No. _____

In The
Supreme Court of the United States

EJS PROPERTIES, LLC,
a Michigan Limited Liability Company,

Petitioner,

vs.

CITY OF TOLEDO, an Ohio municipal corporation;
and ROBERT MCCLOSKEY, an individual,

Respondents.

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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QUESTIONS PRESENTED

A public official demands that petitioner pay $100,000 in exchange for rezoning of real property. When petitioner refuses, the official retaliates by successfully urging other officials to reverse their prior approvals of the rezoning. The bribery attempt is reported to prosecutors. The public official is convicted of bribery and sentenced to prison. Petitioner files an action for civil relief under 42 U.S.C. § 1983 for the damages suffered as a result of the successful bribery scheme.

The questions presented are:

1. Do citizens have a liberty interest under the Constitution to be free of felony bribery solicitations made by public officials in exchange for favorable governmental treatment?

2. Does a public official's felony bribery solicitation in exchange for favorable treatment offend core principles and values deeply rooted in American traditions and is such conduct conscience-shocking under the Due Process Clause of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Sixth Circuit, whose judgment is sought to be reviewed, are:

- EJS Properties, LLC, plaintiff in the underlying action, appellant below, and petitioner here.
- City of Toledo, a municipal corporation, and Robert McCloskey, defendants in the underlying action, appellees below, and respondents here.

Petitioner has no parent corporation and no public company holds 10% or more of its stock.

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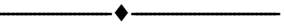
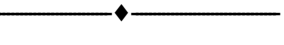
The Sixth Circuit's opinion filed September 5, 2012, the subject of this petition, is reported at *EJS Props., LLC v. City of Toledo*, 698 F.3d 845 (6th Cir. 2012). (App. 1-39.) The Sixth Circuit's October 18, 2012 order denying rehearing and rehearing *en banc* was not published in the official reports. (App. 123-124.)

The district court's August 27, 2009 order granting respondents' motion for summary judgment is reported at *EJS Props., LLC v. City of Toledo*, 651 F. Supp. 2d 743 (N.D. Ohio 2009). (App. 71-104.) The district court's order denying petitioner's motion for reconsideration is reported at *EJS Props., LLC v. City of Toledo*, 736 F. Supp. 2d 1123 (N.D. Ohio 2010).



JURISDICTION

The Sixth Circuit filed its opinion on September 5, 2012. (App. 1-39.) Petitioner timely petitioned for rehearing and rehearing *en banc*, and on October 18, 2012, the Sixth Circuit denied the petition. (App. 123-124.) This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on writ of certiorari the Sixth Circuit's September 5, 2012 decision.



CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Petitioner brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Petitioner alleges that respondents violated its rights under the Fourteenth Amendment of the United States Constitution, Section 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case will set a precedent on an important point of constitutional law applicable to every public official in every state, i.e., whether citizens have a liberty interest to be free of felony bribery by public officials in exchange for favorable governmental treatment and whether such criminal conduct by state officials is conscience-shocking under the Due Process Clause of the Constitution.

Freedom from bribery solicitation by governmental officials is a fundamental right deeply rooted in our nation's history, legal traditions, and practices and is implicit in the concept of ordered liberty. Anti-bribery laws originated in the Magna Carta and have been enacted in nearly every state and federal jurisdiction. These laws against bribery solicitation reflect a resolute, traditional, and powerful American principle and value.

In our democratic and free society, the felony solicitation of bribes by public officials offends the concept of ordered liberty and must be characterized as conscience-shocking. As shown below, the Sixth Circuit's opinion undermines the foundations critical to our system of government and the rule of law.

Petitioner EJS and Pilkington North America, Inc. ("Pilkington") entered into a Purchase and Sale Agreement (the "P&S Agreement") under which EJS would acquire from Pilkington certain undeveloped land and a building (the "Tech Center") in Toledo, Ohio (jointly, the "Property"), for $1.2 million. (App. 3, 72-73.)

EJS entered into a 15-year Lease Agreement (the "Lease") with Lake Erie Academy, who planned to open a public charter school in the Tech Center in August 2002. (App. 3.) The Lease was *not* contingent on EJS obtaining rezoning to allow use of the Property for a school. (App. 19.)

