No. _____

In The
Supreme Court of the United States

TIMOTHY RAY VASQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does *quid pro quo* bribery, in the context of an honest services fraud prosecution, permit conviction on the basis that a public official received a benefit in exchange for performing an official act only if a future opportunity to do so should arise?

PARTIES TO THE PROCEEDING

Petitioner, who was a Defendant-Appellant in the Fifth Circuit, is Timothy Ray Vasquez.

Respondent, who was the Appellee in the Fifth Circuit, is the United States.

RELATED PROCEEDINGS

United States v. Vasquez, No. 6:20-CR-00001-H-BQ-1, U.S. District Court for the Northern District of Texas. Judgment entered on August 5, 2022.

United States v. Vasquez, No. 22-10766, U.S. Court of Appeals for the Fifth Circuit. Judgment entered on November 7, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Ray Vasquez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

On November 7, 2023, the United States Court of Appeals for the Fifth Circuit affirmed Mr. Vasquez's conviction and sentence is unreported. (App. 1)

JURISDICTION

A three-judge panel for the United States Court of Appeals for the Fifth Circuit affirmed Mr. Vasquez's conviction and sentence on November 7, 2023. (App. 1)

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 1346 provides:

> For the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud'

includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

A. Procedural History

Timothy Ray Vasquez was charged with various counts of Receipt of a Bribe, 18 U.S.C. § 666(a)(1)(B), and Honest Services Mail Fraud, 18 U.S.C. §§ 1341 and 1346. He was tried before a jury from March 21 to March 24, 2022, and convicted on all counts. (ROA.669-670)[1] On August 5, 2022, he was sentenced to 186 months of imprisonment. (ROA.705-711) He timely filed his notice of appeal on August 10, 2022. (ROA.712-713)

On November 7, 2023, the United States Court of Appeals for the Fifth Circuit affirmed his conviction and sentence. (App. 1)

B. Statement of Relevant Facts

In 2007, Timothy Vasquez was the elected chief of police in the City of San Angelo. (ROA.878) Mr. Vasquez was also the leader of a musical band that performed at weddings and similar events in the San Angelo area. (ROA.1018, 1334)

[1] "ROA" refers to the record on appeal in the Fifth Circuit.

In 2007, the City of San Angelo contracted with the firm of Dailey & Wells for the design and installation of a communications system to replace the city's previous radio system. (ROA.873-876) Mr. Vasquez was the elected chief of police at the time the city selected Dailey & Wells for its initial contract in 2007. (ROA.879) This initial contract with Dailey & Wells was for approximately six million dollars. (ROA.891)

After Dailey & Wells received the contract with the city in 2007, it began hiring Mr. Vasquez's band to perform at corporate parties. (ROA.1004) It also began to offer Mr. Vasquez gifts such as tickets to Dallas Cowboys football and San Antonio Spurs basketball games. (ROA.1340)

Between 2007 and 2014, Dailey & Wells paid Vasquez approximately $84,000 for his band to perform concerts at their corporate events in the San Antonio area on ten separate occasions. (ROA.1005)

In 2014, the city decided it needed to replace its aging radio system. (ROA.882) In emails to the city's network system administrator, who was responsible for administering the city's radio communication system, Mr. Vasquez suggested invoking the public safety exception to the city's normal competitive bidding process. (ROA.894-897) The network administrator agreed with this decision believing that a competitive bidding process would be a waste of time. (ROA.894-895) At a city council meeting, Mr. Vasquez also supported the new six-million-dollar 2015 contract with Dailey & Wells for the radio system. (ROA.910, 1130)

Several council members who voted to approve the contract testified that Mr. Vasquez's support was important to their decision and that they would have wanted to know that Dailey & Wells had paid Mr. Vasquez approximately $84,000 to perform at its corporate events. (ROA.1044, 1046, 1062, 1064, 1073, 1098, 1102, 1134-1135) They generally expressed the view that pursuant to city and state regulations, Mr. Vasquez should have disclosed his conflict of interest and recused himself from matters pertaining to Dailey & Wells. (ROA.1044, 1046, 1062, 1064, 1073, 1098, 1102, 1134-1135)

