No.

In the Supreme Court of the United States

THEODORE E. SUHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KANNON K. SHANMUGAM
Counsel of Record
ROBERT M. CARY
CHARLES L. MCCLOUD
JOEL S. JOHNSON
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTION PRESENTED

This case involves the scope of the federal bribery laws as applied to alleged payors of bribes. In the decision under review, the court of appeals approved jury instructions that allowed petitioner to be convicted of federal bribery offenses based on a finding that he gave a state official money with a general intent to influence that official; the instructions did not require a finding that petitioner specifically intended a *quid pro quo* exchange of money for a particular official act. While acknowledging that an intended *quid pro quo* exchange was an element of a federal bribery offense, the court of appeals concluded that the instructions were sufficient. The question presented is as follows:

Whether the government may obtain convictions for bribery under the honest-services fraud statute, 18 U.S.C. 1346, and the federal-programs bribery statute, 18 U.S.C. 666, in the absence of jury instructions expressly requiring an intended *quid pro quo* exchange.

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Petitioner Theodore E. Suhl respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 885 F.3d 1106. The district court's order denying a new trial (App., *infra*, 19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 201 of Title 18 of the United States Code provides in relevant part:

> (b) Whoever—
>
> > (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
> >
> > > (A) to influence any official act * * *
>
> shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

Section 666 of Title 18 of the United States Code provides in relevant part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> * * *
>
> > (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstances referred to in subsection (a) of this section is that the organization, government or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

Section 1343 of Title 18 of the United States Code provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Section 1346 of Title 18 of the United States Code provides in relevant part:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT

In *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), this Court addressed the scope of the federal bribery laws as they apply to public officials who allegedly receive bribes. Those laws prohibit both "corruptly giv[ing]" money to a public official "with intent" to procure an "official act," and the receipt of such a bribe by a "public official." 18 U.S.C. 201(b)(1)(A), (2)(A); see also 18 U.S.C. 666, 1346. Relying on its earlier decision in *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999), the Court in *McDonnell* narrowly construed the term "official act" to avoid the "significant constitutional concerns" posed by the more "expansive interpretation" advocated by the government. 136 S. Ct. at 2371-2372.

The question presented in this case implicates the same statutes and the same constitutional concerns, but involves the other end of the allegedly corrupt transaction: namely, whether the government must prove that the alleged *payor* intended a *quid pro quo* exchange of money for a public official's official acts in order for bribery convictions to lie under the honest-services fraud statute, 18 U.S.C. 1346, and the federal-programs bribery statute, 18 U.S.C. 666.

Petitioner, an Arkansas businessman and philanthropist, was charged under those two statutes on the theory that portions of the money he routinely contributed to a local church were actually bribes intended to influence a state official. Both the government and the defense proposed to instruct the jury that it could return a guilty verdict only if it found that petitioner intended a specific *quid pro quo* exchange of funds for a particular official act. The district court rejected both proposals and declined to instruct the jury on the *quid pro quo* requirement. Petitioner was subsequently convicted. In the decision under review, the court of appeals affirmed the convictions and

approved the district court's instructions requiring the jury simply to find that petitioner had a general "intent to influence" the state official.

The court of appeals' interpretation of the federal bribery laws cannot be reconciled with this Court's decisions, especially the decisions in *McDonnell* and *Sun-Diamond*. The decision below also deepens a conflict among the courts of appeals concerning whether the failure to instruct a jury on the requirement of a *quid pro quo* exchange can be cured by the inclusion of general language regarding the defendant's "intent to influence" an official act. If it is allowed to stand, moreover, the decision below would grant the government breathtakingly broad prosecutorial discretion to police the relationship between citizens and their representatives. For all of those reasons, the petition for a writ of certiorari should be granted.

