No. 17-1687

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly found that the jury instructions in this case adequately conveyed the quid pro quo element of bribery.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 885 F.3d 1106.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 2018. The petition for a writ of certiorari was filed on June 20, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, petitioner was convicted of federal-funds bribery, in violation of 18 U.S.C. 666; interstate travel in furtherance of bribery, in violation of 18 U.S.C. 1952(a)(3); and two counts of honest-services fraud, in violation of 18 U.S.C. 1346. Judgment 1-2. He was sentenced to 84 months of imprisonment, to be followed by three years of supervised

release. *Id.* at 3-4. The court of appeals affirmed. Pet. App. 1a-18a.

1. This public-corruption prosecution arose out of a bribery scheme involving three men: petitioner, Steven Jones, and Phillip Carter. Petitioner was an Arkansas businessman who ran "two for-profit companies that provided mental health treatment to juvenile Medicaid recipients." Pet. App. 2a. "Between 2007 and 2011," while the scheme was ongoing, "these two companies received over $10 million per year in Medicaid reimbursement[s]," which were administered by the Arkansas Department of Health and Human Services (ADHS). *Ibid.* Jones was a former state legislator who had recently been appointed the "second-in-command" at ADHS. *Ibid.* Carter was an Arkansas probation officer who knew both men and who served as an intermediary, arranging meetings and using his position at a church to funnel payments from petitioner to Jones. *Ibid.*

The scheme began in 2007, when Carter told petitioner that Jones had been appointed to a position at ADHS. Petitioner, who knew Jones from Jones's time as a state legislator, responded: "That's huge. * * * Maybe we can sit down and talk with him and see what he can do to help us." 7/15/16 Tr. 278. Carter called Jones to arrange a meeting for petitioner, and Jones responded that his "minimum fee" was $2000. *Id.* at 280-282. Carter understood that to be Jones's price for "[m]eeting with [petitioner] and doing things that w[ere] asked of him to assist [petitioner's] company." *Id.* at 281. Carter reported Jones's request for a bribe to petitioner, explaining that Jones "was hungry," meaning that he "wanted to get paid." *Id.* at 280. Petitioner agreed to pay the $2000 Jones had demanded, telling Carter that because petitioner was already a donor to the church

where Carter was a board member and ordained minister, petitioner "would pay that fee through the church." *Id.* at 281; see *id.* at 248.

Before his first meeting with Jones, petitioner indeed wrote a $2000 check to Carter's church, and the church then paid Jones $2000. Pet. App. 3a. "This pattern repeated itself for four years." *Ibid.* "[Petitioner] would call Carter, Carter would call Jones, [petitioner] would pay Carter's church, [petitioner] and Jones would meet, and Carter's church would pay Jones"—often in cash. *Ibid.*; see 7/18/16 Tr. 503.[1] "At their meetings, and by phone through Carter, [petitioner] would ask Jones to assist in his business" by taking various official actions in his capacity as a senior ADHS official. Pet. App. 3a; see 7/18/16 Tr. 487, 498, 503. For example, petitioner asked Jones to assume control of the ADHS Medicaid program so that Jones could raise the reimbursement rates for petitioner's companies and "increase the geographical radius from which one of [petitioner's] companies could receive referrals." Pet. App. 3a. Petitioner also asked Jones "to convince the governor to reappoint him to a state board that licenses and inspects juvenile residential treatment facilities." *Ibid.*

Jones never explicitly agreed "to do any of the things [petitioner] asked." Pet. App. 3a. But he assured petitioner that he would "look into" petitioner's requests, because he wanted to "give [petitioner] the impression that [he] was agreeing to help [petitioner's] companies." 7/18/16 Tr. 505. Jones also provided petitioner with internal ADHS documents referencing petitioner's companies in order to reinforce "the impression that [Jones]

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[1] Unbeknownst to petitioner, Carter and the pastor of his church would sometimes keep a portion of petitioner's payments rather than passing on the entire amounts to Jones. 7/15/16 Tr. 287-288.

w[as] looking out for him." *Id.* at 508. And Jones told Carter that he was participating in weekly ADHS meetings to protect petitioner's interests. *Id.* at 520-521.

