official about a matter pending before them. To avoid constitutional vagueness the "provides advice" component must be limited to two distinct scenarios: (1) where the defendant public official was in a position relative to the contacted public official—such as the highest executive in a branch of government in *McDonnell*—that it can be established beyond a reasonable doubt that the subordinate official understood that the advice was to be followed or (2) where the duties of the defendant public official require the official to provide advice to another official about a matter before that official. The facts in *McDonnell* fall into the first category and the facts in *Birdsall* fall into the second category. Indeed, as the concurrence notes below, the very function of the *Birdsall* defendants was to act in a

[154] App 16a.

formal advisory role: "[T]he public officials had been charged with receiving money 'with the intent that their ***official action*** should be thus influenced.[155]

The decision below cannot be squared with the principal constitutional concerns that undergird *McDonnell*, where the Court took pains to make clear that these sorts of routine constituent services do not constitute criminal conduct.

2. Sixth Circuit's Post-*McDonnell* Approach to Criminalizing Contacting Other Officials Conflicts with the Approach Taken by Second and Third Circuits.

In contrast to the Sixth Circuit, the Second Circuit in *United States v. Silver*[156] and the Third Circuit in *United States v. Fattah*[157] recognized that, after *McDonnell*, contacting other officials on behalf of a constituent, using official stationary or other trappings of the public office, is not criminal under the Honest Services and Hobbs Acts. The decision below gives shortshrift to these decisions stating only that both decisions involved pre-*McDonnell* jury instructions that told the jury that an official act includes any action taken or to be taken under color of official authority. But that distinction does not negate the developing conflict because both cases made plain that certain actions taken by the defendants—analogous to Lee's actions here—do not support criminal liability.

In *Silver,* the Second Circuit vacated and remanded the conviction of the Speaker of the New York Assembly because—although Speaker Silver used his official letterhead to recommend the son of a constituent for a job in an organization

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[155] App. 28a (emphasis added) (quoting *Birdsall*, 233 U.S. at 230).
[156] 864 F.3d 102 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018).
[157] 902 F.3d 197, 238-46 (3d Cir. 2018) (*amending and superseding opinion on rehearing*), *cert. denied*, 139 S. Ct. 1325 (2019).

heavily dependent upon state funding over which Silver had enormous control—there was no evidence that Silver took any steps to pressure the director of the organization to act on his recommendation.[158] In other words, although Silver may have wished to *influence* the hiring decision, he may have taken no steps to "pressure" the director. Similarly, here, although the Indictment alleged that Lee contacted public officials in the hope of having some influence over decisions before them, there were no allegations that she sought to "pressure" those she contacted or, unlike in *Silver*, even had the capacity to "pressure" them.

Similarly, in *United States v. Fattah* jury instructions were overinclusive and the court vacated the conviction.[159] Fattah, a U.S. Congressman, was convicted of Honest Services and Hobbs Acts violations in connection with his attempts to secure an ambassadorship for a constituent.[160] Fattah sent three emails and two letters and made one telephone call to public officials on behalf of the constituent.[161] The court remanded stating:

> *McDonnell* … requires us to determine whether Fattah's efforts qualify as permissible attempts "to express[ ] support," or impermissible attempts "to pressure or advise another public official on a pending matter. *Id.* at 2371. At trial, the jury was not instructed that they had to place Fattah's efforts on one side or the other of this divide. The jury might even have thought they were permitted to find Fattah's efforts—three emails, two letters, and one phone call—to themselves be official acts, rather than a "decision" or "action" on the properly identified matter of the appointment. Such a determination would have been contrary to the dictates of *McDonnell*.

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[158] Like Governor McDonnell, Speaker Silver was not retried.
[159] 902 F.3d at 238-46.
[160] *Id.* at 240.
[161] *Id.*

Just as in *Fattah* where the Third Circuit observed that "the jury was not instructed that they had to place Fattah's efforts on one side or the other of this divide," in Lee the Sixth Circuit did not even acknowledge that such a divide exists. As a result, the Sixth Circuit misapplied *McDonnell*.

3. The Question Presented is Important, Recurring, and Affects a Vast Number of Municipal, County, State, and Federal Officials.

Despite the *McDonnell* decision, after the Sixth Circuit's decision, the dividing line between what is considered routine constituent services and criminal conduct remains unclear and will continue to have a chilling effect on the actions of federal, state, and local official in the nation on behalf of their constituents. Unless the line between what constitutes permissible attempts to express support and impermissible attempts to pressure or advise another public official on a pending matter is clarified, public officials will be left, once again, to divine for themselves (at significant peril if they are wrong) what is permissible and what is criminal.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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