In May 2002, EJS applied to the City for a change in the Property's zoning, which would allow for the operation of a school. (App. 3-4, 73.) The Toledo-Lucas County Plan Commission unanimously recommended approval of the rezoning request. (App. 4, 73.)

The Zoning and Planning Committee, comprised solely of City Council members, held a public hearing during which McCloskey supported the rezoning request. (App. 73, 102-103.) By a 7-0 vote, the Zoning and Planning Committee unanimously recommended approval. (App. 73.)

Between March and August 2002, EJS took major and costly steps toward acquisition and improvement of the Property and spent $200,000 on renovations to convert the Property for use as a school. (App. 5.)

Beginning in late July 2002, McCloskey told Pilkington that "[h]e needed something to continue to support . . . rezoning" and that he would defeat the rezoning if Pilkington did not pay $100,000 to the East Toledo Community Center. (App. 74-75.) McCloskey presented the $100,000 demand as "a condition to EJS receiving approval for the rezoning application" and said that "he would be able to see that [the rezoning application] was voted down." (*Id*.) [McCloskey] "said if we didn't – *if the company didn't come up with this hundred thousand dollars that he was going to change votes*, or he was going to postpone this thing, and he could. *He could get people to change their minds or their votes*. And *he also told me* ***that's how business works in the city if you want to get something done***." (App. 150-151.) (Emphasis added).

Pilkington informed EJS' Erich Speckin of McCloskey's demand. (App. 74.) Speckin then called McCloskey who said "he thought Pilkington needed to give something back to the community to make this project go forward, and without that, he wasn't going to vote in favor of it" and that "he wanted $100,000." (App. 74-75, 79.)

McCloskey also left three voicemail messages for Pilkington executives and Speckin, reiterating his bribery demands in exchange for City Council's affirmation of rezoning. (App. 6.) McCloskey told Pilkington's John Keil: "I have not heard anything from Mr. Berg [of Pilkington] or anybody else [regarding the $100,000] but, uh, as far as I'm concerned, uh,

I will not move the project out of committee. ***I've talked to the majority of Council members and they agree with me***." (*Id*.) (Emphasis added). McCloskey said: "*I have the votes on council to stop the project.*" (App. 7.) (Emphasis added).

McCloskey urged other Council members to reverse their prior approval votes and defeat the rezoning request based on EJS' and Pilkington's refusal to pay McCloskey's $100,000 demand.[1] (App. 5-6, 77-79, 107-108, 129-142.) Contrary to the Sixth Circuit's assertion (App. 8), Pilkington reported this illegal demand to City Council members and informed them of the existence of the tape recorded voicemail messages. (App. 136-140.) However, no responsive action was taken by any city official. (App. 142.)

During the August 27, 2002 Council meeting, McCloskey delivered the votes to reverse the prior rezoning approval. (App. 8, 128-135.) Four Council members – McCloskey, Peter Ujvagi, Wilma Brown, and Tina Skeldon Wozniak – changed their votes after having approved the rezoning at the July 17, 2002 Zoning and Planning Committee meeting. (*Id*.) *The City could identify no other instance in its history where the Council failed to approve a zoning matter that had received unanimous approval by the Plan Commission and the Zoning and Planning Committee*

[1] McCloskey refused to testify regarding his discussions with other councilpersons by asserting his Fifth Amendment right against self-incrimination. (App. 109.)

and had been placed on the Council agenda for formal approval. (App. 89.)

Councilpersons Escobar and Zmuda affirmed that nearly every member of the Council knew of McCloskey's extortion demand and request that members vote down the rezoning request, despite their prior supportive votes. (App. 79, 134-139.) John Stout, the Lake Erie Academy representative, testified that he and Council member Zmuda "discussed McCloskey's request for monies." (App. 78-79.) According to Stout, "[Councilman] Zmuda knew about McCloskey's request and indicated other City Council members did as well." (*Id*.)