After the Federal Bureau of Investigation (FBI) learned of petitioner's scheme, it "comprehensively documented" a meeting between Jones, Carter, and petitioner "over dinner at a steakhouse in Memphis." Pet. App. 3a. In setting up the meeting, petitioner told Carter on a recorded call that he wanted Jones "to put a stop to" ADHS's referrals of patients to one of petitioner's competitors. *Id.* at 3a-4a. FBI agents also heard Jones "accept Carter's invitation to meet with [petitioner], but only if [petitioner] had 'enough time to make sure he's got everything together for us.'" *Id.* at 4a. "At the steakhouse, video surveillance recorded [petitioner] passing Carter a check intended for Jones." *Ibid.*

2. A federal grand jury in the Eastern District of Arkansas indicted petitioner on charges including three counts of honest-services fraud, in violation of 18 U.S.C. 1346, and one count of federal-funds bribery, in violation of 18 U.S.C. 666(a)(2). Pet. App. 4a.

a. Jones and Carter, who had agreed to cooperate with the FBI after being confronted with the video and audio evidence of their scheme, pleaded guilty to bribery offenses and testified against petitioner at his trial. Pet. App. 4a. Carter testified that he had served as an intermediary, accepting checks that petitioner gave him "to give compensation to Steven Jones." 7/15/16 Tr. 285. Jones testified that at each of his meetings with petitioner, petitioner asked him to do things at ADHS to help petitioner's businesses and that after the meetings he (Jones) was paid. 7/18/16 Tr. 487. Jones also stated

that he gave petitioner the impression that he was taking official actions to help petitioner's companies so that petitioner would continue to pay him. *Id.* at 496-497, 507-508, 510, 521-522, 530, 532.

Petitioner's defense was that the checks he gave to Carter were donations to Carter's church, not payments to be funneled to Jones. Petitioner took the stand and maintained that he had neither agreed to make nor made any payments to Jones, and that all of the payments at issue were "donations to the Church." 7/19/16 Tr. 764; see *id.* at 707-708. In his closing argument, petitioner's counsel likewise urged the jury to conclude that all of the payments "were donations to the 15th Street Church of God in Christ." 7/20/16 Tr. 923.

b. Following the close of the evidence, the district court instructed the jury on both the honest-services-fraud charges and the federal-funds-bribery charges.

Under the honest-services statute, the mail- and wire-fraud statutes prohibit schemes "to deprive another of the intangible right of honest services." 18 U.S.C. 1346. Bribing a public official constitutes honest-services fraud. *Skilling* v. *United States*, 561 U.S. 358, 408-409 (2010). Here, the parties agreed to define "bribery" for purpose of the honest-services charges by reference to the statute prohibiting bribery of federal officials, 18 U.S.C. 201. Pet. App. 6a. The relevant portion of Section 201 prohibits "directly or indirectly, corruptly giv[ing] * * * anything of value to any public official * * * with intent * * * to influence any official act." 18 U.S.C. 201(b)(1)(A).

The district court instructed the jury that the honest-services charges required the government to prove that petitioner "voluntarily and intentionally participated in a scheme to defraud the public of its right to the honest

services of Steven Jones through bribery." Pet. App. 20a. Using language drawn from Section 201, the court then described the charged bribery scheme as one in which petitioner "made several payments or offered payments with the intent that Mr. Jones * * * would take official actions that would benefit [petitioner] and his businesses." *Ibid.* The court further instructed that the government was not required to prove that Jones himself actually "intended to, or did perform the official acts for which he was promised or which he agreed to receive something of value." *Id.* at 21a. Instead, the court explained, "[i]t is sufficient if [petitioner] knew that the money was offered with the intent to induce the performance of an official act by Mr. Jones." *Ibid.* Finally, after defining "official act" using language drawn from this Court's decision in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), the district court instructed the jury to "consider all the evidence * * * to determine whether [petitioner] intended or solicited an exchange of money for official acts." Pet. App. 23a.