REASONS FOR GRANTING THE WRIT

Because the alleged payor of the bribes in this case, the city vendor, began hiring Mr. Vasquez's band seven years before an opportunity arose for Mr. Vasquez to take official action on behalf of the vendor, the government argued that the payments for the performances of Mr. Vasquez's band were, in effect, a retainer for Mr. Vasquez to take some possible action on behalf of the vendor on an "as opportunities arise" basis. The government requested, over defense objection, that the district court instruct the jury that it may convict Mr. Vasquez if it found the city vendor conferred a benefit on Mr. Vasquez so that he might take an official action on its behalf if someday an opportunity to do so arose. Because this is not the exchange of a benefit for a specific act, or in other words, because this is not true

quid pro quo bribery, this instruction is contrary to this Court's precedent.

Quid pro quo bribery requires the exchange of a benefit for a specific official act, not an unspecified hypothetical act that might potentially arise in the future. The Fifth Circuit's decision permits the government to convict public officials who merely have accepted a benefit from someone who the public official could potentially favor with an official act. It has thus improperly converted honest services fraud into an unconstitutionally broad and vague criminal statute.

Honest Service Fraud

The original mail fraud provision, enacted in 1872, the predecessor of the modern-day mail and wire fraud laws, proscribed, without further elaboration, use of the mail to advance "any scheme or artifice to defraud." *See McNally v. United States*, 483 U.S. 350, 356 (1987). In 1909, Congress amended the statute to prohibit, as it does today, "any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises*." § 1341; *see id*. at 357-58.

In *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941), the Fifth Circuit reviewed the mail fraud prosecution of a public official who allegedly accepted bribes from entrepreneurs in exchange for urging city action beneficial to the bribe payers. "It is not true that because the [city] was to make and did make a saving by the operations there could not have been an intent to

defraud." *Id*. at 119. "A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official," the court observed, "would not only be a plan to commit the crime of bribery but would also be a scheme to defraud the public." *Id*. at 115.

Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, *see*, *e.g.*, *United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987), the honest-services theory targeted corruption that lacked this symmetry. Even if the scheme occasioned a financial gain for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services." *See*, *e.g.*, *United States v. Dixon*, 536 F.2d 1388, 1400 (2d Cir. 1976).

In 1987, this Court, in *McNally*, held that the mail fraud statute did not encompass the deprivation of intangible rights. *McNally* involved a state officer who, in selecting Kentucky's insurance agent, arranged to procure a share of the agent's commissions *via* kickbacks paid to companies the official partially controlled. 483 U.S., at 360. The prosecutor did not charge that, "in the absence of the alleged scheme[,] the Commonwealth would have paid a lower premium or secured better insurance." *Id*. Instead, the prosecutor maintained that the kickback scheme "defraud[ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id*. at 353.

This Court held that the scheme did not qualify as mail fraud. "Rather than construe[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," it read the statute "as limited in scope to the protection of property rights." *Id*. at 350. "If Congress desires to go further," it stated, "it must speak more clearly." *Id*.

The following year, Congress enacted a statute "specifically to cover one of the 'intangible rights' that lower courts had protected . . . prior to *McNally:* 'the intangible right of honest services.'" *Cleveland v. United States*, 531 U.S. 12 (2000). In full, the honest-services statute stated:

> For the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." § 1346.

This Court, in *Skilling v. United States*, 561 U.S. 368 (2010), considered the question of whether § 1346, the honest services statute, was unconstitutionally vague. The Court concluded that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally* derailed the intangible rights theory of fraud. *Skilling*, at 404. In view of this history, the Court held there is no doubt that Congress intended § 1346

to reach at least bribes and kickbacks. However, reading the statute to proscribe a wider range of offensive conduct, it acknowledged, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, it held that § 1346 criminalizes only the bribe-and-kickback core of the pre-*McNally* case law. *Id*. at 409.

