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

REPLY BRIEF FOR THE PETITIONER

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The government's brief in opposition is cut from the same cloth as its (unsuccessful) opposition in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016). Here, as there, the government attempts to paint the dispute before this Court as involving only a narrow, fact-specific question about the application of settled precedent. Compare Br. in Opp. 19-20 with Br. in Opp. at 12, *McDonnell* v. *United States* (No. 15-474) (characterizing that petition as arguing that the court of appeals "misapplied [a] properly stated rule of law to the particular circumstances of this case" (internal quotation marks and citation omitted)).

The Court saw through that gambit in *McDonnell*, and it should do so here too. As in *McDonnell*, the government fails to grapple with the sweeping implications of the court of appeals' decision to uphold the error-laden jury instructions given in this case. The decision below contravenes decisions of this Court and other courts of appeals, and, if allowed to stand, threatens to chill activity vital to a robust democracy. Remarkably, the government also fails to acknowledge that the critical limitation improperly omitted from the jury instructions is one the government itself asked for in this case (and in others). See Br. in Opp. 5-7. And while the government halfheartedly argues that the instructional error was harmless, the jury's verdicts prove otherwise. Like *McDonnell*, this case is a compelling candidate for further review. The petition for a writ of certiorari should be granted.

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

Consistent with the decisions of numerous courts of appeals, petitioner proposed to instruct the jury that, in order to convict him of the charged bribery-based crimes, it was required to find that he specifically intended to give something of value in exchange for an official act. See D. Ct. Dkt. 97, at 19, 21 (July 8, 2016). The government agreed that proof of a specific intent to exchange was required, at least for the honest-services fraud counts. See D. Ct. Dkt. 91, at 19 (July 6, 2016).

But the district court inexplicably omitted that limitation from its instructions on all of the bribery-based counts. The instruction for the honest-services fraud count did not require either a *quid pro quo* or a corrupt intent. See Pet. App. 20a-22a. And the instruction for the federal-funds bribery count also omitted a *quid pro quo* requirement and defined "corruptly" merely as an intent

"to influence," without any additional requirement that petitioner acted unlawfully or sought an unlawful result. See *id.* at 25a. The court of appeals then approved those instructions despite acknowledging that an intended *quid pro quo* exchange was an element of the charged offenses. See *id.* at 10a, 11a n.5.

The government makes a litany of excuses to defend the district court's failure to include a limitation in the instructions that the government itself requested. Each is unavailing.

1. The government first contends (Br. in Opp. 11-13) that *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999), stands for the proposition that an "intent to influence" is synonymous with an intended *quid pro quo* exchange. That is plainly not correct.

In *Sun-Diamond*, the Court explained that an "intent to influence" is what distinguishes a bribe from an illegal gratuity. 526 U.S. at 404 (internal quotation marks omitted). But what distinguishes a bribe from a goodwill gift is that it was "corruptly given." *Ibid.*; see, *e.g.*, *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998). And there was no question in *Sun-Diamond* that establishing *corrupt* intent to influence required proof of "a *quid pro quo*—a specific intent to give * * * something of value *in exchange* for an official act." 526 U.S. at 404-405. Indeed, the government's brief in *Sun-Diamond* twice acknowledged that "bribery * * * requires proof of a *quid pro quo and* intent to influence the official." U.S. Br. at 16, 32, *Sun-Diamond*, *supra* (No. 98-131) (emphasis added). In other words, just as petitioner has consistently maintained and other courts of appeals have long recognized, the government must prove *both* the desire to affect official action (an "intent to influence") and the specific intent to engage in an exchange (an intended "*quid pro quo*"). See Pet. 18-21.

The government stresses the court of appeals' acknowledgment that an intended *quid pro quo* exchange is an element of the charged offenses, and it disparages petitioner's argument as a request for "magic words." Br. in Opp. 10-11. But the flaw in jury instructions here is no mere matter of wordplay. Without the *quid pro quo* element, the bribery laws would raise even graver constitutional concerns than were present in *McDonnell*, where the jury instructions clearly required an agreement "to accept a thing of value *in exchange for* official action." 136 S. Ct. at 2366, 2372 (emphasis added). As we have explained, under the government's view, virtually all issue-based campaign donations and lobbying would be criminalized, and many other activities essential to a robust democracy would be chilled. See Pet. 22-23. That cannot be the law.