The federal-funds bribery statute, as relevant here, prohibits "corruptly giv[ing], offer[ing], or agree[ing] to give anything of value to any person, with intent to influence or reward an agent of * * * a State * * * government, or any agency thereof, in connection with any business, transaction, or series of transactions of such * * * government, or agency," provided that the series of transactions involves $5000 or more of value and that the agency receives more than $10,000 of federal funds in a calendar year. 18 U.S.C. 666(a)(2).

Using language drawn from Section 666, the district court instructed the jury that the federal-funds bribery charge required the government to prove that petitioner "corruptly gave, offered, or agreed to give money

to Steven Jones in connection with some business, transaction, or series of transactions of ADHS." Pet. App. 24a. The court further instructed that a person acts "'corruptly'" if he acts "with the intent that something of value be given or offered to influence an agent of the state in connection with the agent's official duties." *Id.* at 25a.

Finally, at petitioner's request, the district court instructed the jury on the theory of petitioner's defense, explaining that his position was that "[a]ll of the checks that he gave to the 15th Street Church of God in Christ were charitable donations in support of the church's ministry." D. Ct. Doc. 123, at 23 (July 20, 2016) (Jury Instructions).

c. The jury rejected that defense and found petitioner guilty of federal-funds bribery and two of the three charged acts of honest-services fraud. Pet. App. 4a. The jury also found petitioner guilty of interstate travel in aid of federal-funds bribery, in violation of 18 U.S.C. 1952(a)(3). Pet. App. 4a. The jury acquitted petitioner on the remaining honest-services fraud count and on a conspiracy charge. *Ibid.* The district court sentenced petitioner to 84 months of imprisonment. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-18a.

a. As relevant here, the court of appeals first rejected petitioner's contention that "the honest-services bribery instruction did not require the jury to find that he paid Jones *in exchange for* an official act." Pet. App. 10a; see *id.* at 10a-11a. The court accepted petitioner's premise that bribery in violation of the honest-services statute requires "a specific intent to give . . . something of value in exchange for an official act." *Id.* at 10a (quoting *United States* v. *Sun-Diamond Growers*, 526 U.S.

398, 404-405 (1999) (*Sun-Diamond*)). But the court found that, when "[r]ead as [a] whole," the instructions given in this case "fairly submitted the quid pro quo element to the jury." *Id.* at 11a. The court observed that the instructions required the jury to find that petitioner made or offered payments "with the intent that Mr. Jones * * * would take official actions that would benefit [petitioner] and his businesses," and also that petitioner "knew that the money was offered with the intent to induce performance of an official act by Mr. Jones." *Id.* at 10a-11a. And the court emphasized that petitioner had "offer[ed] no support for the assertion that th[e] specific phrase ['in exchange for'] must be included when the instructions otherwise convey the quid pro required." *Id.* at 11a.

b. In a footnote, the court of appeals noted that, while it was "not entirely clear," petitioner "may" have argued "that the federal-funds bribery instruction omitted the quid pro quo" element as well. Pet. App. 11a n.6. "Assuming without deciding that [Section] 666 requires a quid pro quo," the court found that "the federal-funds instructions did include the element by defining 'corruptly' as acting 'with the intent that something of value be given or offered to influence an agent of the state in connection with the agent's official duties.'" *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 11-24) that the district court's jury instructions did not adequately convey the quid pro quo element of bribery. The court of appeals correctly rejected that argument, and its case-specific assessment of the particular instructions given here does not conflict with any decision of this Court or another court of appeals. In addition, even if the proper phrasing of instructions on the quid pro quo element

otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider that issue. The petition for a writ of certiorari should be denied.

