No. _____

In the Supreme Court of the United States

MICHAEL KIMBREW,

Petitioner,

–v–

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner-Appellant Michael Kimbrew, a field representative for then-Congresswoman Janice Hahn, accepted a $5,000 bribe from an undercover government agent and, in return, promised to secure a permit for a marijuana dispensary operating illegally in the City of Compton, California. For this misconduct, a jury convicted him of one count of bribery of a public official, in violation of 18 U.S.C. § 201(b)(2)(A).

Critically, however, there was no marijuana permitting process in Compton. As such, *no* public official – Kimbrew or otherwise – had the power to issue a Compton-based dispensary a permit, and Kimbrew's promise did not relate to a "question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3). Kimbrew was thus convicted of federal bribery though his offense conduct lacked an "official act." *Id.*

The Ninth Circuit Court of Appeals nonetheless upheld Kimbrew's conviction. *See United States v. Kimbrew*, 944 F.3d. 810 (9th Cir. 2019). The court reasoned

that it did not matter whether a "question, matter, cause, suit, proceeding or controversy" actually existed, provided that Kimbrew claimed it did. In other words, as the court construed 18 U.S.C. § 201, the government is not required to prove beyond a reasonable doubt that the *quo* in an illicit *quid pro quo* between a briber-payor and a public official is real – a real "matter" of public concern, upon which some public official has the power to act.

Kimbrew thus effectively converts § 201 into a commercial bribery statute, a tool to punish private acts of unjust enrichment perpetrated by federal employees. In so doing, *Kimbrew* violates the dictates of *Sun-Diamond* and creates a split with the D.C. Circuit. *See United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999); *Valdez v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc). The Court should therefore grant certiorari to correct the Ninth Circuit's misguided path, by answering the following question:

Is *Kimbrew*'s expansive reading of § 201 unconstitutional?

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Michael Kimbrew petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

OPINIONS BELOW

The Ninth Circuit's published opinion in *United States v. Kimbrew*, 944 F.3d. 810 (9th Cir. 2019), is reproduced below at App.1.

JURISDICTION

The Ninth Circuit issued its Opinion on December 9, 2019. App.1. The court denied Mr. Kimbrew's petition for panel rehearing/rehearing en banc on January 13, 2020. App.6. On March 19, 2020, this Court extended the time to file a petition for writ of certiorari by 150 days. Order list 589 U.S. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 201

(b) Whoever –

...

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of 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.

STATEMENT OF THE CASE

The Ninth Circuit's opinion in *United States v. Kimbrew* all but eliminates a core limitation on the

federal bribery statute's breadth. As the court construed 18 U.S.C. § 201, the government is not required to prove beyond a reasonable doubt that the *quo* in an illicit *quid pro quo* between a briber-payor and a public official is a real "matter" of public concern, upon which some public official has the power to act. Instead, the panel permits the government to secure a conviction where the *quo* is an outlandish promise or pure fiction, outside any official's purview.

Kimbrew is a dangerous precedent and it should not stand. At a time when the scope of liability for acts of federal bribery is an issue of national importance, *Kimbrew* effectively converts § 201 into a commercial bribery statute, in violation of the dictates of *Sun-Diamond* and in direct contravention of a reasoned en banc opinion of the D.C. Circuit. *See United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999); *Valdez v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc).

Kimbrew's expansive reading of § 201 is unconstitutional, the Ninth Circuit has veered far off course, and the Court should grant certiorari to correct its misguided path.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT REVIEW TO CORRECT THE NINTH CIRCUIT'S MISREADING OF 18 U.S.C. § 201

1. Introduction

After promising that the City of Compton had a secret plan to issue permits to marijuana dispensaries operating illegally within its borders, Petitioner-Appellant Michael Kimbrew accepted $5,000 from a government undercover agent in return for his "undying support" in securing such a permit. Though surely reprehensible, Kimbrew's conduct did not fall within 18 U.S.C. § 201, the federal bribery statute.[1]

In reaching the opposite conclusion, a three-judge panel of the Ninth Circuit noted that "[t]he reach of § 201 is not unlimited," because "the 'official act' core of § 201 carries with it a requirement that there be a nexus between the public official's position and the *quo* he promises." *United States v. Kimbrew*, 944 F.3d 810,

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[1] A public official commits bribery if he "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." 18 U.S.C. § 201(b)(2)(A).