Shortly after the August 27, 2002 vote, Council President Escobar learned of McCloskey's voice mail messages and spoke with nine of the 12 Council members about McCloskey's ongoing illegal activities. (App. 136-142.) The district court observed that

> [t]he results of the Lucas County criminal investigation disclosed, contrary to the deposition testimony taken in 2004 and 2005, that Council President Peter Ujvagi and Council members Tina Skeldon Wozniak, Wilma Brown, and Wade Kapszukiewicz, were all aware of the McCloskey bribe solicitation in connection with the Pilkington matter before the August 27, 2002 vote.

(App. 110.) However, City officials took no action to remedy the injustice. (App. 142.)

As a result of McCloskey's felony bribery attempt and his successful retaliation against EJS through

the Council's defeat of the rezoning ordinance, EJS lost the value of its P&S Agreement with Pilkington, and its Lease with Lake Erie Academy, and forfeited its entire investment in the property.

Petitioner's civil action led to the Lucas County Prosecutor's Office investigation of McCloskey's alleged bribery of EJS/Pilkington, a grand jury indictment and, ultimately, McCloskey's no contest plea to state felony bribery charges. (App. 75, 109, 151-152.) The facts of the state felony bribery conviction against McCloskey are identical to the facts of this Section 1983 action (App. 109), contrary to the Sixth Circuit's misimpression. (App. 10, n.5.)

EJS initiated the underlying action on May 25, 2004 against the City of Toledo ("City") and Councilman McCloskey, in his individual capacity, asserting claims under 42 U.S.C. § 1983 for denial of substantive and procedural due process and equal protection, and interference with business expectancy under state law. (App. 2-3.) Defendants separately moved for summary judgment. (App. 3, 10.) The district court granted both summary judgment motions on the 42 U.S.C. § 1983 claims and EJS' claim against the City for intentional interference with contractual relationships. (*Id*.) EJS moved for reconsideration on August 31, 2009, which the district court denied. (*Id.*, App. 11.) EJS filed its Motion for Federal Rule of Civil Procedure 54(b) Certification (App. 11), which the district court granted on October 13, 2010. (*Id*.)

The Sixth Circuit issued its opinion on September 5, 2012. It observed that EJS' asserted liberty

interest in "corruption-free decision making" presents a "compelling proposition" but that without a separate identifiable property or liberty interest, such corruption is not actionable under 42 U.S.C. § 1983. (App. 26.) The Sixth Circuit also held that the solicitation of a bribe by a public official does not shock the conscience or violate the substantive protections of the Due Process Clause. (App. 30.) The Sixth Circuit equated the felony bribery by the public official in this case to "petty harassment of a state agent." (App. 31.)

The Sixth Circuit denied petitioner's motion for rehearing and rehearing *en banc* on October 18, 2012. (App. 123-124.)

REASONS TO GRANT THE PETITION

I. Citizens Have a Liberty Interest to Be Free of Felony Bribery Solicitations Made By Public Officials in Exchange for Favorable Governmental Treatment.

All citizens have a liberty interest to be free of criminal bribery solicitations made by public officials as *quid pro quo* for securing governmental approval to pursue one's business or occupation. To the extent that such a liberty interest has not been expressly articulated in its prior decisions, the Court should do so now.

The Constitution prohibits governmental infringement upon liberty interests without due process of

law. U.S. CONST. amend. XIV § 1. This Court has never defined "with exactness the liberty . . . guaranteed (by the Fourteenth Amendment)." *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). But, "[i]n a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Roth*, 408 U.S. at 572.

In *Washington v. Glucksberg*, the Court set forth the framework for identifying the rights and liberties protected by the Due Process Clause:

> First, . . . the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. Second, we have required in substantive due process cases a careful description of the asserted fundamental liberty interest. Our Nation's history, legal traditions, and practices thus provide the crucial guideposts for responsible decision making that direct and restrain our exposition of the Due Process Clause.

521 U.S. 702, 720-721 (1997) (internal citations omitted); *see also Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002), *cert. denied*, 539 U.S. 915 (2003).

The liberty interest asserted here – to be free of felony bribery demands made by public officials in

exchange for favorable governmental treatment – implicates a sacred liberty interest as obvious as it is rare in its breach. Bribery has been prohibited by our common law at least since the Magna Carta declared that "[t]o no one will we sell, to no one deny or delay right or justice." Magna Carta, Art. 40 (1215).[2] The Founding Fathers of our Constitution were so opposed to bribery that it was specified as a ground to impeach members of the executive and judicial branches. U.S. CONST. art. II § 4. The prohibition against bribery was extended by statute to the congressional branch in 1853. 10 Stat. 170 (1853), as amended, 18 U.S.C. § 283 (1958).

