No. 19-6076

IN THE SUPREME COURT OF THE UNITED STATES

TAMELA M. LEE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the indictment and evidence were sufficient to support a county council member's convictions for honest-services fraud, Hobbs Act extortion, and related conspiracies where the council member accepted money and goods from a storeowner in return for agreeing to use her official position to influence other public officials in resolving pending criminal cases, bringing criminal charges, and ending a federal tax investigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 919 F.3d 340. The opinion and order of the district court (Pet. App. 39a-47a) is not published in the Federal Supplement but is available at 2016 WL 7336529.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on March 18, 2019. A petition for rehearing was denied on April 26, 2019 (Pet. App. 48a). On July 15, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including September 23, 2019, and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of conspiracy to commit honest-services fraud, in violation of 18 U.S.C. 1349; honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346; Hobbs Act conspiracy, in violation of 18 U.S.C. 1951; Hobbs Act extortion, in violation of 18 U.S.C. 1951; obstruction of justice, in violation of 18 U.S.C. 1512(c)(2); and making a false statement to law enforcement, in violation of 18 U.S.C. 1001. Pet. App. 31a-32a. She was sentenced to 60 months of imprisonment, to be followed by one year of supervised release. Id. at 33a-34a. The court of appeals affirmed. Id. at 1a-29a.

1. Over the course of several years, petitioner, a county council member in Ohio, accepted bribes from the owner of a local convenience store in return for advising or pressuring other officials to take acts in the storeowner's favor. Pet. App. 2a-11a. For example, petitioner accepted bribes in return for helping the storeowner's teenage nephews, who had been arrested for felonious assault after a fight with another man. See id. at 3a. In one conversation, petitioner "offered to call or email the judge," and the storeowner "discussed [petitioner's] financial problems" and "promised her that they would 'work it out.'" Ibid. (citation omitted). The next day, petitioner called a judge

handling one of the nephew's cases, and the storeowner gave petitioner $200. Ibid. The storeowner also told a relative that he had "promised to give [petitioner] an additional three hundred dollars if she 'finish[ed] up this matter for [him].'" Ibid. (citation omitted; second set of brackets in original). Over the next several weeks, petitioner made two calls to another judge, appeared at a hearing, and spoke in person to the judge and the prosecutor about the case, falsely presenting herself as a relative and asserting that she would be a character witness. Id. at 4a-5a. Petitioner also spoke to the city's chief prosecutor, questioning why the city had arrested the nephews but not the other man involved in the fight. Ibid. The chief prosecutor later testified that she feared that, if she failed to respond to petitioner's concerns, petitioner "might 'go over [her] head and contact [her] supervisor.'" Id. at 6a (citation omitted; second set of brackets in original). Throughout the same period, petitioner repeatedly picked up money from the storeowner. Id. at 4a.

In a separate incident, a friend of the storeowner asked him to obtain petitioner's help in an Internal Revenue Service investigation. Pet. App. 6a-7a. The friend told the storeowner that he wanted a supportive "letter from [petitioner]" and promised that "No matter what it costs -- I'll pay." Id. at 7a (citations omitted). The storeowner responded that he would obtain a letter from petitioner "with a governmental stamp." Ibid. (citation

omitted). When petitioner prepared the requested letter on official letterhead and asked the storeowner to come to her house to pick it up, she "told [the storeowner] that she was hungry and out of cigarettes"; the storeowner responded by offering "to bring her cigarettes and food." Id. at 9a. A few days later, the storeowner asked petitioner to mail the letter, stating that "he had $500 to give her." Ibid. In conversations with his friend, the storeowner explained that petitioner would do "whatever" he asked, that "her presence did change the entire situation" for his nephews, and that she was "getting from [him] 200 to 300 a week" in "[c]igarettes, chips, candy, and this and that" for which he did not "charge her." Id. at 7a, 9a (citations omitted).

Once petitioner began to suspect that she was under investigation, she threw away the letter she had written for the storeowner's friend. Pet. App. 9a. Petitioner also lied to agents from the Federal Bureau of Investigation, telling them, among other things, that she had never spoken to the judges or the prosecutors handling the nephews' case. Id. at 9a-10a.

2. In December 2015, a federal grand jury indicted petitioner on the six counts on which she was later convicted. Indictment; Pet. App. 31a. The district court denied petitioner's motion to dismiss the honest-services and Hobbs Act counts. See id. at 39a-47a. The court rejected petitioner's contention that the indictment failed to allege sufficient facts showing one of

the elements of those crimes, namely, "official act[s]" that were the subject of petitioner's schemes. Ibid.

Petitioner proceeded to trial. At the close of evidence, the district court denied petitioner's motion for judgment of acquittal, rejecting petitioner's contention that the evidence was insufficient to support a finding of an official act. Pet. App. 11a-12a. The jury found petitioner guilty on all counts. Id. at 12a. The court sentenced petitioner to 60 months of imprisonment on each count, to run concurrently. Id. at 33a-34a.