1. In an effort to save the broad and indefinite honest-services fraud statute from unconstitutional vagueness, this Court has narrowly construed it to prohibit "core" bribery—an offense that "draws content" both from prior case law and from similar federal statutes such as 18 U.S.C. 201(b) (the federal-official bribery statute) and 18 U.S.C. 666 (the federal-programs bribery statute). *Skilling* v. *United States*, 561 U.S. 358, 402-404, 409, 412 (2010). Here, as in other post-*Skilling* cases, it is undisputed that Section 201(b) supplies the elements for the crime of honest-services fraud when the government pursues a bribery-based theory. See, *e.g.*, *McDonnell*, 136 S. Ct. at 2365. Section 201(b) proscribes both ends of a transaction constituting bribery of a federal official: it prohibits the donor from "corruptly giv[ing], offer[ing] or promis[ing] anything of value to any public official * * * with intent" to "influence any official act," and it prohibits the "public official" from receiving or agreeing to receive such a bribe. 18 U.S.C. 201(b)(1)(A), (2)(A). Under the

federal-official bribery statute, the government must prove "a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act." *Sun-Diamond*, 526 U.S. at 404-405. The federal-programs bribery statute forbids the same range of conduct in circumstances involving entities that receive federal assistance. 18 U.S.C. 666(1)(B), (2).

In *McDonnell*, the Court limited the "official acts" needed for federal bribery convictions under Section 201(b) to discrete actions on matters that "involve a formal exercise of governmental power." 136 S. Ct. at 2371-2372. The Court reasoned that statutory text, precedent, and serious constitutional concerns required that "bounded interpretation." *Id.* at 2367-2368. The Court also reaffirmed its holding from *Sun-Diamond* that "Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an 'official act.'" *Id.* at 2372.

2. Petitioner owns two mental-health facilities providing services to children in Northeast Arkansas. The facilities were originally founded by petitioner's parents as an extension of their volunteer work with troubled children. During the period at issue, petitioner's companies employed hundreds of staff and provided care to thousands of children. Tr. 717-720, 723-725.

Since 2002, petitioner and his family have contributed more than $1.4 million to Christian causes. That figure includes thousands of dollars in donations that petitioner made beginning in 2003 to a church in West Memphis, Arkansas, led by petitioner's longtime family friend, Pastor John Bennett. D. Ct. Dkt. 112, at 1-2 (July 18, 2016); Tr. 710-711, 728, 730, 748; Gov't Ex. 54, at 1; Gov't Ex. 55, at 1.

In 2011, the government learned that a deacon in Pastor Bennett's church, Phillip Carter, was buying votes for a political candidate and conspiring to destroy absentee

ballots cast against that candidate. When the government confronted Carter with evidence of his conduct, Carter agreed to help catch, in his words, "as many 'Big Fish' as possible." D. Ct. Dkt. 108, at 7-8 (July 15, 2016); D. Ct. Dkt. 26-2, at 28 (Apr. 7, 2016).

Carter directed the government's attention to Steven Jones, who had been appointed deputy director of the Arkansas Department of Human Services in 2007, four years after petitioner began routinely donating to Pastor Bennett's church. Jones was also providing marketing and publishing services to promote Pastor Bennett's campaign for election to a position in his church's national leadership. Jones received some of the money donated to the church by petitioner and others. Before this Court's decision in *McDonnell*, Jones pleaded guilty to one count of federal-programs bribery and one count of conspiracy to commit honest-services fraud. Tr. 144, 478, 484-486, 533-534, 552-559, 585; Gov't Ex. 39, at 1.

3. A grand jury in the Eastern District of Arkansas indicted petitioner on one count of conspiracy to commit honest-services wire fraud and bribery under 18 U.S.C. 371; three counts of honest-services wire fraud under 18 U.S.C. 1343 and 1346; one count of federal-programs bribery under 18 U.S.C. 666; and one count of violating the Travel Act, 18 U.S.C. 1952. The indictment alleged a bribery scheme through which petitioner paid Jones to perform various "official acts" by means of petitioner's donations to Pastor Bennett's church. Carter allegedly facilitated the payments and arranged multiple meetings between petitioner and Jones. The alleged "official acts" concerned various political issues relevant to petitioner and his mental-health facilities. In fact, however, Jones allegedly did nothing more than to agree to "look into" the

issues. D. Ct. Dkt. 1, at 3-5, 21-22, 32 (Dec. 2, 2015) (indictment).[1]

Just days before petitioner's trial was scheduled to begin, this Court issued its decision in *McDonnell*, circumscribing the definition of "official act." See p. 6, *supra*. In the wake of *McDonnell*, petitioner moved to dismiss the indictment for failure to state an offense, on the ground that merely "look[ing] into" an issue did not constitute the requisite "official act" for a federal bribery conviction. The district court denied the motion, summarily concluding that "*McDonnell* does not affect the [i]ndictment in this case." C.A. Add. 14; D. Ct. Dkt. 74 (June 28, 2016).

