IN THE
INDIANA SUPREME COURT

No. 19A-CR-1086

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| DANIEL TANOOS,<br>*Appellant-Defendant*, | Appeal from the<br>Marion Superior Court 4, |
| v. | No. 49G04-1809-FC-32385, |
| STATE OF INDIANA,<br>*Appellee-Plaintiff*. | The Honorable Lisa Borges,<br>Judge. |

**STATE'S BRIEF IN RESPONSE TO PETITION TO TRANSFER**

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## QUESTION PRESENTED ON TRANSFER

The State restates the question presented as:

Did the Court of Appeals properly refuse to dismiss Defendant's bribery charges that are supported by sufficiently specific allegations of a *quid pro quo*: that while a school superintendent who personally controlled most of the contracting process, Defendant solicited and accepted specific gifts from a company in exchange for the company's exclusive access to lucrative contracts?

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## BACKGROUND AND PRIOR TREATMENT OF THE ISSUES PRESENTED

Former Vigo County School Corporation superintendent Daniel Tanoos appealed the trial court's order denying his motion to dismiss three counts of bribery, and the Court of Appeals affirmed. *Tanoos v. State*, 137 N.E.2d 1008, No. 19A-CR-1086 (Ind. Ct. App. 2019). The charges (App. Vol. II at 17–18) are in connection to his alleged solicitation and acceptance of meals and entertainment expenses on three specific occasions from the company Energy Systems Group and one of its employees, Doug Tischbein, in exchange for exclusive access to the school corporation's contracts for guaranteed energy savings construction projects. The probable cause affidavit extensively details the business dealings between the school corporation and ESG, and the relationship between Tanoos and Tischbein (App. Vol. II at 19–42). It specifically outlines how Tanoos effectively controlled the contracting process from beginning to end so that ESG always secured contracts that were worth tens of millions of dollars and over $11 million of profit for ESG, how Tanoos allegedly demanded gifts for his support of ESG on different occasions, how Tanoos allegedly threatened to open up contracting to ESG competitors if Tischbein did not extend gifts, and how Tanoos allegedly granted ESG special access to the school corporation to aid in strengthening its bids (App. Vol. II at 19–42). The State's Brief exhaustively explains this history. *Appellee's Br.* at 4–10.

Tanoos unsuccessfully sought dismissal of the charges against him on the theory that the State did not allege the bribery with sufficient particularity and

that the State was essentially charging him with so-called "generalized" bribery (App. Vol. II at 164–72). The Court of Appeals accepted jurisdiction over an interlocutory appeal and then affirmed. That Court explained how the allegations state a *quid pro quo* and are specific enough to satisfy long-standing precedent requiring enough detail for a defendant to anticipate the evidence against him, marshal evidence in his defense, and protect against double jeopardy violations. *Tanoos*, 137 N.E.3d at 1018–19, slip op. at 20–22. The Court concluded,

> The State asserts, and we agree, that "Tanoos's arguments are not about legal deficiencies in the information," but rather "amount to an assertion that he will be able to convince a jury that the alleged bribes were actually innocent acts of business development and there was no *quid pro quo* for these gifts." Appellee's Brief at 12. As stated, a motion to dismiss an information is not a proper vehicle for raising questions of fact to be decided at trial or facts constituting a defense. *See State v. Sturman*, 56 N.E.3d 1187, 1196 (Ind. Ct. App. 2016). The trial court properly denied Tanoos's motion to dismiss.

*Id.,* 137 N.E.3d at 1019, slip op. at 22–23. Tanoos now petitions this Court to transfer jurisdiction.

