NO. 19-6076

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

REPLY IN SUPPORT OF PETITION

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Table of Contents

Page

Table of Authorities

Page(s)

Cases

Constitutional Provisions

Statute

Rule

Introduction

Upon this Court's remand of *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the government dismissed the case against Governor McDonnell because the facts it had alleged in the indictment and proved at trial could not withstand a retrial bound by the definitions of "official acts" enunciated in that decision. Here, although the indictment also was handed down before *McDonnell*, the government decided to shoehorn shockingly weak pre-*McDonnell* allegations and evidence into the post-*McDonnell* legal framework. The result is a conviction of a county councilwoman on facts that should have been insufficient even before *McDonnell*. There were no allegations in the indictment—and, thus not surprisingly, no proof at trial—that petitioner *promised to give or gave any advice whatsoever* to officials in different levels of government on matters before them or had any leverage over them. This case, therefore, represents a bald attempt by the government to continue the same sort of prosecutorial overreach that made the *McDonnell* decision necessary. As a result, petitioner's conviction and the decision of the United States Court of Appeals for the Sixth Circuit conflict with *McDonnell* and two post-*McDonnell* decisions in other federal district courts. The case is of paramount importance because it affects all local, state, and federal public officials and the constituents with whom they provide services—something the Court recognized to be of fundamental importance to our republican form of government. We address each issue raised by the government in its opposition, none of which has merit.

Argument

1. ***Respondent's Question Presented Is Unresponsive to McDonnell***. Respondent's brief in opposition continues to ignore the sea change *McDonnell* visited upon honest services fraud and Hobbs Act extortion law as it applies to public officials. This case represents an unabashed effort by respondent to continue pre-*McDonnell* business as usual. The indictment in this case was filed before *McDonnell* and lacks facts that meet the requirements set forth in *McDonnell*. Instead of dismissing the case, as it did in *McDonnell* upon remand, respondent left untouched its pre-*McDonnell* indictment and argued that the allegations in the indictment and the proof at trial were sufficient post-*McDonnell*. This cannot be the case if *McDonnell* is to have any meaning.

Respondent's brief in opposition doubles down on this approach with its statement of the question presented: whether petitioner can be held criminally liable for "us[ing] her official position to ***influence*** other public officials in resolving pending" official actions before them. (emphasis added). But the *McDonnell* Court concluded that defining an "official act" as the exercise of a public official's "influence" is overinclusive, and "something more is required." *Id.* at 2370. The thrust of *McDonnell* was to differentiate between attempts to influence—something the Court found essential to our republican form of government—and attempts to "pressure" or coerce other officials to decide a matter before them in a certain way. *Id.* at 2372 ("The basic compact underlying representative government ***assumes*** that public officials will hear from their constituents and act appropriately on their concerns—

whether it's the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm") (emphasis added). Respondent's statement of the question presented is unresponsive to the holding in *McDonnell* and reflects its determination to continue the prosecutorial overreaching struck down in *McDonnell*.

2. ***The Decision Conflicts with McDonnell, Silver, and Fattah***. Consistent with its pre-*McDonnell* question presented, respondent boldly contends that the decision below by the United States Court of Appeals for the Sixth Circuit does not conflict with *McDonnell* or the post-*McDonnell* decisions by the United States Courts of Appeals for the Second and Third Circuits in *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017) and *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019). Resp. 11-12. That is a remarkable assertion. The Second and Third Circuits recognized that an effort to influence another official about a pending matter, without more, is insufficient to meet the "exerts pressure" or "provides advice" prongs of *McDonnell*'s definition of what constitutes an "official act."[1] The court of appeals in this case did not recognize this post-*McDonnell* reality. Instead, the court in effect applied pre-*McDonnell* principles to the allegations in the indictment and the proof at trial. App. 1a at 18 and 23 (stating that "we do not adopt Defendant's additional constraint on the requirements for an official to 'provide advice' or 'exert pressure' on

[1] *See Silver*, 864 F.3d at 120 (stating that Silver's "letter [on General Assembly letterhead] offering general assistance with an event occurring in his district—absent any actual 'exert[ion] [of] pressure on other officials regarding a particular matter under consideration—did not satisfy the standards for an official act as defined by *McDonnell*"); *Fattah*, 914 F.3d at 154-55 (stating that a congressman's setting up a meeting with a government official for a constituent seeking an ambassadorship did not, standing alone, qualify as an "official act").

another official," and rejecting defendant's argument that an official cannot exert pressure on another official without holding a position of leverage over that official).