3. The court of appeals affirmed. Pet. App. 1a-29a.

As relevant here, the court of appeals rejected petitioner's contention that the indictment was insufficient with respect to the honest-services and Hobbs Act counts. Pet. App. 12a-19a. The court explained that, under this Court's decision in McDonnell v. United States, 136 S. Ct. 2355 (2016), a public official satisfies the official-act requirement if he uses or agrees to use "his official position to exert pressure on another official to perform an 'official act,'" or if he uses or agrees to use "his official position to provide advice to another official, knowing or intending that such advice form the basis for an 'official act' by another official." Pet. App. 14a (quoting McDonnell, 136 S. Ct. at 2370) (brackets omitted). The court rejected petitioner's argument that "an official can only 'provide advice' to a second official if the first official is in an advisory role to the second, and an official can only 'exert pressure' on a second

official if the first official has 'leverage or power' over the second official." Id. at 15a 9citation omitted). The court found that the indictment contained "sufficient facts" to support an inference that petitioner had accepted bribes in return for agreeing to "pressure or advise" other officials to perform official acts. Id. at 19a.

The court of appeals also rejected petitioner's contention that the evidence was insufficient to support conviction on the honest-services and Hobbs Act counts. Pet. App. 20a-24a. The court again rejected petitioner's efforts to impose "additional constraints on the requirements for an official to 'provide advice' or 'exert pressure.'" Id. at 21a. In addition, the court emphasized that "[t]he government did not have to prove beyond a reasonable doubt that [petitioner] actually took official action," but only that petitioner "agreed" to do so. Ibid. The court explained that, regardless of whether the particular acts that petitioner "actually took" qualify as pressure and advice under McDonnell, "the evidence was sufficient for a rational juror to conclude beyond a reasonable doubt that [petitioner] agreed to perform" additional acts that would qualify. Ibid. (emphasis added).

Judge Nalbandian concurred. Pet. App. 27a-29a. He expressed "reservations" about interpreting the relevant statutes to cover "one public official's attempt to pressure another public official into taking an official act," but he acknowledged that this Court

did not embrace his view in McDonnell. Id. at 27a-28a. He concurred on the ground that the opinion of the court of appeals "accurately sets forth the governing law and * * * reaches the correct result under that law." Id. at 27a.

ARGUMENT

Petitioner renews (Pet. 25-33) her challenges to the sufficiency of the indictment and of the evidence supporting her conviction. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. This case also would be an unsuitable vehicle for reviewing petitioner's contentions. Further review is unwarranted.

1. An indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charge against him, and includes sufficient information to enable him to plead an acquittal or conviction as a bar to future prosecutions. United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007). And evidence suffices to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

This Court clarified the elements of honest-services fraud and Hobbs Act extortion in McDonnell v. United States, 136 S. Ct. 2355 (2016). In that case, the government agreed that, where the "theory underlying" a charge of honest-services fraud or Hobbs Act

extortion is that the defendant accepted bribes, the government must show that the defendant committed or agreed to be influenced in an "'official act'" -- as defined in the federal bribery statute, 18 U.S.C. 201(a)(3) -- in exchange for a thing of value. Id. at 2365. The Court explained that "[t]he text of § 201(a)(3) sets forth two requirements for an 'official act.'" Id. at 2368. First, the government must identify a "'question, matter, cause, suit, proceeding or controversy'" -- in other words, "a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." Id. at 2368, 2372. Second, the government must prove that the defendant "made a decision or took an action 'on' that question, matter, cause, suit, proceeding, or controversy, or agreed to do so." Id. at 2368. The Court explained that a public official may take a decision "on" a matter by "using his official position" either "to exert pressure on another official to perform an 'official act'" or "to provide advice to another official, knowing or intending that such advice will form the basis for an 'official' act by another official." Id. at 2370.

In this case, the government identified at least four separate "questions or matters," McDonnell, 136 S. Ct. at 2374: each of the pending criminal cases against the storeowner's two nephews, the bringing of criminal charges against the man with whom the nephews had fought, and the IRS investigation in which the storeowner's friend had asked petitioner to intervene. See Pet.

App. 43a-44a. And the government alleged and introduced evidence that petitioner, "using [her] official position," both exerted "pressure" on other officials to act on those questions or matters and "provide[d] advice" to other officials, "knowing or intending that such advice will form the basis for" action on those questions or matters. 136 S. Ct. at 2370; see Pet. App. 12a-24a. As a result, the indictment and evidence were sufficient to support petitioner's conviction. Petitioner renews (Pet. 25-33) her claim that the government's allegations and evidence were insufficient because "the 'exerting pressure' option [under McDonnell] requires an official to have authority or leverage over the other official" and because "the 'providing advice' option is limited to public officials who have an advisory role in relation to the other official." Pet. App. 44a. McDonnell, however, does not express such limitations.