## ARGUMENT

### Tanoos is properly charged with bribery.

Tanoos is alleged to have solicited gifts from a contract vendor in exchange for exclusive access to contracts for specific school corporation construction projects. This is an unambiguous *quid pro quo*. The trial court and the Court of Appeals have properly found that Tanoos is not entitled to dismissal of the bribery charges against him because they comport with long-standing Indiana precedent. Not only is there no conflict between state court decisions that warrants this Court's review,

but there is no conflict with federal precedent because the federal courts have nothing to say about what Indiana law is and should be. Finally, while there can be no question that the enforcing public corruption laws are a matter of great public importance, Tanoos's peculiar view of the bribery statute would decriminalize virtually all bribery. While Tanoos claims that he can explain away his allegedly corrupt acts, the courts below have properly directed those factual disputes to a trial. This Court should deny transfer as this case does not present any significant questions of law for this Court to resolve.

### *A.* The Court of Appeals' opinion does not conflict with *Wurster v. State.*

Tanoos asserts that the decision below conflicts with *Wurster v. State*, 708 N.E.2d 587, 596 (Ind. Ct. App.), *summarily aff'd in relevant part by* 715 N.E.2d 341, 350 (Ind. 1999), insofar as the *Tanoos* panel stated, "we do not find that Indiana law precludes bribery only if negotiations of a pending contract are occurring." *Tanoos*, 137 N.E.3d at 1019, slip op. at 22. In Tanoos's view, this approves of so-called "generalized" bribery prosecutions contrary to the *Wurster* holding. But Tanoos actually does not explain how *Wurster* and the opinion below are incompatible. Nor can he.

The State's charges and the supporting probable cause affidavit allege specific acts that constitute *quid pro quo* and not some inchoate possibility of bribery like the one attempted to be used by the State in the *Wurster* case. In *Wurster*, the Court of Appeals disapproved of "generalized" bribery charges like a

company paying a legislator to generally look favorably upon and support measures in the legislature that would benefit the company financially. 708 N.E.2d at 596. Instead, the Court of Appeals held that the State is required under Indiana law to allege a specific *quid pro quo* so that the defendants can anticipate what the evidence might be against them, marshal evidence in defense of the charge, and defend against possible violations of double jeopardy protections. *Id.*

Both the trial court and the Court of Appeals properly concluded that the charges against Tanoos are sufficiently specific to satisfy these requirements. One way that a person commits bribery is when "being a public servant, [the person] solicits, accepts, or agrees to accept, either before or after the person becomes appointed, elected, or qualified, any property, except property the person is authorized by law to accept, with intent to control the performance of an act related to the person's employment or function as a public servant." Ind. Code § 35-44.1-1-2(a)(2). The State has properly alleged that Tanoos committed that form of bribery on three occasions, each one involving Tanoos's intent to use his position as superintendent to have VCSC grant to ESG the contracts and continued business for its ongoing projects.

Count I alleges the payment of restaurant charges as a bribe to gain Tanoos's assistance to ESG in winning the $4 million contract for a project at Hoosier Prairie Elementary School (App. Vol. II at 17, 28–34). The probable cause affidavit details the allegations that this dinner occurred in the middle of ESG pursing new contracts for upcoming VCSC projects that were under consideration—most

specifically a contract for a project at Hoosier Prairie Elementary School—and Tanoos's recommendation of ESG for those contracts was a powerful advantage for the company (App. Vol. II at 28–30). Just a few days before the dinner, Tischbein raised the Hoosier Prairie project with Tanoos in an email, which eventually led to Tanoos allegedly soliciting and accepting Tischbein's payment for a $365.65 meal at Mo's Steakhouse on August 24, 2013 (App. Vol. II at 29–32).

As the Hoosier Prairie project progressed over the next few months, Tanoos assisted Tischbein with gaining special access to the school to help with developing ESG proposal, and Tanoos recommended ESG for the contract that was eventually awarded to ESG (App. Vol. II at 33–34). The State believes that Tanoos demanded the dinner expenses in exchange for his support for ESG winning the contract for the then-upcoming Hoosier Prairie project that he and Tischbein had been discussing for months. *See Tanoos*, 137 N.E.3d at 1012–13, 1018, slip op. at 8–9, 21.