4. The case proceeded to trial. Jones testified that he had met with petitioner several times and that he had come to consider him a "personal friend." The two discussed politics, their shared Christian faith, and their hopes that their mutual friend Pastor Bennett would be elected to the church leadership. Petitioner also sometimes expressed his views on public-policy issues and complained that government officials treated him unfairly because he was overtly Christian. Notably, Jones was adamant that he and petitioner never discussed money and that he never performed or agreed to perform any official acts for petitioner. Jones testified that the money he re-

[1] Specifically, the indictment alleged that (1) "Jones agreed to look into" asking the Governor to appoint petitioner to the Arkansas Child Welfare Agency Board; (2) "Jones agreed to look into" the issue of expanding the site radius for mental illness providers; (3) "Jones agreed to look into" whether he could assume responsibility for Medicaid billings; (4) Jones said he would "see about * * * what's been going on with" an exclusive referral policy favoring petitioner's competitor; and (5) Jones provided petitioner a monitoring document that petitioner had "already seen." D. Ct. Dkt. 1, at 21-22, 27-28, 31-32.

ceived from the church was for his work on Pastor Bennett's campaign. Tr. 484-486, 499, 550-559, 560-562, 592-594.

Before trial, both the government and the defense had proposed to instruct the jury that it could convict petitioner on the honest-services fraud counts only if it found a *quid pro quo*: that is, that petitioner specifically intended to give something of value in exchange for a particular official act. See D. Ct. Dkt. 91, at 19 (July 6, 2016) (government's proposed jury instructions); D. Ct. Dkt. 97, at 19, 21 (July 8, 2016) (petitioner's proposed jury instructions). But the district court rejected both proposals. As to honest-services fraud, the court instructed the jury that it need only find petitioner gave money to a public official with a general "intent to induce the performance of an official act." App., *infra*, 21a. As to federal-programs bribery, the court similarly instructed that the jury need only find that petitioner gave money with a general intent to "influence" a public official "in connection with [his] official duties." *Id.* at 25a.

The jury convicted petitioner on two counts of honest-services fraud and on the federal-programs bribery and Travel Act counts; it acquitted him on the remaining counts. C.A. Add. 1.

5. The district court denied petitioner's motion for a new trial on the same day it was filed. App., *infra*, 19a. The court subsequently sentenced petitioner to 84 months of imprisonment, to be followed by three years of supervised release. C.A. Add. 25.

6. On appeal, petitioner argued, as is relevant here, that the district court had erred in instructing the jury on the honest-services fraud and federal-programs bribery

counts by not requiring the jury to find beyond a reasonable doubt that petitioner had intended a specific *quid pro quo* exchange of funds for particular official acts.[2]

The court of appeals affirmed. App., *infra*, 1a-19a. As is relevant here, the court began by distinguishing cases involving alleged bribe payors (such as this one) from those involving alleged bribe recipients (such as *McDonnell*). App., *infra*, 5a-7a. It then acknowledged that a conviction as an alleged payor under the honest-services fraud statute requires that the payment be "offered or made with 'a specific intent to give * * * something of value in exchange for an official act.'" *Id.* at 10a (citing *Sun-Diamond*, 526 U.S. at 404-405). The court of appeals nevertheless concluded that the district's court's instructions were sufficient, quoting the language that called for the jury to find only that petitioner gave money with a general intent to "induce performance of an official act." *Id.* at 11a. In reaching that conclusion, the court of appeals rejected a requirement that the phrase "in exchange for" be used in jury instructions in "a case against a payor defendant." *Ibid.*

As to federal-programs bribery, the court of appeals assumed without deciding that the same intent requirement applied. App., *infra*, 11a n.5. Again, however, the court of appeals concluded that the district court's instructions sufficed because they defined "corruptly" as giving money to a state official with a general intent to "influence" him "in connection with [his] official duties" and required the jury to find that petitioner made payments "in connection with" a public official's general "oversight of" and "reimbursements to" petitioner and his

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[2] Petitioner also argued that the district court erred in instructing the jury on the Travel Act count insofar as that count was based on the commission of federal-programs bribery. See Pet. C.A. Br. 38-39.

businesses. *Ibid.* In concluding that the jury need not specifically be instructed about the *quid pro quo* requirement, the court of appeals reasoned that "a court need not resort to Latin" when instructing the jury. *Ibid.* (quoting *United States* v. *Jennings*, 160 F.3d 1006, 1019 (4th Cir. 1998)).