2. The government next attempts to explain away the infirm jury instructions given in this case. It argues that the instructions sufficiently conveyed the *quid pro quo* requirement because they contained statutory language requiring the jury to find that petitioner gave a state official something of value "with the intent to influence an official act." Br. in Opp. 11 (citing Pet. App. 20a-21a, 23a). But it is often insufficient for jury instructions simply to quote the statutory language without further explaining the meaning of critical terms. Just last Term, the Court held that jury instructions quoting statutory language were inadequate because they did not include necessary narrowing language. See *Marinello* v. *United States*, 138 S. Ct. 1101, 1105-1106 (2018). The Court explained that failing to clarify what is required by "highly abstract general statutory language" would unduly "place[] great power in the hands of the prosecutor" and enable "juries to pursue their personal predilections." *Id.* at 1108 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974)). So too here, where

the statutory language is, to say the least, hardly self-defining.

In this case, the district court's instructions merely quoted the statute's broad "intent to influence" language without clarifying what that language required: namely, a *quid pro quo* exchange. As this Court has explained, bribery requires not just a general "intent to influence" or "induce," but a specific and *corrupt* intent to influence or induce. *Sun-Diamond*, 526 U.S. at 404 (internal quotation marks omitted). And in this context, a corrupt intent is, at a minimum, an intent to engage in a *quid pro quo* exchange. *See Citizens United* v. *Federal Election Commission*, 558 U.S. 310, 359 (2010); *United States* v. *Rosen*, 716 F.3d 691, 700 (2d Cir. 2013). The requirement of an intended *quid pro quo* exchange ensures that "citizens with legitimate concerns" do not "shrink from participating in democratic discourse," *McDonnell*, 136 S. Ct. at 2372, and guards against "the possibility that [individuals] will be prosecuted for bribery without [the] fair notice" due process requires, *Rosen*, 716 F.3d at 700 (citing *Skilling* v. *United States*, 561 U.S. 358, 412 (2010)).

The government further asserts (Br. in Opp. 14) that the instructions were sufficient because portions described the "stream of benefits" theory of liability, and defined "official act," using the word "exchange." But the cited portions of the instructions in no way purported to articulate the elements of the bribery offenses; they simply instructed the jury about evidence it *may* consider in reaching a verdict. The government artfully avoids contending that, in defining the offenses themselves, the instructions required an intended *quid pro quo* exchange. No lawyer—much less a lay juror—could conclude from the instructions that an intended exchange was an element of the charged offenses.

What is more, the government exploited the absence of such a limitation in the instructions by affirmatively arguing to the jury that petitioner merely intended to "influence" a public official. Tr. 902. That argument was born of necessity, because it was undisputed that the official in question did not engage in a single official act for petitioner during an alleged bribery scheme that lasted five years. That is why the government argued in closing that the jury should "focus" not "on what [the official] didn't do for the [petitioner]," but rather on petitioner's "paying so he could try to influence [the official] in his official acts." Tr. 916.

Finally on this score, it bears noting that the cited uses in the instructions of the word "exchange" were permissive, not mandatory. The option that the jury "*may* consider all the evidence * * * to determine whether Mr. Suhl intended or solicited an exchange of money for official acts," Pet. App. 23a (emphasis added), was just that—an option. The same is true of the instruction that a bribery scheme "*may* involve a 'stream of benefits' offered or paid in exchange for some official action." Pet. App. 21a (emphasis added). The "use of the permissive 'may' " is a far cry from "use of the mandatory 'should.'" *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001).[*] Contrary to the government's contention (Br. in Opp. 15), therefore, the instructions in this case did not preclude the jury from convicting petitioner based on a mere "intent to influence."