A similar *quid pro quo* supports the other two counts. Counts II alleges the payment of restaurant charges, and Count III alleges the payment of concert tickets and expenses as bribes to maintain Tanoos's support for ESG in the then-ongoing Hoosier Prairie project, avoid Tanoos starting discussions with a competitor to ESG, and secure Tanoos's support for ESG for additional contracts under consideration (App. Vol. II at 17–18, 34–38). The probable cause affidavit alleges that Tanoos first solicited the concert tickets before the Hoosier Prairie contract was awarded to ESG (App. Vol. II at 37). During the summer of 2014 and while the Hoosier Prairie renovation project was underway, Tanoos taunted Tischbein with the possibility

that Tanoos would start discussions with one of ESG's competitors (App. Vol. II at 34–35). Once Tischbein showed how eager he was to avoid that possibility, Tanoos solicited Tischbein's payment for a $1,116.80 dinner at a Nashville, Tennessee restaurant (App. Vol. II at 35–36). Over the next few weeks, Tischbein also arranged to pay for tickets and expenses at the concert Tanoos brought to Tischbein's attention just a few months earlier (App. Vol. II at 37).

After Tischbein paid for the dinner and purchased the concert tickets, Tanoos assisted ESG in shoring up support for ESG among members of the VCSC School Board (App. Vol. II at 36). Over the next few months, Tanoos secured the School Board's awarding a nearly $5 million contract for ESG for the renovation of West Vigo Elementary School (App. Vol. II at 38–39). Moreover, Tanoos provided Tischbein and ESG with special access to discussions and preparations for several other projects that VCSC eventually chose not to undertake (App. Vol. II at 38). *See Tanoos*, 137 N.E.3d at 1012–13, 1018, slip op. at 9–10, 21–22.

In exchange for the dinner and concert expenses, the State alleges that Tanoos assisted Tischbein in shoring up ESG's business relationship with the School Board, arranged a contract for ESG, and implicitly committed his continued support for ESG regarding several projects being considered by VCSC. When the probable cause affidavit is read as a whole, Tanoos has notice of the *quid pro quo* evidence supporting the bribery charges, can marshal evidence against the charges, and vindicate any double jeopardy violations. *Tanoos*, 137 N.E.3d at 1018–19, slip op. at 20–22. There is no conflict among Court of Appeals opinions, and neither

interpret Indiana law to preclude Tanoos's charges and prevent a trial. This Court should deny transfer.

**B. *McDonnell v. United States* is irrelevant to this case.**

The courts below have also properly understood that the *McDonnell* decision is irrelevant to the charges brought against Tanoos. *McDonnell* was a statutory interpretation case involving the meaning of a federal statute, making it at most persuasive authority. But Indiana's statutory text differs from the federal bribery statutes in significant ways, so the decision's usefulness to Tanoos's case is quite limited. Perhaps most importantly, Tanoos's alleged acts are a crime under both Indiana and federal law as interpreted in *McDonnell*. No matter how one looks at it, *McDonnell* is not particularly relevant to this appeal, except to underscore the universality of Tanoos's alleged crimes.

*McDonnell* involved the appeal of former Virginia Governor Robert McDonnell from his federal bribery convictions. *McDonnell v. United States*, 579 U.S. __, 136 S. Ct. 2355, 2361 (2016). To convict McDonnell of bribery under federal law, the Government had to prove in part that he agreed to commit an "official act" in exchange for property. *Id.*; 18 U.S.C. § 201 (b)(1)(a). An "official act" is defined as "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." 18 U.S.C. § 201(a)(3). The Government had charged McDonnell with accepting over $175,000 in gifts and loans from a company that developed and

marketed a certain nutritional supplement. *McDonnell*, 136 S. Ct. at 2362–64. In exchange, the Government alleged, McDonnell set up meetings, hosted events, and contacted other state officials to promote the supplement across state government. *Id.* at 2365. The district court instructed McDonnell's jury that an official act includes "'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.'" *McDonnell*, 136 S. Ct. at 2366. In other words, the district court and the Government believed that the statutory definition of "official act" intentionally included "any decision or action, on any question or matter, that may at any time be pending, or which may by law be brought before any public official, in such official's official capacity." *Id.* at 2367 (citing the United States' brief).