REASONS FOR GRANTING THE PETITION

In the decision under review, the court of appeals approved a jury instruction that allowed petitioner to be convicted of bribery based on a mere finding that he "gave [a public official] something of value with the intent to influence an official act." App., *infra*, 23a. That instruction omitted a crucial limitation on the reach of the federal bribery laws imposed by this Court in *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999), and reaffirmed in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016): namely, that only a defendant with the "specific intent to give or receive something of value *in exchange* for an official act" may be convicted of bribery. *Sun-Diamond*, 526 U.S. at 404-405; see *McDonnell*, 136 S. Ct. at 2372.

In approving the instruction in petitioner's case despite the absence of an express *quid pro quo* requirement—which both petitioner and the government had proposed—the court of appeals badly misinterpreted this Court's precedents construing the federal bribery laws. The court of appeals permitted the jury to return convictions under the federal bribery laws based on only a general intent to influence, rather than a specific intent to effect a particular *quid pro quo* exchange. If allowed to stand, that decision threatens to criminalize broad swaths of activity essential to representative democracy and to inflate federal prosecutorial power—exactly what this Court has repeatedly sought to prevent, most recently in

McDonnell. Because the court of appeals' decision cannot be reconciled with the decisions either of this Court or of other courts of appeals, the petition for a writ of certiorari should be granted.

A. The Court Of Appeals' Decision Conflicts With The Decisions Of This Court

1. The federal-official bribery statute, 18 U.S.C. 201, contains separate provisions governing alleged payors and alleged recipients of bribes. Section 201(b)(1) governs alleged payors of bribes; it provides, as relevant here, that "[w]hoever * * * directly or indirectly, corruptly gives, offers or promises anything of value to any public official * * * *with intent* * * * *to influence* any official act" shall be guilty of bribery. 18 U.S.C. 201(b)(1) (emphasis added). Section 201(b)(2) governs alleged recipients; it states that whoever "being a public official * * * directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value * * * *in return for* * * * *being influenced in* the performance of any official act" shall also be guilty of bribery. 18 U.S.C. 201(b)(2) (emphasis added).

The plain language of Section 201(b)(2) provides that an alleged bribe recipient must trade the act of "being influenced" in the performance of an official act "in return for" the accepted gift: that is, he must intend to enter an exchange in which his side of the bargain is "being influenced." Thus, for the recipient, soliciting or agreeing to such an exchange is the crime's *actus reus*; the *mens rea* is supplied by the word "corruptly," which signifies that he must purposefully solicit or agree to the exchange. See *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part).

To be sure, Section 201(b)(1), unlike Section 201(b)(2), does not contain the phrase "in return for." As a result, it

arguably could be read to criminalize the mere giving of a thing of value "with intent to influence" an official act, without any requirement of an intended *quid pro quo* exchange. But if that were so, Section 201(b)(1) would criminalize a variety of routine political conduct, including campaign donations and lobbying.

In *Sun-Diamond Growers*, this Court, recognizing that potential "absurdit[y]," interpreted Section 201(b) to provide for symmetrical treatment between alleged bribe payors and alleged bribe recipients. See 526 U.S. at 408. Writing for a unanimous Court, Justice Scalia described the requirements of federal-official bribery under Section 201(b) as follows:

> Bribery requires intent "to influence" an official act or "to be influenced" in an official act * * *. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.

Id. at 404-405.

Thus, the Court understood Section 201(b)(1) and Section 201(b)(2) to mirror each other. Section 201(b)(1) requires a "specific intent to *give* * * * something of value in exchange for an official act"; Section 201(b)(2) requires a "specific intent to * * * *receive* something of value in exchange for an official act." *Sun-Diamond*, 526 U.S. at 404-405 (emphasis added). As the Court explained, the specific-intent requirement is necessary to distinguish a bribe from a gratuity, a lesser-included crime that carries a significantly lower penalty. *Ibid.*

By reading the "intent to influence" requirement of Section 201(b)(1) as the flip side of the "in return for * * * being influenced" requirement in Section 201(b)(2), the Court imposed a significant limit on the

scope of the federal-official bribery statute. That limit demarcates criminal activity from permissible democratic discourse. As the Court explained, the broader construction advocated by the government "would criminalize" perfectly acceptable interactions between private citizens and their representatives, such as the giving of "replica jerseys [to the President] by championship sports teams each year during ceremonial White House visits"; "a high school principal's gift of a school baseball cap to the Secretary of Education * * * on the occasion of the latter's visit"; and the "provi[sion] [of] a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to * * * farmers concerning various matters of USDA policy." *Sun-Diamond*, 526 U.S. at 399, 406-407.