Prior to *McDonnell*, public officials could be convicted of honest-services or Hobbs Act violations simply for contacting another official about a pending official action in the hopes of having some influence. To avoid constitutional vagueness and federalism concerns, *McDonnell* narrowed the meaning of "official act" to remove the cloud of potential criminal liability in connection with the provision of routine constituent services. Under *McDonnell*, a public official cannot be held criminally liable for advising another official about how to decide a pending matter ***unless*** the defendant official "pressures" the official to reach a certain conclusion or "provide[s] advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *McDonnell*, 136 S. Ct. at 2370. By equating an official's "attempt to influence" with the pressure or advice constitutionally required by *McDonnell*, respondent and the Sixth Circuit simply disregarded *McDonnell*, which the Second and Third Circuits expressly refused to do.

3. ***The "Provides Advice" Element of McDonnell***. As to the "provides advice" element of an "official act," respondent argues that the Sixth Circuit correctly concluded an "official act" includes any time one public official contacts another official and expresses an opinion on a matter pending before that official.[2] In this way, the Sixth Circuit—cheered on by the government—interprets "provides advice"

[2] Appendix 18 (stating that the fact that officials holding advisory roles have been convicted for accepting gifts in exchange for providing advice does not mean that holding an advisory role is necessary for such conviction).

to include any attempt to influence another official, which swallows whole the limitations on prosecutorial overreaching imposed by *McDonnell*. But the "provides advice" prong has an important qualifier: The advice must be given "***knowing or intending that such advice will form the basis for an 'official act' by another official***." *McDonnell*, 136 S. Ct. at 2370 (emphasis added).

The Court in *McDonnell* included this qualifying phrase to preclude precisely what occurred here. It was included to make clear that the "provides advice" prong applies only in two discreet circumstances: (a) where the advising official—for example, the chief executive of a state—holds a position relative to the official contacted—for example an officer within the executive branch of that state—and the official feels obligated to decide a matter in accordance with that advice or (b) the advising official's position requires the official to provide advice to another official about how to decide a matter and the official provides advice corruptly for their personal benefit, as was the case in *United States v. Birdsall*, 233 U.S. 749 (1914).[3]

Applying the "provides advice" prong more broadly than the facts in *McDonnell* or *Birdsall*, as the Sixth Circuit does here, would be to ignore the core point of *McDonnell* because any attempt to influence can be construed as "provid[ing] advice." The government specifically argued that attempting to influence was sufficient to satisfy the "provides advice" element of an official act and no definition of, or

[3] In *Birdsall*, defendants were responsible for providing advice to the deciding official about how the official should decide a certain matter and the defendants took bribes to advise the official in a way beneficial to the bribers' clients. *See also United States v. Repak*, 852 F.3d 230 (3d Cir. 2017) (holding post-*McDonnell* that the director of redevelopment authority responsible for recommending contracts for approval to the board of directors violated honest services and Hobbs Act law by recommending contractors who paid the director bribes).

qualifying instruction regarding, this element was given to the jury. Government counsel at closing argument told the jury that petitioner's official acts were "her using her political ***influence*** to reach out to 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." (emphasis added).[4] Petitioner, therefore, could have been convicted by the jury because it believed contacting other officials in the hopes of having some impact met the "advice" prong of *McDonnell*. There is no reason to think future juries also would not be similarly confused.