McDonnell explained the official-act requirement is satisfied if a defendant "us[es] 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.'" 136 S. Ct. at 2371; see, e.g., id. at 2372 ("Setting up a meeting * * * does not qualify as a decision or action on the pending question * * * as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'"); ibid. ("A jury could conclude, for

example, that the official was attempting to pressure or advise another official on a pending matter. And if the official agreed to exert that pressure or give that advice in exchange for a thing of value, that would be illegal."); id. at 2372 ("[The public officer's] decision or action 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.") Petitioner proposes "additional restrictions on the meaning of 'provide advice' and 'exert pressure,'" Pet. App. 18a, which would require the government to show that petitioner either held "leverage" over the other official or held an "advisory or other relationship such that the other officials could be expected to follow [petitioner's] advice," Pet. 25. The court of appeals noted, however, that "nowhere in McDonnell did the Supreme Court state that it was creating such a rule." Pet. App. 15a; see id. at 18a.

In any event, petitioner's sufficiency challenges fail even under petitioner's approach. In this case, petitioner spoke to judges and prosecutors about pending criminal cases, and the storeowner stated that her involvement "did change the entire situation." Pet. App. 7a (citation omitted). A trier of fact could reasonably infer that petitioner possessed "leverage" that she could use to affect the outcomes of pending criminal cases, or that petitioner's relationship with the other officials was such

that "the other officials could be expected to follow [petitioner]'s advice," Pet. 25. Similarly, the chief prosecutor testified that she feared that, if she failed to respond to petitioner's concerns, petitioner could "go over [her] head." Pet. App. 6a (citation omitted). Again, a trier of fact could reasonably infer that petitioner, a county council member, held leverage over the chief prosecutor and the city prosecutor's office, or that the prosecutors could be expected to follow petitioner's advice. Finally, "[t]he government [also] presented evidence that [the storeowner said] he had given [petitioner] $200 and had promised to give her an additional $300 if she 'finish[ed] up this matter.'" Id. at 23a (citation omitted). Regardless of whether the particular acts that petitioner "actually took" qualify as pressure or advice within the meaning of McDonnell, at a minimum, "the evidence was sufficient for a rational juror to conclude beyond a reasonable doubt that [petitioner] agreed to perform" additional acts that would qualify as pressure or advice even on petitioner's theory. Id. at 21a (emphasis added); see McDonnell, 136 S. Ct. at 2371 ("[A] public official is not required to actually make a decision or take an action on a 'question, matter, cause, suit, proceeding or controversy'; it is enough that the official agree to do so.").

3. Petitioner errs in contending (Pet. 31-33) that the decision below conflicts with the decisions of the Second and Third Circuits in United States v. Silver, 864 F.3d 102 (2d Cir. 2017),

cert. denied, 138 S. Ct. 738 (2018), and United States v. Fattah, 914 F.3d 112 (3d Cir. 2019). In Silver, a state legislator received kickbacks in return for political favors. See 864 F.3d at 106-110. Most of those favors involved the state legislator's own acts (for example, votes on legislation) rather than pressure on or advice to other officials. See id. at 108-110. Silver is thus largely inapposite. And as the court of appeals observed, Silver merely reversed a conviction resting on pre-McDonnell jury instructions and remanded the case for a new trial with proper instructions. Pet. App. 16a-17a. Silver did not find the evidence insufficient to support conviction, and it "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." Id. at 17a.

In Fattah, a congressman accepted bribes from a constituent in exchange for various political favors, including sending emails, writing letters, and making a phone call to the President and a Senator urging the constituent's appointment as an ambassador. See 914 F.3d at 137-139. Like the Second Circuit in Silver, the Third Circuit in Fattah merely reversed a conviction resting on pre-McDonnell jury instructions and remanded the case for a new trial with proper instructions. See id. at 156. The court neither found the evidence insufficient to support conviction nor adopted the legal theory that petitioner here develops. See ibid.

4. In any event, this case would be an unsuitable vehicle for addressing the question presented. As the court of appeals observed, petitioner herself proposed jury instructions that tracked McDonnell's definition of "'official act'" and that did not separately require the jury "to find that [petitioner] held an advisory role or held power or leverage over the officials with whom she communicated." Pet. App. 20a-21a; see D. Ct. Doc. 100, at 3-6 (Jan. 25, 2017). The district court adopted those instructions with only minor stylistic variations. See Trial Tr. 653-655. And petitioner did not object to those instructions in the district court, in the court of appeals, or in her petition for a writ of certiorari in this Court. See Pet. App. 21a-22a; Pet. 25-33.

Although petitioner's position on the jury instructions does not itself foreclose her challenges to the sufficiency of the indictment and the evidence, see Musacchio v. United States, 136 S. Ct. 709, 715 (2016), it does make this case an inappropriate vehicle for reviewing the question presented. This Court has "treated an inconsistency between a party's request for a jury instruction and its position before this Court" as a relevant "consideration[] bearing on" whether to grant a writ of certiorari. United States v. Wells, 519 U.S. 482, 488 (1997). "[T]here would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested." City of Springfield v. Kibbe, 480 U.S. 257,

259 (1987) (per curiam). In addition, the posture of this case means that the petition presents highly factbound questions regarding the inferences that could properly be drawn from the allegations and evidence -- rather than purely legal questions regarding the accuracy of the jury instructions. And this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10. A writ of certiorari should accordingly be denied here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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