2. *Sun-Diamond*'s narrowing approach comports with the Court's interpretive methodology in other public-corruption cases. In *McCormick* v. *United States*, 500 U.S. 257 (1991), the Court read a *quid pro quo* requirement into the broad definition of extortion set out in the Hobbs Act. That statute defines "extortion," *inter alia*, as "the obtaining of property from another * * * under color of official right." 18 U.S.C. 1951(b)(1). The Court held that, in the context of campaign contributions, the statute required proof of a *quid pro quo*. See 500 U.S. at 272-274. "To hold otherwise," the Court explained, "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable." *Id.* at 272. Shortly thereafter, the Court reiterated that extortion "under color of official right" contains a "*quid pro quo* requirement." *Evans* v. *United States*, 504 U.S. 255, 268 (1992).

This Court has twice narrowly construed the federal mail- and wire-fraud statutes to address similar concerns. In *McNally* v. *United States*, 483 U.S. 350 (1987), the

Court read the mail-fraud statute not to reach a state officer's kickback scheme, refusing 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." *Id.* at 360. After Congress responded by enacting the honest-services fraud statute, which made clear that mail and wire fraud included "scheme[s] * * * to deprive another of the intangible right of honest services," 18 U.S.C. 1346, the Court again "pare[d] * * * down" the scope of the statute, reading the vague language of the honest-services statute to "encompass only bribery and kickback schemes." *Skilling* v. *United States*, 561 U.S. 358, 404, 412 (2010).

Most recently, in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), the Court vacated a former Virginia governor's bribery convictions under both the Hobbs Act and the honest-services fraud statute. The Court unanimously interpreted the "official act" language of Section 201(b) narrowly to encompass only discrete actions that "involve a formal exercise of governmental power." 136 S. Ct. at 2371-2372. In so doing, the Court rebuffed the government's ambitious contention that "nearly any activity by a public official" constitutes an official act; it reasoned that statutory text, precedent, and serious constitutional concerns required a "more bounded interpretation" excluding such routine activities as "setting up a meeting, calling another public official, or hosting an event." *Id.* at 2367-2368.

To conclude otherwise, the *McDonnell* Court explained, would be to "cast a pall of potential prosecution over" even "the most prosaic interactions" between citizens and their representatives, such that "citizens with legitimate concerns might shrink from participating in democratic discourse"—the "basic compact underlying

representative government." 136 S. Ct. at 2360, 2372-2373. It further noted that the "standardless sweep" of the government's broad interpretation left the "outer boundaries" of federal bribery impermissibly "shapeless" and infringed on a State's "prerogative to regulate the permissible scope of interactions between state officials and their constituents." *Id.* at 2373 (citations omitted). Of particular relevance here, the Court also reaffirmed its holding from *Sun-Diamond* that "Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an 'official act.'" *Id.* at 2372.

3. The *quid pro quo* requirement applies with equal force to the federal-programs bribery statute, which forbids the same range of conduct as Section 201(b) in circumstances involving entities that receive federal assistance. 18 U.S.C. 666(1)(B), (2). Indeed, this Court has unanimously construed Section 666 in a manner "[]congruous" with Section 201(b) in light of the statutory language of Section 666 and the events leading to its enactment, both of which "demonstrate[d]" that Section 666 was "designed to extend" the "federal bribery prohibitions" of Section 201 to "bribes offered to state and local officials employed by agencies receiving federal funds." *Salinas* v. *United States*, 522 U.S. 52, 58 (1997). Subsequent decisions of this Court likewise reflect that the essential elements of federal-programs bribery are coextensive with those of federal-official bribery. See, *e.g.*, *Skilling*, 561 U.S. at 412 (identifying Section 201 and Section 666 as illustrative of the "core" bribery conduct from which the honest-services fraud statute "draws content").