816 (9th Cir. 2019). Though the panel did not cite a source for this "nexus" requirement, surely it derives from § 201's definition of "official act," which limits an illicit *quo* to "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).

The panel's opinion has the practical effect of reading that very nexus requirement out of the statute. Outside of Kimbrew's outlandish promises that he exercised dominion over all of Compton's affairs by virtue of his post as a local field representative for then-Congresswoman Janice Hahn, *see Kimbrew*, 944 F.3d at 812, the government adduced no evidence that *any* public official *anywhere* could issue a permit to a marijuana dispensary operating unlawfully in Compton because there was no permitting process. This was no accident. The government's theory of prosecution was that Kimbrew was guilty if he created a reasonable impression that he could issue an illegal dispensary a permit. The government never once argued at trial that a nascent permitting process was

in fact underway in Compton, nor that Kimbrew's promises were evidence that such a process existed.

Consistent with the government's theory, the district court instructed the jury to evaluate Kimbrew's claims of influence not for their *truth* (i.e., as evidence that he could, in fact, obtain a permit for an illegally-operating marijuana dispensary), but for their *believability* (by instructing that Kimbrew was guilty if he created a reasonable impression that he could make good on his promises to secure a permit). As a result, the record reflects wholly insufficient evidence that a "nexus" existed between Kimbrew's promise of a permit (the *quid*) and a "matter" that was *actually* within some public official's purview (the *quo*).

By sustaining Kimbrew's conviction on these facts, *Kimbrew* effectively lowers the government's burden of proof on the *quo* element of an illicit *quid pro quo*, in a manner entirely inconsistent with § 201's text and purpose. No longer must the government present any evidence that a real matter of public concern existed, over which the defendant promised to exert some influence; the "matter" may be a pure fiction, one invented to achieve a purely private motive of self-enrichment, without any harm to the public interest.

Stated different, if Kimbrew is guilty of federal bribery merely for lying, believably, to induce a private individual to part with money, then § 201 "lack[s] a limiting principle," as an *en banc* panel of the D.C. Circuit found in a pertinent and highly persuasive decision. *Valdez*, 475 F.3d at 1328.

Kimbrew is a particularly troubling precedent at a time when the bounds of the federal bribery statute have been squarely at issue in prominent prosecutions and legal proceedings nationwide. *See* Blake, Aaron, *Why 'bribery' is the Democrats' new impeachment focus*, Washington Post, Nov. 14, 2019 (noting that Articles of Impeachment to be introduced against President Donald Trump were, at the time, thought likely to include bribery, as defined in § 201); Anderson, Nick, *Several coaches plead not guilty in college admissions bribery scandal*, Washington Post, Mar. 25, 2019 (noting that coaches charged in the nationwide admissions scandal face bribery and racketeering charges predicated upon the federal bribery statute).

For these, and the reasons further discussed herein, the Ninth Circuit's opinion conflicts with a decision of another Court of Appeals on an issue of

national importance.

2. Background

The Ninth Circuit's opinion omits critical elements of the record, as described herein.

The government's theory, both at trial and on appeal, was that Kimbrew was guilty of federal bribery because "he agreed to perform an official act in exchange for [a] bribe payment and *created the reasonable impression that he could do so*." (GAB[2] at 34 (emphasis added); *see also* GAB at 32-33; ER 46, 87.) In other words, the government argued, it did not matter whether Kimbrew, or anyone else, actually had any power over dispensary permitting in Compton because Kimbrew claimed he did, and his claims were believable. (ER 125, 368-376.)

