App. No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN F. TATE

Applicant,

v.

UNITED STATES

Respondent.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Justice Gorsuch, as Circuit Justice for the United States Court of Appeals for the Eighth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioner John F. Tate respectfully requests that the time to file a petition for a writ of certiorari in this case be extended for thirty days to November 5, 2018. The Eighth Circuit issued its opinion on April 6, 2017, Appendix ("App.") A, and denied a timely petition for rehearing and rehearing *en banc* on July 6, 2018, App. B. Absent an extension of time, the petition therefore would be due on October 4, 2018. Petitioner is filing this application at least ten days before that date. *See* Sup. Ct. R. 13.5. The Court has jurisdiction under 28 U.S.C. § 1254(a) to review this case.

Background

This case involves important and recurring issues concerning the intersection of campaign-finance laws and federal false-statement statutes:

l. Tate was Ron Paul's campaign manager for his 2012 presidential candidacy. In late 2011, Iowa state senator Kent Sorenson offered to leave Michelle Bachman's campaign and join the Paul campaign. Sorenson wanted to be paid for joining and working for the Paul campaign, just as he was paid by the Bachman campaign. Soon thereafter, Sorenson began working for the Paul campaign by, *inter alia*, recording robocalls, publicly appearing in person and on television, and traveling in support of Paul's candidacy. The campaign—without Tate's knowledge or permission—arranged

to pay Sorensen in monthly installments that were invoiced by and routed through Interactive Communications, Inc. ("ICT"). *See* App. A, at 6-8.

The Paul campaign was required by the Federal Election Campaign Act of 1971 ("FECA") to report its expenditures to the Federal Election Commission ("FEC"). *See* 52 U.S.C. §§ 30104(a)(1), (b)(5)(A). Consistent with the invoices it received and the payments it sent out, the Paul campaign reported the payments as going to ICT for "audio/visual services." Federal law does not prohibit the use of intermediaries to pay vendors or reporting only the immediate, rather than ultimate, recipient of campaign expenditures. And federal law does not prohibit paying an individual for his or her endorsement. *See* App. A, at 21.

2. The government nevertheless charged three officials from the Paul campaign—including Tate—with multiple felonies. Because the conduct described above is all legal, the charges were premised on an unusually narrow theory: that the defendants had caused reports to be filed with the FEC that falsely described the purpose of the payments as "audio/visual expenses." Furthermore, the government charged that these reports not only violated FECA, but the statute prohibiting false statements to federal agencies (section 1001), the Sarbanes-Oxley Act (section 1519), and the conspiracy statute. *See* App. A, at 15-18

A first trial resulted in all of the counts against Tate being dismissed (before Double Jeopardy attached) and the jury deadlocking or acquitting on most of the charges against the other defendants. The government responded by securing a new indictment against Tate and trying all three defendants together on the remaining

charges. At the second trial, Tate was convicted on all charges despite the lack of evidence that he knew anything about or agreed to the method by which Sorenson was paid—let alone the Paul campaign's decision to use the "audio/visual" description in the FEC reports. *See* App A, at 9.

3. The Eighth Circuit affirmed. First, the court rejected Tate's argument that the government failed to prove materiality as required by the false-statement statute. Second, the court rejected the argument that the government failed to prove that Tate obstructed "a matter within the jurisdiction" of the FEC by filing the expenditure reports. *See* App A, at 16.

Reasons For Granting An Extension Of Time

The time to file a petition for a writ of certiorari should be extended for thirty days, to October 4, 2018, for several reasons, including:

1. The forthcoming petition will present two important questions of federal law this Court should resolve. First, the petition will present an important question about materiality under Section 1001—which, here, requires Tate to have "knowingly and willfully … falsifie[d] … a material fact" in a "matter within the [FEC's] jurisdiction." 18 U.S.C. § 1001(a)(1). Under this "rigorous" and "demanding" rule, an agency must demonstrate that it would have acted differently if the defendant had told the truth. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2002-03 (2016). In other words, "what is relevant" for purposes of establishing materiality "is what would have ensued from official knowledge of the misrepresented fact ... not what would have ensued from official knowledge of inconsistency between a posited

assertion of the truth and an earlier assertion of falsehood." *Kungys v. United States*, 485 U.S. 759, 775 (1988).

Numerous circuit courts have adopted and applied this interpretation of the materiality requirement. *See, e.g. United States v. Moyer*, 674 F.3d 192, 208 n.8 (3d Cir. 2012); *United States v. David*, 83 F.3d 638, 648 (4th Cir. 1996); *United States v. Evans*, 42 F.3d 586, 593 (10th Cir. 1994); *United States v. Johnson*, 530 F.2d 52, 55 (5th Cir. 1976). Yet the Eighth Circuit ignored it. The government never proved that the FEC would have made a different decision had the Paul campaign reported the payments to ICT as attributable to "Sorenson's endorsement" instead of "audio/visual expenses." In overriding this essential requirement, the Eighth Circuit has rendered every statement in an expenditure report material and thus read "materiality out of the statute." *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 660 (4th Cir. 2004). As Judge Easterbrook has observed, for example, "[d]eliberately using the wrong middle initial … is not a felony—not unless the right middle initial could be important." *United States v. Kwiat*, 817 F.2d 440, 445 (7th Cir. 1987). The Court's guidance is needed on this recurring federal question that the Eighth Circuit incorrectly decided.

Second, the petition will present an important question about what it means for a "matter" to be "within the jurisdiction of any department or agency of the United States ...." 18 U.S.C § 1519. The Court has cautioned against broadly applying section 1519. *See Yates v. United States*, 135 S. Ct. 1074 (2015). It is not a "coverall" statute, *id.* at 1088; it should not be "cut … loose from its financial-fraud mooring," *id.* at 1079; and it should not be read as superfluous with other criminal statutes, *id* at 1084-85

& n.6. Thus, at least three circuits have held that no "matter within the jurisdiction of" an agency is implicated when the agency receives false information that it has no power to act on. *See United States v. Blankenship*, 382 F.3d 1110, 1136-41 (11th Cir. 2004); *United States v. Holmes*, 111 F.3d 463, 466 (6th Cir. 1997); *United States v. Facchini*, 874 F.2d 638, 641-43 (9th Cir. 1989) (en banc).

Tate would have been acquitted in these courts. The FEC has jurisdiction to bring civil-enforcement actions against individuals who violate federal campaign-finance laws. But the Paul campaign's statement about "audio/visual expenses" does not implicate the FEC's jurisdiction because paying for someone's endorsement does not violate federal law. In dividing from these courts, the Eighth Circuit ignored that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *Yates*, 135 S. Ct. at 1088, and "'doubt will be resolved against turning a single transaction into multiple offenses,'" *Simpson v. United States*, 435 U.S. 6, 15 (1978 (citation omitted). Here too, the Court's guidance is needed on a recurring federal question that the Eighth Circuit incorrectly decided.

2. No prejudice would arise from the extension. Whether or not the extension is granted, the petition will be considered during this Term and the case would be heard either this Term or next Term should the Court choose to grant the writ. The judgment below will be in force and effect pending the disposition of this petition for a writ of certiorari.

3. The press of other matters before this Court and other federal courts makes the submission of the petition difficult absent an extension. Applicant's counsel is

counsel or co-counsel in several other cases in which trials and evidentiary hearings will be held in federal courts over the next two months, including a three-week trial in *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass.).

Conclusion

For these foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended thirty days to and including November 5, 2018.

Dated: September 13, 2018

Respectfully submitted,

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