4. In this case, the jury was instructed that, in order to convict petitioner of federal bribery offenses, the prosecution needed only to prove that petitioner gave a public official "something of value with the intent to influence an

official act." App., *infra*, 23a. "It [was] sufficient," the instructions continued, "if [petitioner] knew that the money was offered with the intent to induce the performance of an official act." *Id.* at 21a.

Put simply, those instructions criminalized conduct that did not constitute a crime under the federal bribery laws, as interpreted by this Court. In nonetheless approving them, the court of appeals failed to apprehend the distinction drawn in *Sun-Diamond* between a general "intent to influence" and a specific intent to effect a *quid pro quo* exchange. While recognizing (as it had to under this Court's precedent) that an intended *quid pro quo* exchange is an element of a federal bribery offense, the court of appeals agreed with the government that this Court in *Sun-Diamond* "equated" the words "with 'intent to influence' " with "in exchange for" or "*quid pro quo*." See App., *infra*, 11a; Gov't C.A. Br. 31.

That analysis was mistaken. Far from equating those phrases, the Court in *Sun-Diamond limited* Section 201(b)(1)'s "intent to influence" language by requiring a specific intent to enter into a *quid pro quo* exchange. Put another way, the Court took the statute's broad "intent to influence" language and held that it reached no further than a "specific intent to give * * * something of value *in exchange* for an official act." *Sun-Diamond*, 526 U.S. at 404-405. In a recent article, Professor Albert Alschuler elaborated on the distinction between those two concepts:

> "Intent to influence" and "exchange" are not different words for the same thing. Some of the 179 people who "bundled" more than $500,000 apiece for President Obama's 2012 reelection campaign undoubtedly hoped to influence governmental action—perhaps by increasing the likelihood of their own appointment as ambassadors. One would be surprised, however, to learn of any quid pro quo or corrupt understanding at

> the time they gave their support. As courts have recognized, giving something with a "generalized hope or expectation of ultimate benefit on the part of the donor" is not a bribe.

Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 Fordham L. Rev. 463, 474 (2015) (footnote omitted).

In the decision below, the court of appeals ignored that crucial distinction and approved the use of jury instructions containing general "intent to influence" language that did not convey the essential requirement of a *quid pro quo* exchange. This Court should grant review to clarify that an intended *quid pro quo* exchange is required and to reaffirm the importance of construing the federal bribery laws narrowly so as to avoid chilling interactions between citizens and their representatives.

B. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Courts Of Appeals

Further review is also warranted because the court of appeals' holding that the jury instructions in petitioner's case did not need to contain an express requirement of an intended *quid pro quo* exchange conflicts with the decisions of other courts of appeals.

1. The court of appeals deepened a circuit conflict by holding that a district court's failure to instruct the jury on the *quid pro quo* requirement could be cured by the inclusion of general language regarding the defendant's intent to "induce" or "influence" an official act.

In *United States* v. *Jennings*, 160 F.3d 1006 (1998), the Fourth Circuit held that a Section 666 bribery instruction using "intent to influence" language without including a *quid pro quo* requirement was not just erroneous, but plainly so. See *id.* at 1021. The instruction, the court explained, had failed to alert the jury that it must find the

defendant "ha[d] given money * * * *in exchange for* some specific official act or course of action." *Id.* at 1022 (emphasis added). As a result, the instruction mistakenly conveyed the impression that the law "prohibits *any* payment made with a generalized desire to influence or reward (such as a goodwill gift), no matter how indefinite or uncertain the payor's hope of future benefit." *Id.* at 1020.[3]

Conversely, in *United States* v. *Whitfield*, 590 F.3d 325 (2009), cert. denied, 562 U.S. 833 (2010), the Fifth Circuit upheld convictions for honest-services fraud "[d]espite the district court's failure to include the actual phrase *quid pro quo* in the jury charge." *Id.* at 353. Like the court of appeals here, the Fifth Circuit reasoned that the challenged instructions sufficed because they required a finding that the defendant "provide[d] the [public official] with things of value specifically *with the intent to influence* [his] action or judgment." *Ibid.* The Fifth Circuit found that such language "sufficiently conveyed the essential idea of give-and-take." *Ibid.* (internal quotation marks and citation omitted).