Relying on this so-called principle, the government requested that the district court instruct the jury as follows:

The government also does not need to prove that the defendant had actual or final authority over the

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[2] GAB refers to the government's answering brief. AOB refers to Appellant's opening brief. ARB refer to Appellant's reply brief. ER refers to Appellant's excerpts of record.

end result sought by the bribe-payer, *so long as it would have been reasonable to conclude under the circumstances* that the defendant had the influence, power, or authority over a means to the end sought by the bribe-payer. (ER 90, 91 (emphasis added).) As authority, the government cited *United States v. Freeman*, 6 F.3d 586 (9th Cir. 1993), a decision construing Hobbs Act robbery under color of official right, and cited nowhere in this Court's seminal decisions regarding § 201. (ER 90, 91.)

Consistent with its theory of liability, at trial, the government called no witnesses to testify as to whether the City of Compton was in fact planning to establish a marijuana dispensary permitting process, nor even whether there had been closed-door discussions of a future permitting endeavor. Such evidence – of the actual state of affairs – was irrelevant under its theory, provided that Kimbrew created a reasonable impression that he could issue a permit to Green Legendz, the marijuana dispensary that the undercover purported to represent.

The defense called the Compton City Attorney, Craig Cornwall, who testified that Kimbrew had no influence over him, nor over the fate of Green Legendz.

(ER 349-351.) The government made no attempt to impeach Cornwall. It made no argument, either through cross-examination or in closing, that Cornwall was in Kimbrew's pocket or otherwise not credible. Nor did it argue, at any point, that Kimbrew could influence Cornwall to give Green Legendz preferential treatment in a nascent permitting process, or even that such a process existed.

In defining "official act" – the *quo* in Kimbrew's allegedly illicit *quid pro quo* – the district court instructed the jury that, "It must be reasonable under the circumstances for a payer to have the impression the official possesses the power to bring about official action even if the official does not have the actual power to do so." (ER 465.) The district court thus, like the government, asked the jury to decide Kimbrew's liability on the basis of whether his claims of dominion over Compton's affairs were believable.[3] The jury convicted.

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[3] On appeal, the government paradoxically agreed with Kimbrew that the district court's instruction – though grounded in *Freeman*, a case that the government argued consistently at trial and *in the very same appellate brief* helped define the scope of § 201 liability – "import[ed] an additional, inaccurate element into the statute." (GAB at 42 (citation omitted).)

On appeal, Kimbrew challenged the sufficiency of the government's evidence that he violated § 201, arguing that he did not undertake an "'official act' because permitting a dispensary 'fell outside *any* official's purview[:] ... it was not a matter either pending, or which by law could be brought, before any public official, anywhere.'" *Kimbrew*, 944 F.3d, at 814. In rejecting this claim, the three-judge panel reasoned that, "[a]lthough the City Attorney denied that Kimbrew had any influence over him, … a rational jury could have reasonably concluded that Kimbrew in fact had the ability to exert the promised influence," and, that the "jury reasonably could have taken Kimbrew's recorded statements at face-value, and accepted as true that the City had pending plans to permit a small number of marijuana dispensaries to operate." *Id.*

In other words, while the panel agreed with Kimbrew that § 201 requires "a nexus between the public official's position and the *quo* he promises," *id.* at 816, it concluded that the district court record contained sufficient evidence that such a "nexus" existed. In reaching this conclusion, the panel ignored the manner in which the government and the district court framed the question of Kimbrew's guilt and,

thereby, eviscerated the very nexus requirement that it purported to honor.

3. Argument

An "official act" must be a "formal exercise of government power," such as a decision on a "question" or "matter" that is either "pending" or that "may by law be brought" before the defendant-public-official. 18 U.S.C. § 201(a)(3); *McDonnell v. United States*, ––– U.S. ––––, 136 S. Ct. 2355, 2368 (2016). However, the defendant-official need not take any official action himself to be liable under Section 201. It is sufficient that he agrees to "us[e] his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *McDonnell*, 136 S. Ct. at 2372.