The Supreme Court disagreed, and held that "setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act.'" *Id.* at 2368. More specifically, it explained that,

> In sum, an "official act" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." The "question, matter, cause, suit, proceeding or controversy" must involve 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. It must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that "question, matter, cause, suit, proceeding or controversy," or agree to do so. That 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. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of "official act."

*Id.* at 2371–72. And because the jury instructions on "official act" allowed the jury to find McDonnell guilty for conduct that was not unlawful, the Court reversed the convictions and remanded the case for a new trial. *Id.* at 2375.

*McDonnell* does not conflict with the decisions below. First, *McDonnell* involved the Supreme Court's interpretation of a federal statute that narrowly defined the scope of federal bribery law. *Id.* at 2365. It is a statutory interpretation case about the elements of a federal crime that does not purport to regulate the definitions of state bribery laws. To be sure, the Court discussed some possible constitutional concerns that were avoided by the Court's narrow interpretation of "official act," *id.* at 2372–73, but that discussion explained how the Court's holding was consistent with the principle of constitutional avoidance rather than actually making holdings of constitutional law. Moreover, those concerns echo much of what the Court of Appeals explained over two decades ago in the *Wurster* case. 708 N.E.2d at 596 (discussing notice concerns of "generalized" bribery prosecutions). Whatever debate over "generalized" bribery persists, Indiana has prohibited it for more than twenty years and continues to do so in the decisions below.

Second, what *McDonnell* says about the proper interpretation of "official act" for federal bribery law is of limited import to Indiana because our statute is different. Indiana's bribery statute does not speak in terms of an "official act." As charged in this case, Indiana prohibits bribes intended "to control the performance of an act related to the person's employment or function as a public servant," I.C. § 35-44.1-1-2(a)(2), while federal law only prohibits "any decision or action" about "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," *McDonnell*, 136 S. Ct. at 2372. The definition chosen by Congress is narrower than Indiana's in that the public official's act must be about a final decision of the use of government power—a limitation that makes sense given the supposedly limited purposes of federal criminal law. But state criminal law can have a somewhat broader scope, and Indiana has chosen to include the acts of public servants within the scope of their employment or authority. This includes a somewhat broader set of public employees that do not have control or influence over the formal decisions of using governmental power as well as more decisions such as those of a less formal nature. But, as *Wurster* and the decisions below explain, the scope of Indiana's bribery statute is not boundless, although cabined by the *quid pro quo* requirement rather than a statutory requirement of formal decision-making about the government's use of its power. *Wurster*, 708 N.E.2d at 594, 596; *Tanoos*, 137 N.E.3d at 1015, 1016, 1018, slip op. at 13–14, 17–18, 20–22.

Finally, whatever the differences are between federal and state anti-corruption laws are, Tanoos conveniently ignores the simple fact that the State has alleged acts that violate the laws of both governments. The Supreme Court explained that its narrowing construction of "official act" still includes non-explicit agreements, and "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." *McDonnell*, 136 S. Ct. at 2370–71, 2372.

Here, Tanoos may not have personally awarded the contracts, but the probable cause affidavit explains how he controlled all other decisions in the contracting process leading up to his advocacy for and recommendations of ESG for the school board's final determination. Tanoos was the gatekeeper and sole decision maker as to what options and advice the school board received in relation to those contracts. Tanoos always recommended ESG to the board, gave ESG exclusive access to information to develop its bids, and threatened to withhold from ESG his favor in the contracting processes unless Tischbein gave Tanoos the gifts he allegedly demanded. While Tanoos claims that *McDonnell* prohibits that theory of bribery, Transfer Pet. at 6–7, the Supreme Court's decision unquestionably allows federal prosecutions for such recommendations. *McDonnell*, 136 S. Ct. at 2372. There was no difference—under *McDonnell*—between Tanoos creating the environment where the school board always awarded contracts to ESG or him awarding the contract himself.