1. Petitioner was convicted of honest-services fraud, which the parties agreed to define by reference to 18 U.S.C. 201, and of federal-funds bribery in violation of 18 U.S.C. 666. As this case comes to the Court, it does not present any question about the meaning of either of those statutes—or, for that matter, any other disputed question of statutory interpretation.

Section 201 makes it unlawful to "corruptly give[], offer[] or promise[] anything of value to any public official * * * with intent * * * to influence any official act." 18 U.S.C. 201(b)(1)(A). The court of appeals agreed with petitioner that this language requires "a specific intent to give . . . something of value in exchange for an official act." Pet. App. 10a (quoting *United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 404-405 (1999)). The government never argued otherwise. To the contrary, it explicitly accepted that it was required to prove that petitioner made payments in an attempt to effect a "*quid pro quo*" exchange of money for official acts. Gov't C.A. Br. 31; see *id.* at 30-34.[2]

Section 666 makes it unlawful to "corruptly give[], offer[], or agree[] to give anything of value to any person, with intent to influence or reward an agent" of a

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[2] The government was not required to prove that Jones himself actually "intended to, or did," follow through on his end of the bargain by performing the official acts that petitioner paid him to take. Pet. App. 21a; cf. *United States* v. *Hood*, 343 U.S. 148, 151 (1952) ("Whether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption.").

covered entity in connection with a transaction or series of transactions involving $5000 or more of value. 18 U.S.C. 666(a)(2). Because it includes payments made "'to influence *or reward*'" the recipient, several courts of appeals have determined that Section 666 "impose[s] criminal liability for both * * * bribery and illegal gratuities" and thus does not require proof of a quid pro quo. *United States* v. *Ganim*, 510 F.3d 134, 150 (2d Cir. 2007) (Sotomayor, J.) (emphasis added; citation omitted), cert. denied, 552 U.S. 1313 (2008).[3] But the government has litigated this case on the assumption that Section 666 reaches only quid pro quo bribes, and the court of appeals likewise "[a]ssum[ed] without deciding that [Section] 666 requires a quid pro quo exchange." Pet. App. 11a n.5.

2. Petitioner acknowledges (Pet. 17) that the court of appeals "recogniz[ed] * * * that an intended *quid pro quo* exchange is an element of a federal bribery offense." He thus does not contend that the court's decision rested on an erroneous interpretation of Section 201 or Section 666. Instead, he asserts only that the court erred in determining that the instructions given here adequately communicated the quid pro quo concept to the jury. Specifically, petitioner faults the district court (*e.g.*, Pet. I, 16-17) for not using the specific words "*quid pro quo*" or "in exchange for." That argument is doubly mistaken. The court of appeals correctly

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[3] See also, *e.g.*, *United States* v. *Boender*, 649 F.3d 650, 655 (7th Cir. 2011); *United States* v. *McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010), cert. denied, 562 U.S. 1270 (2011); *United States* v. *Abbey*, 560 F.3d 513, 520 (6th Cir.), cert. denied, 558 U.S. 1051 (2009); but see *United States* v. *Fernandez*, 722 F.3d 1, 26 (1st Cir. 2013) (holding that Section 666 reaches only bribes, not gratuities given without a quid pro quo).

determined that those magic words are not required—and even if they were, the instructions given here *did* use the words "in exchange for."

a. Petitioner focuses exclusively on the district court's statement that the government was required to prove that he gave Jones something of value "with the intent to influence an official act" or "the intent to induce the performance of an official act." Pet. 16-17 (quoting Pet. App. 20a-21a, 23a); see Pet. App. 25a (similar instruction for federal-funds bribery). Those instructions reflect the text of Section 201, which defines bribery to include corruptly making a payment to a public official "with intent * * * to influence any official act." 18 U.S.C. 201(b)(1)(A); see 18 U.S.C. 666(a)(2) ("with intent to influence or reward"). Petitioner's challenge thus hinges on the proposition that an instruction using the language of the statute was insufficient to communicate the statute's requirements.