The "official act" definition – whether used to determine the scope of the defendant's official purview, or that of the official over whom he promises to exert influence – supplies the "nexus" critical for liability. *See Kimbrew*, 944 F.3d at 816; *see also Valdez*, 475 F.3d at 1331 ("Both the bribery and gratuities statutes require the prosecution to show some nexus between a gift and a covered official action.") (Kavanaugh, J.,

concurring). Only those *quos* that are within the relevant official's duties as a public servant – those "questions" or "matters" that are "pending" or that "may by law be brought" before him or her – are actionable.

A defendant cannot be held liable under § 201 for a promise to do, or to influence another official to do, the impossible. Stated differently, liability will not inhere where the defendant promises action on a "matter" that does not exist, or one that could not possibly exist within the scope of the relevant official's duties. For example, a postal worker would not be guilty for accepting money in exchange for a promise to influence the Governor of California to shorten the federal work week. A Ninth Circuit clerk would not be guilty for accepting money in exchange for a promise to influence the County Supervisor of Pikesville, Maryland to heighten Los Angeles's air quality standards. So too, Kimbrew, a field representative for a federal congresswoman, is not guilty for his promise to influence the issuance of a permit to a marijuana dispensary in the City of Compton, where no permitting process existed.

To find otherwise would make a mockery of the

statute and extend § 201 beyond constitutional bounds. The D.C. Circuit's *en banc* decision in *Valdez* makes this point abundantly clear. There, the court found "official action" lacking where the defendant, a detective with the D.C. Metropolitan Police Department, accepted cash in return for querying proprietary police databases and providing a government informant with information obtained therefrom. *Valdez*, 475 F.3d at 1328-30.

The court first reasoned that the detective's query did not amount to "official action" on a "pending" matter because the queries did not relate to an investigation that was then currently underway. *Id.* at 1326 ("[W]e believe that a police officer's ascertainment of answers to questions cannot amount to a 'decision or action' on an investigation unless the ascertainment itself, or other activity in the real world, could have some prospect of bringing about (or, for that matter, squelching or redirecting) some sort of government investigation. Certainly Valdes's behavior is a far cry from that found illegal in *United States v. Carson*, 464 F.2d 424 (2d Cir. 1972), where the investigation at issue was already underway, or in *United States v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000), where the police

officer defendant visited illegally operated massage parlors and, in lieu of reporting the violations as duty required, secured payments from the parlors' operators, Valdes's queries belonged to no such active or incipient police investigation.") (some citations omitted). To take the contrary view – to find "official action" on a "pending" matter where no investigation was actually underway – the court explained, would constitute an "enormous expansion" of the range of conduct prohibited by 18 U.S.C. § 201(a)(3), one that simply "goes too far …." *Id.*

Second, the court reasoned that the detective's queries did not constitute "'decision[s] or action[s] on' some *future* investigation that might one day 'be brought' before [him] or another public official" because "the underlying issue" had not even "surfaced to some degree." *Id.* at 1328. The court explained that a "matter" that could only hypothetically be brought before some public official, at a future date, was far too speculative to fall within § 201's ambit. *Id.* ("[I]nterrogative activity cannot qualify as a 'decision or action on any question, matter, cause, suit, proceeding or controversy' merely because one can imagine that the activity would qualify as such in some imagined

investigation that might conceivably 'be brought' before some public official."). Otherwise, the "official act" definition would "lack a limiting principle…." *Id.* To satisfy constitutional muster, the court therefore concluded, the "matter" must be "at least nascent … not a pure fiction." *Id.*

The *Kimbrew* opinion directly contravenes this well-reasoned analysis. The government presented no evidence that the "matter" of a permit for marijuana dispensaries in the City of Compton was anything other than a pure fiction. Prosecutors called no witnesses to attest to any nascent permitting process, yet to be announced officially. They did not so much as cross-examine City Attorney Cornwall on his claims that Kimbrew exerted no influence over him, nor suggest that Cornwall was not credible or harbored a motive to lie. Critically, the government did not so much as argue to the jury that Kimbrew's promises were evidence that a nascent permitting process actually existed.