In *McDonnell v. United States*, 579 U.S. 550 (2016), this Court reviewed a challenge to jury instructions on extortion under color of right and honest services fraud. At issue was "whether arranging a meeting, contacting another official, or hosting an event—without more—can be a[n official act]." *McDonnell*, at 567. The parties in *McDonnell* agreed to define "official act" by reference to the federal bribery statute, 18 U.S.C. § 201(a)(3) ("[T]he 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."). *See McDonnell*, at 562. The district court defined "official act" accordingly, but further instructed the jury that official acts "encompassed acts that a public official customarily performs, including acts in furtherance of longer-term goals or in a series of steps to exercise influence or achieve an end." *Id*. at 564-65 (internal quotation marks omitted).

This Court, citing concerns that the "standardless sweep" of this definition could "subject [public officials]

to prosecution, without fair notice, for the most prosaic interactions," found these instructions to be inadequate. *Id*. at 576 (citation omitted). It explained that, in order to "avoid[ ] this 'vagueness shoal,'" *id.* (quoting *Skilling*, 561 U.S. at 368), a narrower definition of "official act" was necessary.

First, this Court observed that a "'cause,' 'suit,' 'proceeding,' [or] 'controversy' . . . connote[s] a formal exercise of governmental power, such as a lawsuit, hearing, or administrative determination." *Id*. at 567, 578 (quoting 18 U.S.C. § 201(a)(3)). Second, because "a word is known by the company it keeps," *id.* (citation omitted), this Court held that a jury must find that the "question" or "matter" before the official was "something specific and focused that is 'pending' or 'may by law be brought before [him],'" *id.* at 579 (quoting 18 U.S.C. § 201(a)(3)). Third, this Court interpreted the terms "'[p]ending' and 'may by law be brought' [to] suggest something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id.* at 570 (quoting 18 U.S.C. § 201(a)(3)). Finally, this Court noted that a jury must find that the official "made a decision or took an action—or agreed do so—on the identified 'question, matter, cause, suit, proceeding or controversy.'" *Id*. at 579.

McDonnell thus stands for the proposition that bribery requires that an official accept a payment, knowing that he is expected to use his office to influence a "focused," "concrete," and "specific" question or matter that "may be understood to refer to a formal

exercise of governmental power." *Id*. at 570-71, 574. The question or matter need only be "focused," "concrete," or "specific" enough to satisfy the *quid pro quo* requirement—the official need only promise to do something about a question or matter that "may be understood to refer to a formal exercise of governmental power." *Id*. at 569.

This Court's vacatur of McDonnell's conviction was not limited to concerns that the jury may have believed a meeting, on its own, qualifies as a "decision or action." *McDonnell*, at 579. This Court was also concerned that the jury may have convicted the defendant "without finding that he agreed [(or promised)] to make a decision or take an action on a *properly defined* '*question, matter, cause, suit, proceeding or controversy*.'" *Id*. at 571 (emphasis added). In fact, this Court discussed specific examples of both properly—and improperly—defined "focused and concrete . . . formal exercise[s] of governmental power." *Id*. at 571. The examples were limited to "questions or matters" because there was no allegation that McDonnell promised to influence a "cause, suit, proceeding or controversy"—like "a lawsuit, hearing, or administrative determination." *See id*. at 567-71.

Thus, *McDonnell* made clear that the relevant point in time in a *quid pro quo* bribery scheme is the *moment at which the public official accepts the payment*. *See id*. at 579; *see also Evans v. United States*, 504 U.S. 255, 268 (1992) ("[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official

acts. . . .”). This Court’s decision in *McDonnell* suggests that at the time the bribe is made, the promised official act must relate to a “properly defined” “question, matter, cause, suit, proceeding or controversy.” *See McDonnell*, at 578.

This follows from the fact that there are two requirements for an official act: “First, the Government must identify a ‘question, matter, cause, suit, proceeding or controversy,’ ” and “[s]econd, the Government must prove that the public official made a decision or took an action ‘on’ that question, matter, cause, suit, proceeding, or controversy, or agreed to do so.” *Id*. at 567. For an official to promise to perform an official act—and thereby engage in the prohibited *quid pro quo*—the official must promise to act on an identified “question, matter, cause, suit proceeding, or controversy” at the time of the promise. *Id*.