To justify that position, petitioner asserts (Pet. 12-14, 17-18) that this Court's decision in *Sun-Diamond* interpreted Section 201(b)(1) to require a quid pro quo exchange only by supplementing the statutory language and imposing a limit on the statute's reach that would not otherwise be apparent. In fact, just the opposite is true. The Court has understood Section 201(b)(1) to require a quid pro quo *because* that is the natural import of the statute's "intent to influence" language.

The question presented in *Sun-Diamond* concerned the illegal-gratuity offense defined in Section 201(c), not the bribery offense defined in Section 201(b). 526 U.S. at 400. In the relevant portion of the opinion, the Court sought to "place [Section] 201(c)(1)(A) within the context of the statutory scheme" by briefly describing the distinction between bribes and illegal gratuities. *Id.* at

404. "Bribery," the Court explained, "requires intent 'to influence' an official act or 'to be influenced' in an official act, while illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act." *Ibid.* "In other words," the Court continued, "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.

In treating those formulations as intuitively equivalent, the Court did not suggest that it was departing from Section 201(b)'s text. In fact, the Court did not engage in any extended discussion of Section 201(b) at all. It simply recognized that the natural reading of the statute's "intent * * * to influence" language is that it requires an intent to effect a "*quid pro quo*" or to give something of value "*in exchange* for" an official act. As the Court put it, those are "other words" for describing the same concept. *Sun-Diamond*, 526 U.S. at 404.[4]

Petitioner advances no sound reason to believe that the jury's natural understanding of the statutory language would differ from this Court's. The relevant portion of the instructions required the jury to find that petitioner made payments to Jones "with the intent that Mr. Jones * * * would take official actions that would benefit petitioner and his businesses" or to "induce the performance of an official act by Mr. Jones." Pet. App.

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[4] In arguing otherwise, petitioner asserts that the Court in *Sun-Diamond* read Section 201(b)(1) to require a quid pro quo in order to avoid a "potential 'absurdity.'" Pet. 13 (quoting *Sun-Diamond*, 526 U.S. at 408) (brackets omitted). In fact, the portion of the opinion that petitioner quotes appears several pages after the Court's discussion of Section 201(b), and did not address Section 201(b) at all. Instead, the Court was construing the illegal-gratuity offense in Section 201(c) and the definition of "official act" in Section 201(a)(3). See *Sun-Diamond*, 526 U.S. at 408.

10a-11a, 21a. The natural understanding of that language is that it required the jury to find that petitioner intended to effect a quid pro quo exchange—that is, that he made payments to Jones with the understanding that Jones would take favorable official actions in return. Contrary to petitioner's assertions (*e.g.*, Pet. 11, 21-24) the language of those instructions would not encompass legitimate campaign contributions or other gifts given to "curry favor" (Pet. 22) or to gain "influence" in some general sense—scenarios that are in any event far removed from this case. Such gifts may be given in the *hope* that they may encourage unspecified official actions in the future, but they are not given with "the intent that [the recipient] * * * would take official actions that would benefit [the payer]." Pet. App. 20a. That language describes a payment given on the *understanding* that it will cause the official to take the desired official actions in return—that is, a payment given with intent to effect a quid pro quo exchange.

Petitioner may have preferred that the instructions express the quid pro quo requirement using other language. But the court of appeals correctly recognized that he "offer[ed] no support for the assertion that th[e] specific phrase ['in exchange for'] must be included." Pet. App. 11a. To the contrary, it is well-settled that "[a] trial judge has considerable discretion in choosing the language of an instruction so long as the substance of the relevant point is adequately expressed." *Boyle* v. *United States*, 556 U.S. 938, 946 (2009).

b. In any event, even if the "intent to influence" language standing alone would have been insufficient, the court of appeals correctly found that, "[r]ead as a whole, the instructions fairly submitted the quid pro quo element to the jury." Pet. App. 10a-11a. In fact, the case

was even stronger than the court recognized. The court accepted petitioner's premise that "the phrase 'in exchange for' [wa]s not in the instructions as given." *Id.* at 11a. But that phrase (or its equivalent) was actually included twice.