4. ***The "Exerts Pressure" Element of McDonnell***. The same is true regarding the "exerts pressure" part of the definition of "official act." In this case, as in *McDonnell*, *Silver*, and *Fattah*, the jury instructions did not alert the jury to divide the contacts of petitioner into those contacts that are permissible and those that are not, and the Sixth Circuit concluded that it was sufficient that the jury instructions included the undefined phrase "exerts pressure."[5] Unlike this case, the allegations in the indictments and proofs at trial in *McDonnell*, *Silver*, and *Fattah* demonstrated that the defendant public officials were in positions to "pressure" other officials to decide an official action in a way to their liking. The issue was whether they, in fact, did coerce those officials to decide a matter a certain way. *McDonnell*, 136 S. Ct. at 2374-75; *Silver*, 864 F.3d at 120; *Fattah*, 902 F.3d at 241. All three convictions were

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[4] Docket Entry (DE) 164 (Trans. of Closing Arg.), PageID#1726:10-14, 1728:09-11.

[5] Appendix 21 (court of appeals opinion) (rejecting petitioner's argument that a qualifying instruction was required to give meaning to *McDonnell*, stating "the jury instructions that the district court gave were consistent with *McDonnell*'s narrow definition of 'official act'").

vacated because the jury instructions failed to inform the jury that they were required to divide the facts between permissible contacts, *i.e.*, contacts seeking to influence a decision, and impermissible contacts, *i.e.*, contacts seeking to coerce a decision of another official through "pressure" based on the leverage the official possessed relative to the official contacted.

In contrast, in this case there were no allegations in the indictment or proof at trial that petitioner was in a position to pressure the contacted officials to decide an official act in the manner she desired. The Sixth Circuit rejected petitioner's arguments that the indictment and later the government's case at trial must be dismissed for lack of any allegation or proof that she was in any position to pressure or provide advice to the officials she contacted. Requesting a jury instruction, therefore, on this subject would have been fruitless. As a result, petitioner—a county official—was convicted for merely contacting a federal official and two municipal officials about matters of concern to her constituents. There were no allegations in the indictment or proof at trial that petitioner—one of thirteen council members—promised to "pressure" or had any way to "pressure" officials in the federal or municipal government. Absent an instruction to the jury that "exerts pressure" means that the official must have power or leverage over the other official, juries will continue to misapply *McDonnell* to the evidence, as the jury did here.

5. ***The Decision Is More Expansive than Pre-McDonnell Law***. Moreover, there were no allegations in the indictment—and, therefore, not surprisingly no proof at trial—that petitioner gave any advice whatsoever to the officials she contacted to

decide matters before them in a certain way.[6] The Sixth Circuit decision, therefore, not only conflicts with *McDonnell*, *Silver*, and *Fattah*, it expands criminal liability beyond pre-*McDonnell* law. We could not locate a single court of appeals case—even before *McDonnell*—wherein an official in one level of government was convicted merely for contacting an official in another level of government where the official offered no advice at all.

6. ***The Allegations in the Indictment Are Insufficient as a Matter of Law.*** Respondent argues that the Sixth Circuit correctly rejected petitioner's argument that the indictment must be dismissed because it fails to allege a crime, stating that the Sixth Circuit correctly "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." Resp. 6. But nowhere in the pre-*McDonnell* indictment is there an allegation that petitioner agreed to pressure, was in a position to "pressure," or did "pressure" other officials or that petitioner "provided advice to another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *McDonnell* at 2370.

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[6] Respondent states that petitioner received cash and things of value from a constituent "[o]ver the course of several years." Resp. 2. That is misleading. The events that formed the basis of the indictment happened over a period of a few months in 2014; petitioner had been a councilwoman for only about a year. DE 47 (Opening Br.) at PageID#37 at 10-16. Respondent ignores the fact that the small amounts of cash and items from a corner store owned by a constituent—who was also a friend—was kept on a tab at the store. DE 127, PageId#1194:11-1195:04, 1211:08-1129:05-23. The store owner also kept tabs for other customers. And, respondent ignores that there was a history of petitioner paying the store owner back for amounts advanced. DE 127, PageID#1227 (constituent store owner who ran a tab on amounts lent to petitioner told her in June 2014 that "'[w]e'll work it out. We worked it out last summer, we work it out this summer, too.' Right?"); *see also id*. 1200. In any event, respondent's focus on items of value is viewing the case through the wrong analytic lens. The issue here relates to what petitioner agreed to do for her longtime friend/constituent and what she did.