The Ninth Circuit nonetheless concluded that Kimbrew's promises that "he 'overs[aw] the City of Compton' in his capacity as a congressional staffer," and "had a close relationship with city officials, including the City Attorney" were evidence from which

the jury could have drawn an inference sufficient for guilt. *Kimbrew,* 944 F.3d at 812. Far from merely drawing all inferences in the government's favor, as the court was required to do, *see id.*, this analysis presumes that the jury drew inferences that the government never even suggested, namely, that Kimbrew's promises were evidence of Compton's true state of affairs. It likewise ignores the district court's instruction that Kimbrew was guilty if it was "reasonable under the circumstances for [the undercover] to have the impression" that he "possesse[d] the power to bring about official action…." (ER 465.) This instruction, by tethering guilt to the mere believability of Kimbrew's promises, removed any requirement that the jury find that Compton actually had, "in the real world," *Valdez*, 475 F.3d 1326, a permitting process that was at least nascent. It defies common sense to presume that the jury imagined such a requirement and reached their verdict in reliance upon it, as the Ninth Circuit did.

To sustain Kimbrew's conviction under the facts of this case – where the jury was instructed that he was guilty if his lies about his influence were plausible, not that the "matter" of dispensary permitting needed to be

more than a "pure fiction" – constitutes an "enormous expansion" of the range of conduct prohibited by 18 U.S.C. § 201(a)(3), one that simply "goes too far …." *Valdez*, 475 F.3d at 1326. Moreover, *Kimbrew* effectively lowers the government's burden of proof. No longer must the government make any evidentiary showing that the *quo* was a "real world" possibility, *see id.*, not a mere hypothetical; it is sufficient for the government simply to argue that a bribe-payor would reasonably believe that whatever the defendant-official promised to do could be accomplished, by him or someone else over whom he claimed to have some influence. The government will fail only in the most outlandish of cases, those where it seems unlikely that a bribe-payor would ever part with money in the first place. *Kimbrew*'s "nexus" requirement thus "lack[s] a limiting principle," stretching the statute beyond constitutional bounds. *Id.* at 1328.

Should any doubt remain, this Court made clear in *Sun-Diamond* that the term "official act" is to be narrowly construed. *See Sun-Diamond Growers*, 526 U.S. at 412 ("[T]he numerous ... regulations and statutes littering this field [ ] demonstrate that this is an area where precisely targeted prohibitions are

commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter."). Yet, in direct contravention of this principle, the Ninth Circuit adopted a construction that reads critical limitations on the statute's breadth – like "which may at any time be pending, or which may by law be brought" – in an "overly expansive" manner, or "out of the statute entirely." *Valdez*, 475 F.3d at 1323.

In conclusion, *Kimbrew* should not stand, particularly given that the proper construction of § 201 is an issue of exceptional importance today. In relieving the government of a burden to prove that the allegedly illicit *quo* was sufficiently nascent, the Ninth Circuit threatens to subvert the very purpose of the federal bribery statute: to prevent "the corruption of official decisions through the misuse of influence in *governmental* decision-making …." *United States v. Muntain*, 610 F.2d 964, 968 (D.C. Cir. 1979) (emphasis added). That is, by diluting the "nexus" requirement, the Ninth Circuit has turned the federal bribery statute into a tool to prosecute essentially private

harms, wrought by public employees. If the "matter" is a mere hypothetical, or a pure fiction, the defendant-official has enriched himself unjustly, but he has not influenced a matter of public concern in the bribe-payor's interest at the public's expense. *See id.*

As the foregoing makes plain, *Kimbrew* renders § 201 unconstitutional and creates a split of authority with the Court of Appeals for the D.C. Circuit. Because the proper scope of the federal bribery statute is an issue of national importance, *Kimbrew* must not stand, and this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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