Both state and federal law also prohibit bribery for future decisions. Tanoos suggests that bribery cannot occur for agreements to take possible corrupt actions at some point in time in the future. Transfer Pet. at 6. It makes no sense for a legislature to allow all bribes to occur with impunity except those that are made contemporaneously with the public servant taking the agreed upon action. The Indiana statute does not include a specific timeframe, but rather simply focuses on

the intent to control a public servant's acts. Federal law is somewhat more specific in that it includes within the definition of "official acts" activity "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." 18 U.S.C. § 201(a)(3) (emphasis added). Tanoos cannot explain why the law should permit a candidate for judge to take bribes in exchange for the promise to always dismiss charges against members of a specific group. Or allow a superintendent to promise to always give a contractor exclusive access to contracts so long as that contractor continues to grease the skids whenever asked. *McDonnell* does not purport to address the question, nor did Governor McDonnell purport to make it.

This is a large part of why the law requires a specific *quid pro quo* and specific intent that a public servant actually be bought or sold—and juries must apply the beyond a reasonable doubt standard to ensure that prosecutors prove that the *this* is actually connected to the *that*. Obviously, the more attenuated that connection is then the less persuasive the prosecutor's theory of a case. But this is a question of the weight to be given to proof of intent, and juries are asked to resolve those questions in a majority of criminal trials. And questions about the sufficiency of evidence are not for the courts at the motion to dismiss juncture.

**C. This is not a question of public importance necessitating transfer.**

Tanoos cautions this Court that public servants around the state and those who seek to influence them will now feel fear prosecution unless Tanoos's charges are dismissed. Transfer Pet. at 7–8. Not so. Tanoos allegedly solicited bribes from

Tischbein for specific things on each occasion: a contract for an elementary school construction project, advocacy on ESG's behalf before the school board to quell concerns that had arisen, inside access to planning for upcoming construction contracts, continued exclusive access to contact awards, and exclusion of other vendors from the contracting process. Tischbein was not offering charity to Tanoos, nor was Tanoos a charitable cause. Nor were the contracts in this case public-private partnerships transparently arranged through fair dealing and honest services. Courts are well-suited to unbiasedly address alleged politically motivated prosecutions when those cases arise, but this is not one of those cases.

Perhaps the best evidence that the decisions below are not troubling is Tanoos's lack of amicus curiae support. While Tanoos relies on the support of the Indiana Association of Public School Superintendents that he once enjoyed in this case, Transfer Pet. at 9, that support has vanished. Perhaps once the trial court fully explained what this case was actually about and the stakes involved, that organization and its client superintendents came to understand that there is little for them to be concerned with going forward when conducting school business honestly. Certainly nothing in the Court of Appeals' opinion or the State's arguments have caused potential amici to be concerned. *Cf. McDonnell*, 136 S. Ct. at 2372 (citing several amici curiae briefs of bipartisan coalitions of former federal and state officials opposing the United States' position).

Finally, while it is true that this Court has not written on the bribery statute in many years, there has not been a need to do so. The State accepts the Court of

Appeals' *quid pro quo* holding in *Wurster*—indeed, it did not even seek transfer of that part of the opinion when that case was being litigated. And *McDonnell* does not have relevance to Tanoos's case for the reasons explained above. The Court should accept review of a bribery case when there is a particular need for its intervention; an interlocutory appeal that does nothing to upset existing law is not such an occasion. This Court should deny the petition.

## CONCLUSION

This Court should deny Tanoos's petition to transfer or, in the alternative, affirm the trial court's order denying the motion to dismiss.

Respectfully submitted,

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## WORD COUNT CERTIFICATE

I certify that the foregoing document contains less than 4,200 words in compliance with Indiana Appellate Rule 44(E).

/s/ Stephen R. Creason
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## CERTIFICATE OF SERVICE

I certify that on February 10, 2020, the foregoing document was electronically filed using the Indiana E-filing System (IEFS). I certify that the foregoing was served upon opposing counsel via IEFS:

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