A criminal defendant is entitled to an indictment that states the essential elements of the charge. *Jones v. United States*, 526 U.S. 227, 232 (1999). As the Court stated in *Hamling v. United States*, 418 U.S. 87, 117 (1974), "[a]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *See also* Fed. R. Crim. P. 7(c) (providing that an indictment must provide "a plain, concise, and definite written statement of the essential facts constituting the offense charged"). An indictment that fails to allege the essential elements of the crime charged offends both the Fifth and Sixth Amendments. *United States v. Pirro*, 212 F.3d 86 (2d Cir. 2000) (citing *Russell v. United States*, 369 U.S. 749, 760-61 (1962)).

The Grand Jury Clause of the Fifth Amendment guarantees that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment by a Grand Jury …." Accordingly, if an indictment does not assert all elements of a crime, the defendant cannot be assured that defendant is being tried on the evidence presented to the grand jury. *Russell*, 369 U.S. at 770.

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him.

Id. In addition, the Sixth Amendment guaranty of a defendant's right "to be informed of the nature and cause of the accusation" against the defendant is also violated by an indictment that does not state the essential elements of a crime. *Russell*, 369 U.S.

at 761. Because the sufficiency of an indictment serves these paramount goals, an indictment must be considered as it was actually drawn, not as it might have been drawn. *Sanabria v. United States*, 437 U.S. 54, 65-66 (1978) (stating that "[t]he precise manner in which an indictment is drawn cannot be ignored …."). Accordingly, although pleading practice has been liberalized, the Supreme Court has recognized the limitations of this practice, and an indictment may not rely upon the generic terms, such as "official act" here, but "must state the specifics—it must descend to particulars." *Russell*, 369 U.S. at 756 (quoting *United States v. Cruikshank*, 92 U.S. 542 (1875)).

After *McDonnell*, alleging only that the public official contacted another official about a matter pending before that official for decision is not sufficient to allege all elements of honest services fraud or Hobbs Act extortion. "[S]peaking with interested parties is not, standing alone, a decision on an action within the meaning of § 201(a)(3). Instead, something more is required." *Id.* None of the allegations in the indictment were sufficient to establish honest services or Hobbs Act violations post-*McDonnell* and the failure to do so requires that the indictment be dismissed.

7. ***The Argument that It Is Sufficient that Petitioner "Agreed" to Contact Officials Is Specious***. Respondent argues that at a minimum petitioner agreed to perform additional acts that would qualify as pressure or advice even under petitioner's theory. Resp. 11. Respondent does not identify what petitioner promised. There are no allegations in the indictment and there was no proof at trial that petitioner promised anything more than to contact a federal official and two

municipal officials. Nowhere is there even a hint in the indictment or evidence at trial that petitioner promised to coerce, had the ability to coerce, or attempted to coerce the official she contacted. Under *McDonnell* an official does not incur criminal liability just for contacting another public official about a pending matter. Respondent's attempt to justify the conviction by arguing that petitioner agreed to contact the officials is meaningless.

8. ***This Case Presents an Appropriate Vehicle for Review***. Respondent argues that this case is an inappropriate vehicle for review because petitioner failed to object that the jury instructions lacked a qualifying instruction about the difference between attempts to influence a decision of another official, which is not illegal under *McDonnell*, and attempts to "pressure" or coerce another official to decide a matter in a certain way, which is illegal. Resp. 13. This argument is without merit. Where a party's pre-trial motion to dismiss is denied on the same issue the defendant raises on appeal with respect to the jury instructions, the issue is preserved for appeal. *See United States v. Pearl*, 324 F.3d 1210, 1214 (10th Cir. 2003); *United States v. Bucey*, 987 F.2d 1297, 1301 n.7 (7th Cir. 1989) (stating that because the district court rejected defendant's motion to dismiss on the definition of "financial institution," defendant preserved the issue for appeal because objecting to the instruction on this issue would have been futile).