First, in elaborating on the proof required to establish a bribery scheme that violates the honest-services statute, the district court explained that such a scheme "may involve a 'stream of benefits' offered or paid *in exchange for* some official action, even if no specific action is identified at the time the bribe is paid." Pet. App. 21a (emphasis added).[5] Second, after defining "official act," the court instructed the jury to "consider all the evidence in this case * * * to determine whether [petitioner] intended or solicited *an exchange of money for official acts*." *Id.* at 23a (emphasis added).

Petitioner does not address those additional instructions, instead focusing exclusively on the "intent to influence" language. It is "well-established," however, that "a single instruction to a jury may not be judged in

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[5] Although petitioner at times states (*e.g.*, Pet. I) that the government was required to prove an exchange of money for "a particular official act," he has not challenged this standard stream-of-benefits instruction. As several courts of appeals have recognized, "the government need not show that the defendant intended for his payments to be tied to specific official acts." *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998). "Bribery requires the intent to effect an exchange of money (or gifts) for specific official action (or inaction), but each payment need not be correlated with a specific official act. * * * In other words, the intended exchange in bribery can be 'this for these' or 'these for those,' not just 'this for that.'" *Ibid.*; accord, *e.g.*, *United States* v. *McDonough*, 727 F.3d 143, 152-153 (1st Cir. 2013), cert. denied, 571 U.S. 1177 (2014); *United States* v. *Terry*, 707 F.3d 607, 612 (6th Cir. 2013), cert. denied, 571 U.S. 1237 (2014); *Ganim*, 510 F.3d at 148-149.

artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973). Accordingly, even "instructions that might be ambiguous in the abstract can be cured when read in conjunction with other instructions." *Jones* v. *United States*, 527 U.S. 373, 391 (1999).

Those familiar principles are dispositive here. Even if the district court's "intent to influence" instruction could be ambiguous in isolation, the additional instructions expressly referencing an intent to "exchange" money for official acts made clear that the jury was required to find a quid pro quo. And for the same reason, those additional instructions also unambiguously excluded the legitimate campaign contributions and other hypothetical scenarios that petitioner asserts (Pet. 21-24) could be swept in by an "intent to influence" instruction standing alone.[6]

3. The court of appeals' decision does not conflict with any decision by another court of appeals.

a. Petitioner principally asserts (Pet. 18-19) that the decision below conflicts with the Fourth Circuit's decision in *United States* v. *Jennings*, 160 F.3d 1006 (1998).

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[6] The instructions expressly referring to an "exchange" of money for official acts were given in the context of the honest-services charges, not the federal-funds charge. Pet. App. 21a, 23a. But petitioner has not distinguished between the two offenses in challenging the adequacy of the instructions. And in any event, the conduct underlying the two offenses was the same. The jury's finding that petitioner committed honest-services fraud thus makes clear that any error in the omission of the word "exchange" from the federal-funds instruction was harmless beyond a reasonable doubt, because it establishes that the jury "necessarily found" that petitioner acted with the intent to exchange money for official acts. *United States* v. *McFadden*, 823 F.3d 217, 224 n.2 (4th Cir. 2016), cert. denied, 137 S. Ct. 1434 (2017).