Relying on the foregoing language in *McDonnell*, the Third Circuit has held that in the context of honest services mail fraud that a bare bones “as opportunities arise” theory of liability for honest services fraud is insufficient. *United States v. Silver*, 948 F.3d 538, 554-58 (3d Cir. 2020). In *Silver*, the district court provided the following instruction to the jury:

> The government must prove that a bribe was sought or received by Mr. Silver, directly or indirectly, in exchange for the promise or performance of official action. The government does not have to prove that there was an . . . agreement . . . that any particular action would be taken in exchange for the bribe. . . .

> [It does have to] prove that Mr. Silver . . . understood that, as a result of the bribe, he was expected to exercise official influence or take official action *for the benefit of the payor* and, at the time the bribe was accepted, intended to do so as specific opportunities arose. . . .

Id. at 558.

Thus, the instructions required that, at the time Silver entered the *quid pro quo*, he believed that the payor expected him to exchange payment for "official action [to] the benefit of the payor . . . as specific opportunities arose," or "official acts as the opportunity arose. Although the district court further instructed the jury that it must find that Silver "*made* [a decision] on a question or matter that . . . [was] specific, focused, and concrete," (emphasis added), it did not require that the specific matter at the time the defendant accepted the bribe be identified. *Id*. at 559.

The Third Circuit, relying on *McDonnell*, determined that an honest service fraud demands more than a mere promise to perform some non-specific official action to "benefit the payor." *Id*. Because the instructions in *Silver* only required the jury to find that the defendant understood, at the time that he accepted any *quid*, that he was expected to exercise some non-specified official influence for the benefit of the payor, the conviction was reversed. *Id*.

In this case, the Fifth Circuit differed with the conclusion reached by the Third Circuit in *Silver*. In this case the Fifth Circuit held:

> The district court's instructions clearly required the jury to find a *quid pro quo*, in which Vasquez accepted D&W's payments in exchange for his support, whenever in the future the need for it might arise. Nothing more was needed.

(App. 13) In reaching this conclusion the Fifth Circuit primarily relied on its own prior precedent, a case preceding this Court's decision in *McDonnell*. *See Whitfield v. United States*, 590 F.3d 325, 350 (5th Cir. 2009).

Moreover, not only are the Fifth Circuit's decisions in this case and in *Whitfield* at odds with this Court's decision in *McDonnell*, they are at odds with this Court's earlier decision in *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 401-02 (1999) In *Sun-Diamond*, this Court focused on the federal illegal gratuity provision in § 201(c). *Sun-Diamond* was about a trade association which gave the Secretary of Agriculture certain items of value. *Id*. An independent counsel determined that the association's giving of those gifts violated the illegal gratuity provision of § 201(c)(1)(A). *Id*. at 401. Though the indictment alluded to some matters before the Secretary in which the association had an interest, it "did not allege a specific connection between" the gratuities and the matters before the Secretary. *Id*. at 402. The question presented was whether the illegal gratuity provision "require[d] any showing beyond the fact that a gratuity was given because of the recipient's official position." *Id*. at 400.

This Court held that more was required. *Id*. at 406-07. In reaching that conclusion, this Court discussed subsections (b) and (c) and how they interact. *Id*. at 404-05. It held that the difference between sections (b) and (c) was intent. Section (b), bribery, requires an intent to influence. Section (c), illegal gratuity, on the other hand, requires "only that the gratuity be given or accepted 'for or because of' an official act." *Id*. at 404.

In other words, bribery requires a *quid pro quo*—"a specific intent to give or receive something of value *in exchange* for an official act"—whereas an illegal gratuity does not. *Id*. at 404-05. Subsection (c) covers an illegal gratuity that is "merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *Id*. at 405.

This Court went on to narrowly construe § 201(c) and say that a gratuity is not illegal if it is given merely because of the public official's office; instead, the government "must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Sun-Diamond* made clear that a "gift [to a public official] to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future," is not even a gratuity, let alone, a *quid pro quo* bribe.

Although the Fifth Circuit in this case states that the government proved a *quid pro quo*, the

government, in fact, did no such thing. Providing a benefit with the expectation that the public official might someday get an opportunity to return the favor is improper, but it is not an exchange of a benefit for a specific official act as a true *quid pro quo* requires.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should issue to review the Order of the United States Court of Appeals for the Fifth Circuit in *United States v. Timothy Ray Vasquez*, No. 22-10766.

Respectfully submitted,

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