Anti-bribery laws have been enacted nationwide by both state and federal governments in nearly every jurisdiction.[3] These laws against bribery solicitation reflect a resolute, traditional, and powerful American principle and value.

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[2] The Fifth Amendment states "no person shall . . . be deprived of life, liberty, or property, without due process of law," which is a direct descendent of the Magna Carta. http://www.archives.gov/exhibits/featured_documents/magna_carta/index.html (last accessed Jan. 13, 2013).

[3] *See, e.g.,* MODEL PENAL CODE §§ 240.0 *et seq.*; Anti-Racketeering Act of 1934, 48 Stat. 979; Hobbs Act of 1946, 18 U.S.C. § 1951, Bribery, Graft, and Conflicts of Interest Act of 1962, 18 U.S.C. §§ 201-208; Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968; Foreign Corrupt Practices Act, 15 U.S.C. § 78dd; Ohio Rev. Code Ann. § 2744.02 (2012); Tenn. Code Ann. § 39-16-102 (2012); Mich. Comp. Laws § 750.125 (2012).

The liberty interest to be free of felony bribery demands by public officials is essential to the concept of ordered liberty, justice, and the rule of law, all of which would be jeopardized and, ultimately, sacrificed, without such recognition.

The Sixth Circuit itself previously has recognized the importance of similar and even lesser interests when it held that "submission to a fatally biased decisionmaking process is *in itself* a constitutional injury. . . ." *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989) (Emphasis added) (internal citation omitted). In *Hammond*, the court held that decisionmakers' general bias on a permit application would not violate due process because "such bias must be more than a general tendency of an administrative agency to serve the executive under which it derives its authority." (*Id.*) However, the court suggested in *dictum* that a more fundamental unfairness in the process *could* implicate a constitutionally protected interest because "the cases in which a bias has been found to exist, in violation of due process, involve one of two characteristics [including where] *the decisionmakers derived a direct, pecuniary interest from decisions adverse to claimants*. . . ." (*Id.* at 177); *see also Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) ("The regular and impartial administration of public rules governing these interests, as required by due process, prohibits . . . gross governmental violations *exemplified by bribery and corruption and the punishment of political and economic enemies through the administrative process*.") (Emphasis added).

The Sixth Circuit observed that EJS' asserted liberty interest in "corruption-free decision making" presents a "compelling proposition."[4] (App. 26.) The court added that "[c]orruption may give rise to a number of legal consequences – criminal sanctions by the state, civil penalties, and private liability under state tort law" but that without a separate identifiable property or liberty interest, such corruption is not actionable under 42 U.S.C. § 1983.[5] (App. 26.)

The Sixth Circuit got it wrong. It simply cannot be the case that American citizens do not possess a liberty interest under the Due Process Clause to bribery-free governmental decisions. The Sixth Circuit's opinion is inconsistent with this Court's decisions in *Glucksberg, Meyer*, and its progeny. The Due Process Clause protects "the right of the individual . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. This Court should grant certiorari to recognize the very

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[4] EJS also asserted a narrower liberty interest in bribery-free government decision making.

[5] Criminal bribery laws may vindicate the public's interest in redressing criminal misconduct, but they do not diminish an individual's civil rights under the Bill of Rights or provide a civil remedy to victims of public official bribery. Rather, in most states, as here, public entities are largely immune even from intentional, tortious conduct. (App. 100-101.); Ohio Rev. Code Ann. § 2744.02(B); *see, e.g., Ziegler v. Mahoning Cty. Sheriff's Dept.*, 137 Ohio App.3d 831, 836 (Ohio 2000) (noting that § 2744.02(B) "contains no specific exceptions for intentional torts").

narrow constitutional liberty interest in bribery-free government decisions. Failure to do so will immunize public officials from § 1983 liability for such criminal misconduct. Surely, that is not what Congress nor this Court intended when enacting and interpreting § 1983 during the last 147 years.