That is not correct. In *Jennings*, the Fourth Circuit assumed without deciding that Section 666 requires a quid pro quo, *id.* at 1018, and then determined that the particular instructions given in that case "did not necessarily require the jury to find that [the defendant] had the intent to engage in a quid pro quo," *id.* at 1022. But petitioner errs in asserting that the Fourth Circuit held that an "intent to influence" instruction is insufficient unless it includes the specific words "*in exchange* for" or "*quid pro quo*." Pet. 17-18 (citation omitted). To the contrary, the Fourth Circuit stated—in language quoted approvingly in the decision below, Pet. App. 11a n.5—that "a court need not resort to Latin" or any other specific formulation to convey the quid pro quo requirement. *Jennings*, 160 F.3d at 1019.

The Fourth Circuit determined that the instructions given in *Jennings* were inadequate not because the district court used the statute's "'intent to influence'" language, but instead because it "repeatedly charged that it was sufficient if [the defendant] paid [an employee of a public agency] to influence him * * * 'in connection with' or 'in reference to' [the agency's] business." 160 F.3d at 1022. The Fourth Circuit explained that those instructions "could have described a situation in which [the defendant] paid [the employee] with a 'vague expectation of some future benefit'" rather than with the intent to effect a quid pro quo exchange. *Ibid.* (brackets and citation omitted). But the Fourth Circuit did not suggest—much less hold—that an instruction like the one at issue here has the same defect.

Indeed, the Fourth Circuit in *Jennings* expressly approved an Eighth Circuit model instruction very similar to the instruction given here. The court explained that a district court "can adequately convey [the quid pro

quo] concept" by "inform[ing] the jury that it may find the defendant guilty only if it determines 'that (defendant's name) gave (the charged payment) corruptly, that is, *with the intent to induce* (official's name) to commit (the specific official act or omission that defendant is charged with intending to induce).'" 160 F.3d at 1019 (citing *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit* § 6.18.201A (1996)) (emphasis altered); see Pet. App. 21a ("It is sufficient if [petitioner] knew that the money was offered with the intent to induce the performance of an official act by Mr. Jones."). The decision in *Jennings* thus provides no reason to think that the Fourth Circuit would have found any defect in the instructions given here—particularly because those instructions also included the additional language expressly referencing an "exchange" of money for official acts.

b. Petitioner also asserts (Pet. 19) that "the decision below is in tension with the decisions of numerous courts of appeals." But as petitioner recognizes (*ibid.*), the various decisions he cites stand only for the proposition that "a bribery-based theory of honest-services fraud requires the government to prove an actual or intended *quid pro quo* agreement." The court of appeals did not disagree. To the contrary, as petitioner elsewhere acknowledges (Pet. 17), the court expressly recognized that honest-services bribery requires "a specific intent to give . . . something of value in exchange for an official act." Pet. App. 10a (quoting *Sun-Diamond*, 526 U.S. at 404-405). Petitioner's only quarrel with the decision below concerns its determination that the district court's instructions adequately con-

veyed that requirement. And that case-specific determination does not implicate any "tension" (Pet. 19) among the courts of appeals.

Only three of the decisions that petitioner cites (Pet. 20-21) addressed the proper phrasing of jury instructions on the quid pro quo element of bribery. Two of them upheld instructions that used the word "exchange," but neither held that the specific word "exchange" is invariably required. See *United States* v. *Terry*, 707 F.3d 607, 614 (6th Cir. 2013), cert. denied, 571 U.S. 1237 (2014); *United States* v. *Ring*, 706 F.3d 460, 468 (D.C. Cir.), cert. denied, 571 U.S. 827 (2013). To the contrary, the D.C. Circuit's decision in *Ring* cited with approval an instruction requiring proof that "the payments to the official were made with the specific purpose of influencing his actions on official matters." 706 F.3d at 468 (brackets and citation omitted).