2. More generally, the decision below is in tension with the decisions of numerous courts of appeals holding that a bribery-based theory of honest-services fraud requires the government to prove an actual or intended *quid pro quo* agreement beyond a reasonable doubt. See, *e.g.*, *United States* v. *Silver*, 864 F.3d 102, 111 (2d Cir. 2017), cert. denied, 138 S. Ct. 738 (2018); *United States* v.

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[3] Consistent with *Jennings* and petitioner's position, the Justice department's own Criminal Resource Manual recognizes that the specific intent to engage in an exchange ("*quid pro quo*") and a general intent to affect official action ("intent to influence") must *both* be proven by the government. *See, e.g.*, Department of Justice, *Criminal Resource Manual* § 2044 (Supp. 2018-4) (explaining that the phrase "with intent to influence" refers "to what the briber expects to accomplish, not to his level of 'criminal intent' ").

Wright, 665 F.3d 560, 567-568 (3d Cir. 2012), as amended (Feb. 7, 2012); *United States* v. *Jefferson*, 674 F.3d 332, 358-359 (4th Cir.), as amended (Mar. 29, 2012), cert. denied, 568 U.S. 1041 (2012); *United States* v. *Terry*, 707 F.3d 607, 614 (6th Cir. 2013), cert. denied, 134 S. Ct. 1490 (2014); *United States* v. *Whitman*, 887 F.3d 1240, 1247 (11th Cir. 2018); *United States* v. *Ring*, 706 F.3d 460 (D.C. Cir.), cert. denied, 571 U.S. 827 (2013). In doing so, those courts have relied on this Court's explanation that the existence of an intent to engage in a *quid pro quo* is what distinguishes a bribe from a gratuity. See *McDonnell*, 136 S. Ct. at 2372; *Sun-Diamond*, 526 U.S. at 404-405.

For example, in *Silver*, the Second Circuit considered whether the federal bribery convictions of the former speaker of the New York State Assembly could be upheld in light of this Court's intervening decision in *McDonnell*. The court reasoned that, "[t]o succeed on a bribery theory of honest services fraud and Hobbs Act extortion, the Government had to prove the existence of a *quid pro quo* agreement—that the defendant received, or intended to receive, something of value in exchange for an official act." *Silver*, 864 F.3d at 111. The Second Circuit repeatedly cited that requirement in vacating the defendant's convictions. See *id.* at 112, 115, 119, 122-123; see also *United States* v. *Alfisi*, 308 F.3d 144, 149-150 (2d Cir. 2002) (holding that the ambiguity created by "intent to influence" language in jury instructions could be cured only by a separate instruction conveying the *quid pro quo* requirement).

In *Terry*, the Sixth Circuit emphasized the importance of requiring a *quid pro quo* agreement before considering "what kinds of agreements—and what level of specificity—must exist between the person offering a bribe and the public official receiving it." 707 F.3d at 612-613. In upholding a conviction, the court emphasized that the jury

instructions had "accurately conveyed that an agreement is the key component of a bribe" by requiring a finding that the defendant "agreed 'to accept [a] thing of value *in exchange for* official action.'" *Id.* at 614 (alteration in original) (emphasis added).

The District of Columbia Circuit reached a similar conclusion in *Ring*. There, the court noted the "requirement" in the honest-services fraud statute that "the payor defendant must at least intend to *offer* * * * [a corrupt] exchange." 706 F.3d at 468 (emphasis omitted). It was that specific intent to offer an exchange, rather than a mere general intent to influence official conduct, that the court adopted as the proper *mens rea* element. *Ibid.* Quoting *Sun-Diamond*, the court held that a defendant commits honest-services bribery "when [a] gift is given with an 'intent "to influence" an official act' *by way of* a corrupt exchange." *Id.* at 464 (quoting 526 U.S. at 404) (emphasis added). The court went on to affirm the defendant's conviction after concluding that the jury instructions "touched all the necessary bases." *Id.* at 468. Those instructions stated that "[the] intent to corruptly influence the public official's acts * * * *requires* some specific quid pro quo." See Gov't Br. in Opp. at 5-6, *Ring* v. *United States*, No. 12-1462 (Aug. 16, 2013) (reproducing full instruction).

C. The Question Presented Is Exceptionally Important

The question presented in this case is one of substantial legal and practical importance to the federal criminal system.