[*] If anything, the latter use of "exchange" made the instructions worse, not better: the jury might well have interpreted the instruction as allowing for conviction if it concluded that petitioner paid the official for some official act other than those purportedly listed in the indictment, a possibility to which the government repeatedly alluded in its closing arguments. See, *e.g.*, Tr. 916, 921.

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

The court of appeals' decision to uphold jury instructions lacking an express *quid pro quo* requirement likewise cannot be reconciled with the decisions of other courts of appeals. See Pet. 18-21. Further review is also warranted on that basis.

Most notably, the Fourth Circuit has held an "intent to influence" instruction lacking the "in exchange for" limitation to be plainly erroneous. *United States* v. *Jennings*, 160 F.3d 1006, 1021 (1998). That holding is flatly inconsistent with the decision below. The government attempts to downplay the conflict, ambitiously claiming that *Jennings* actually supports its position because the court approvingly cited a model instruction allowing a jury to convict if it determined that the defendant "gave (the charged payments) corruptly, that is, with the intent to induce" official acts. Br. in Opp. 17 (quoting *Jennings*, 160 F.3d at 1019).

The government's argument rests on a misreading of *Jennings*. Like *Sun-Diamond*, *Jennings* affirms that an intent to influence or induce action is no crime without a *corrupt* exchange. See *Jennings*, 160 F.3d at 1021. And the instructions here simply did not require that petitioner must have intended to give something "in exchange for" official acts, or even to give something "corruptly," in order to be convicted of honest-services fraud. As a result, it "can be said with confidence that [the Fourth Circuit] would [have] decide[d] the case differently" if petitioner's case had been litigated there. See Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479 (10th ed. 2013).

C. The Government's Remaining Arguments Lack Merit

Finally, the government contends that the Court should deny review for two additional reasons. Neither withstands scrutiny.

1. The government argues (Br. in Opp. 19-20) that petitioner's case is too fact-bound to warrant review. Specifically, the government asserts that petitioner's case is distinguishable from *McDonnell* because that case entailed resolution of a "disputed question of statutory interpretation with broad importance," whereas this case purportedly asks only whether "the court of appeals erred in finding that the particular jury instructions given here adequately conveyed [the *quid pro quo*] requirement." *Id.* at 19.

That argument lacks merit. The statutory question in *McDonnell* rested on an asserted instructional error, and this Court ultimately vacated the conviction in that case because the instructions "lacked important qualifications, rendering them significantly overinclusive." *McDonnell*, 136 S. Ct. at 2374; see *United States* v. *McDonnell*, 792 F.3d 478, 504 (4th Cir. 2015) (identifying the instructional error as a "core" issue on appeal). As in *McDonnell*, permitting the government to exploit the district court's overbroad instructions would vitiate the limits on the scope of the federal bribery laws imposed by this Court's prior decisions.

2. As is its wont, the government also argues (Br. in Opp. 20-21) that the error in petitioner's case is harmless. But it is certainly not clear, as the government contends, 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." Br. in Opp. 21 (quoting *Jennings*, 160 F.3d at 1022). While the government implies at every turn that petitioner participated in a multiyear conspiracy to trade money for official acts from a public

official, the jury actually acquitted him of the conspiracy count and one honest-services count. See Pet. 9. In light of the split verdict, the government cannot credibly contend that any error was harmless beyond a reasonable doubt.

The government further asserts that the omissions from the jury instructions did not affect petitioner's substantial rights because "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." Br. in Opp. 20. Again, the government misreads the record. Petitioner testified that he did not intend the official to "take action in exchange for money." Tr. 749. That testimony was supported by the official's own testimony that he merely met with petitioner and "talk[ed] about whatever his concerns were," and that petitioner even told the official at one point, "I know there's nothing you can do, but thanks for being a friend." Tr. 562, 592. Those statements are fully consistent with simply seeking goodwill, rather than bribery.

This Court should decline the government's invitation to refashion the evidence to excuse the failure to instruct the jury on a critical element of any federal bribery offense. As in *McDonnell*, the vast consequences of that error cry out for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2018