II. A Public Official's Felony Bribery Solicitation in Exchange for Favorable Treatment Offends Core Principles and Values Deeply Rooted in American Traditions and Is Conscience-Shocking.

The prohibition against bribery involving public officials is deeply rooted in our nation's legal history and traditions, and is so fundamental that the framers identified bribery as an impeachable offense in Article II of the Constitution. The Sixth Circuit, however, held that the solicitation of a bribe by a public official does not shock its collective conscience or violate the substantive protections of the Due Process Clause. (App. 30.) ("Perhaps it is unfortunate that the solicitation of a bribe by a public official does not shock our collective conscience the way that pumping a detainee's stomach does.")

The Sixth Circuit relying on *Vasquez v. City of Hamtramck*, equated the $100,000 felony bribery demand at issue here to "petty harassment of a state agent." 757 F.2d 771, 773 (6th Cir. 1985). In *Vasquez*, a police officer improvidently issued two parking tickets to plaintiff. Both tickets were dismissed and the plaintiff filed a § 1983 action for the inconvenience

suffered. (*Id*.) The Sixth Circuit unremarkably affirmed dismissal stating that "[a] citizen does not suffer a constitutional deprivation every time he is subject to the petty harassment of a state agent." (*Id*.)

EJS was subjected to far more than "petty harassment." EJS was subjected to extortion and bribery resulting in a criminal conviction. EJS was deprived of its opportunity to pursue its plans to construct a charter school because it failed to satisfy a public official's felony bribery demand for $100,000. The Court should recognize that citizens possess a liberty interest in bribery-free government decisions and hold that such conduct is conscience-shocking under our Constitution.

The Sixth Circuit's decision on petitioner's substantive due process claim conflicts with the decisions of the Circuit Courts including the First, Second, Third and Seventh. *See Mongeau v. City of Marlborough*, 492 F.3d 14, 19-20 (1st Cir. 2007) (noting that in the zoning and permitting context, "bribery or threats could constitute a substantive due process violation," but affirming summary judgment against the plaintiff who "made it clear that he was not alleging that [either of the defendants] was seeking a bribe") (internal citations omitted); *Roma Constr. Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996) (jury could infer that the plaintiffs were innocent victims of unconstitutional conduct because their payments were made pursuant to coercive extortion and did not constitute voluntary payments); *Nestor Colon Medina & Sucesores, Inc. v. Custodio,* 964 F.2d 32, 45-47 (1st Cir. 1992) (observing

in *dictum* that in cases involving governmental bribery or threats, a substantive due process violation may arise); *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995), *cert. denied*, 515 U.S. 1131 (1995) (affirming judgment on the substantive due process claim because the plaintiffs "surely had a right not to be compelled to convey some of their land in order to obtain utility service."); *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 286 (3d Cir. 2004) (indicating in *dictum* that evidence of "corruption or self-dealing" would suffice to show violation of substantive due process); *Belcher v. Norton*, 497 F.3d 742, 753-754 (7th Cir. 2007) (noting that where police deputy "extorted the van from the plaintiffs by threatening to use his power of arrest if they did not comply . . . a trier of fact would be entitled to say that the Deputy Marshal's actions . . . shock the conscience . . . "); *see also Collier v. Town of Harvard*, 1997 U.S. Dist. LEXIS 23582 *12, 1997 WL 33781338 (D. Mass. Mar. 28, 1997) ("substantive due process requires that permit applicants be free from . . . coercion under color of state law").

The First Circuit's decision in *aRusso* highlights the stark conflict between the Sixth Circuit's decision and other circuits. Whereas the First Circuit finds bribery and extortion by public officials unconstitutional where "a fact finder could conclude that extortion of outsiders, businessmen, or developers, if proven, was 'the way things are done and have been done,'" *aRusso*, 96 F.3d at 576, the Sixth Circuit holds it constitutionally permissible that "*[bribery] is how*

business works in the city if you want to get something done." (App. 150-151.) (Emphasis added).

The Sixth Circuit would be the first – and only – Circuit Court to hold that a felony bribe demand made by a public official in exchange for government action passes constitutional muster.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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