Indeed, in denying petitioner's motion to dismiss, the district court in this case rejected petitioner's leverage argument: "… *McDonnell* did not require a finding of leverage and this Court declines to extend that decision to include a requirement of

leverage."[7] Furthermore, in denying petitioner's motion for acquittal the district court expressly noted that the issue had been preserved for appeal. At the conclusion of the evidence, petitioner argued the government had failed to establish that the petitioner committed an "official act" when she contacted officials over which she had "no meaningful influence." Tr. Tran., DE 132 PageID#1469. The court responded that it stood by its reasoning in denying the motion to dismiss and stated "[o]bviously, you want to preserve it for the record; it's there." *Id.* at 1469-1470.

Respondent also argues that this case is unsuitable because it "presents highly fact-bound questions regarding inferences that could properly be drawn from the allegations and evidence—rather than purely legal questions regarding the accuracy of the jury instructions." Resp. 14. First, the Court need not examine the evidence to provide the clarity that is needed for *McDonnell* to be applied as intended. That clarity can be provided in holding that (a) the indictment was insufficient as a matter of law because it failed to allege a crime under *McDonnell* or (b) the lack of a qualifying instructions about what constitutes "advice" or "pressure" under *McDonnell* renders the application of an "official act" unconstitutionally vague—a principal driver of the *McDonnell* decision.

In addition, under the proper application of *McDonnell*, determining if a reasonable jury could have constitutionally determined petitioner's guilt beyond a reasonable doubt is not a difficult undertaking. The trial court denied *on legal grounds* petitioner's motion for judgment of acquittal for lack of evidence that

[7] Appendix 45a (Opinion and Order).

petitioner was in a position to pressure or provide advice within the meaning of *McDonnell*, *i.e.*, ruling that no such evidence was required. Indeed, the government never argued below that petitioner was in a position to pressure or provide advice that another official was obliged to follow, but instead presented its case to the jury and on appeal as one of petitioner attempting to influence on behalf of her constituents.

Accordingly, there is simply no evidence that petitioner promised to, did, or was in any position to exert pressure on the federal and municipal officials that were contacted. And, there is no evidence that she provided her opinion about how the matters pending before them should be decided. Petitioner's letter to the IRS is essentially a character reference: "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."[8] She told the municipal judge that she wished to be a character witness and simply inquired of the municipal prosecutor why the adult involved in an altercation with her constituent's nephews was not charged. There is no evidence of what she said to the juvenile court judge.

9. ***The Question Presented Affects the Conduct of Public Officials at All Levels of Government***. This case presents an important question of federal law that remains unsettled after *McDonnell* and absent a clarifying opinion the constitutional vagueness concern identified in *McDonnell* will continue to be present. It also presents an important question of federalism. In *McDonnell*, the Court emphasized

[8] Appendix 16.

the importance of not interfering unnecessarily in the affairs of state and local government: "[W]e decline to 'construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials.'" 136 S. Ct. at 2373 (citations omitted). The local officials contacted by petitioner were both attorneys licensed by the state of Ohio and they did not believe petitioner was acting feloniously.[9]

This case is of paramount importance because honest services fraud and Hobbs Act extortion law applies to all municipal, county, state, and federal officers. Absent clarification of the law, a chilling effect on the discharge of their responsibilities will persist.

Conclusion

For the foregoing reasons and those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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[9] The municipal judge testified that petitioner did not attempt to plead her constituent's teenage nephew's case, did not ask for special treatment, offered nothing to sway him to give any particular sentence, or come to any ruling. DE 132, PageID#1354:16:22, 1355:20-22, 1359:14-20, 1359:14-20, 1359:08-13, 1361:14-21. The municipal prosecutor testified she saw nothing unusual about petitioner's call. *Id.*, PageID#1382:10-12, 1389:05-15, 1391:25-1392:09.