In the third decision, the Second Circuit considered an instruction requiring the jury to find that the defendant had made a payment with "specific intent to influence [a public employee's] official acts." *United States* v. *Alfisi*, 308 F.3d 144, 149 (2002). Contrary to petitioner's characterization (Pet. 20), the court did not hold that an "ambiguity created by [this] 'intent to influence' language * * * could be cured only by a separate instruction conveying the *quid pro quo* requirement." In fact, the Second Circuit strongly suggested that the quoted instruction was sufficient by itself, emphasizing that—like the instruction given here—it "virtually mirror[ed] the statutory language" in Section 201. 308 F.3d at 149; see *id.* at 150 ("Where a district court's jury instructions accurately track the language and meaning of the relevant statute, we generally will not find error."). But the court ultimately had no occasion to pass

on the validity of the original instruction because it concluded that the district court had "erased all doubt" by instructing that bribery requires "'a corrupt intention specifically to influence the outcome of the official act.'" *Id.* at 150. That instruction is equivalent to the instructions given here.

4. Petitioner also asserts (Pet. 21-24) that further review is warranted because the decision below threatens to criminalize legitimate campaign contributions and other innocent gifts to public officials. But that parade of horribles rests on the assertion (Pet. 24) that the court of appeals interpreted the relevant statutes to allow a bribery conviction "in the absence of an intended *quid pro quo* exchange." It did not. Instead, the court merely determined that, when "[r]ead as a whole," the instructions given here "fairly submitted the quid pro quo element to the jury." Pet. App. 11a.

That case-specific conclusion lacks broader significance. And the court of appeals' narrow decision also illustrates the error in petitioner's attempts to analogize this case to *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016). There, this Court granted review to resolve a disputed question of statutory interpretation with broad importance. See *id.* at 2367 ("The issue in this case is the proper interpretation of the term 'official act'" in Section 201(a)(3).). Here, in contrast, petitioner asks this Court to decide whether, on an uncontested interpretation of the bribery statutes as requiring a quid pro quo, the court of appeals erred in finding that the particular jury instructions given here adequately conveyed that requirement. That contention does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the

asserted error consists of * * * the misapplication of a properly stated rule of law.").

5. Even if the proper phrasing of jury instructions on the quid pro quo element otherwise warranted this Court's consideration, this case would not be an appropriate vehicle in which to take up that issue because the trial record makes it abundantly clear that any error was harmless beyond a reasonable doubt. This was not a case in which a jury was required to resolve a dispute about whether things of value given to a public official were innocent gifts or were instead given pursuant to an implicit quid pro quo. Cf. Pet. 21-24. Instead, the evidence showed an explicit quid pro quo arrangement: Petitioner began funneling money to Jones after Jones communicated that his "minimum fee" was $2000, 7/15/16 Tr. 280-281, and the ensuing scheme consisted of a years-long pattern of surreptitious payments made after meetings at which petitioner asked Jones to take specific official acts, Pet. App. 2a-4a.

At trial, petitioner did not argue (and could not plausibly have argued) that those payments were made with anything other than an intent to effect a quid pro quo exchange. Instead, he flatly denied paying Jones *any* money. Petitioner took the stand and insisted that Carter and Jones had fabricated the bribery scheme and that the checks he gave to Carter were bona fide "donations to the Church," not payments for Jones. 7/19/16 Tr. 764; see *id.* at 707-708. The jury necessarily rejected that defense and declined to credit petitioner's testimony.

In that respect, this case is very similar to *Jennings*. After concluding that the quid pro quo instruction given there had been plainly erroneous, the Fourth Circuit nonetheless declined to disturb the conviction because

it found the jury's verdict to be a "fair and reliable determination of [the defendant's] guilt." 160 F.3d at 1022 (citation omitted). There, as here, the defendant "did not claim at trial that he paid gratuities" rather than bribes and instead "took the stand and testified that he did not pay [the official] a dime." *Ibid.* There, as here, "[t]he jury completely rejected [the defendant's] testimony." *Ibid.* And as in *Jennings*, it is clear that "a [different] quid pro quo instruction would not have changed the jury's assessment of [petitioner's] story or its determination of his guilt." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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