1. In *Sun-Diamond*, the Court found it a "peculiar result[]" that, on the government's theory, the illegal gratuity statute, which carries a maximum prison sentence of two years, would apply to a group of farmers providing a complimentary lunch to the Secretary of Agriculture after

he gave a speech to the group. 526 U.S. at 406-407. The Court read the gratuity statute to avoid that "absurdit[y]." *Id.* at 408. Yet the instructions approved by the court of appeals in this case would permit a conviction of those same farmers for *bribery*, which carries a maximum sentence of fifteen years.

Given the well-known aphorism about free lunches, prosecutors would have no trouble convincing a jury that the meal was offered with the "intent to influence" the Secretary's policy decisions. The instructions would also cover constituents who "invited [an] official to join them on their annual outing to the ballgame," *McDonnell*, 136 S. Ct. at 2372, if a jury concluded that they did so with the "intent to influence" the official's position on some matter. And any convenience-store owner who gives an occasional free cup of coffee to a neighborhood police officer would be guilty of bribery if a jury found that he hoped to curry favor with the officer as he walked his beat.

Under the instructions approved by the court of appeals, any person who ever gave anything of value to any federal, state, or local official would be at risk for prosecution the moment that official "hear[d] from the[m]" about some official act. *McDonnell*, 136 S. Ct. at 2372. But as this Court has repeatedly recognized, "favoritism and *influence* are not * * * avoidable in representative politics." *Citizens United* v. *FEC*, 558 U.S. 310, 359 (2010) (emphasis added) (quoting *McConnell* v. *FEC*, 540 U.S. 93, 297 (2003) (opinion of Kennedy, J.)). Because a jury might view any citizen's interaction as intended to influence public policy outcomes, many "citizens with legitimate concerns" would "shrink from participating in democratic discourse," *McDonnell*, 136 S. Ct. at 2372. That would frustrate the democratic process and chill the exercise of First Amendment rights.

Indeed, in this very case, the government alleged that petitioner had broken the law by allegedly seeking Jones' assistance in obtaining support for the passage of a bill in the Arkansas Senate, and also by expressing his opposition to an exclusive referral policy that petitioner believed was not in the best interests of children receiving mental-health services. See Gov't C.A. Br. 10-11. But as courts have long recognized, "commenting on proposed legislation, and other lobbying activities[,] implicate First Amendment speech and petition rights." *Ring*, 706 F.3d at 466. This Court's intervention is necessary to protect those cherished rights.

2. This Court's review is also necessary because the court of appeals' decision provides the government with a ready path for circumventing the limits that the Court placed on the government's ability to criminalize political activity in *McDonnell*. There, the Court emphasized the need to avoid casting the "pall of potential prosecution" over normal and desirable political interaction. 136 S. Ct. at 2372. It thus rejected the "standardless sweep" of the government's broad interpretation, which left the "outer boundaries" of federal bribery impermissibly "shapeless." *Id.* at 2373 (citations omitted).

As the facts of this case amply demonstrate, however, prosecutors could potentially skirt *McDonnell*'s constraints on their power simply by targeting the alleged bribe payor instead of the alleged recipient. *McDonnell*'s narrow definition of "official act" provides a safe harbor to public officials, who can forestall any inference of wrongdoing by avoiding any "official act" possibly tied to a donor. Private citizens, by contrast, remain at risk of prosecution whenever they interact with any public official, as long as a jury might later conclude they hoped to "influence" the official's position on some topic of interest.

A criminal statute "cannot [be] construe[d] * * * on the assumption that the Government will use it responsibly." *McDonnell*, 136 S. Ct. at 2372-2373 (internal quotation marks and citation omitted). And due process precludes defining a crime "in a manner that * * * encourage[s] arbitrary and discriminatory enforcement." *Id.* at 2373 (quoting *Skilling*, 561 U.S. at 402-403). To prevent prosecutors from redirecting their attention from public officials to high-profile citizens such as petitioner, it is imperative that the government not be allowed to obtain convictions under the federal bribery laws in the absence of an intended *quid pro quo* exchange.

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The court of appeals' erroneous decision flouted this Court's precedents and deepened a conflict among the courts of appeals on the question whether the government may obtain convictions under the federal bribery laws in the absence of jury instructions expressly requiring an intended *quid pro quo* exchange. That is an exceptionally important question, and this case is an ideal vehicle for resolving it. Further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KANNON K. SHANMUGAM
ROBERT M. CARY
CHARLES L. MCCLOUD
JOEL S. JOHNSON
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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