No. 21-5081

IN THE SUPREME COURT OF THE UNITED STATES

JAMES DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether sufficient proof supports petitioner's conviction for honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; and conspiring to commit honest-services wire fraud and extortion under color of official right, in violation of 18 U.S.C. 371, where any conviction based on exchanging campaign contributions for official action was premised on an "explicit," but not necessarily "express," agreement between the payor and payee.

2. Whether this Court should overrule its decision in Evans v. United States, 504 U.S. 255 (1992).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Pa.):

United States v. Davis, No. 15-cr-138 (Mar. 5, 2019)

United States v. Green, No. 15-cr-138 (Aug. 7, 2019)

United States Court of Appeals (3d Cir.):

United States v. Davis, No. 19-1604 (Dec. 15, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the Federal Reporter but is reprinted at 841 Fed. Appx. 375. The order of the district court (Pet. App. 14a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2021. A petition for rehearing was denied on February 9, 2021 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on July 9, 2021. 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 Pennsylvania, petitioner was convicted on one count of conspiring to commit honest service wire fraud (18 U.S.C. 1343 and 1346) and to obtain property under color of official right (18 U.S.C. 1951), in violation of 18 U.S.C. 371; one count of honest services wire fraud, in violation of 18 U.S.C. 1343 and 1346; two counts of filing a false tax return, in violation of 26 U.S.C. 7206(1); and three counts of willfully failing file a tax return, in violation of 26 U.S.C. 7203. Judgment 1-2. The district court sentenced him to 121 months of imprisonment, to be followed by one year of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-13a.

1. Petitioner owned an advertising company called Reach Communications and a title search and deed preparation business called RCS Searchers, Inc. Pet. App. 2a. Beginning in 1989, the advertising company would publish property foreclosure notices for the Philadelphia Sheriff's Office, and the title company conducted title searches and prepared deeds for those properties. Ibid. Through that arrangement, petitioner's businesses made millions of dollars. Ibid.

To secure its Sheriff's Office business, petitioner provided John Green, the elected Sheriff of Philadelphia, with numerous financial benefits. Pet. App. 2a. For example, petitioner bought and repaired a house that the sheriff wanted, allowed the sheriff

to live there rent-free, and then sold the house to the sheriff at a loss of over $39,000. Ibid. Petitioner also gave the sheriff $62,000 to buy a home in Florida for his retirement; when the sheriff closed on the home, petitioner gave the sheriff an additional interest-free loan of $258,152.32, which petitioner wired directly to the title company. Ibid. Petitioner also hired the sheriff's wife to work for one of his companies and paid her $89,000 between 2004 and 2010. Id. at 3a.

In addition to those benefits, petitioner provided benefits to the sheriff's reelection campaign in 2007. The sheriff did not want to run again in 2007, but petitioner persuaded him to do so, so that petitioner could maintain his contracts with the Sheriff's Office. Pet. App. 3a. The sheriff told petitioner and Barbara Deeley, the sheriff's chief deputy, that he would run if they did "all of the work" for the campaign. Ibid. Petitioner then not only gave the sheriff's campaign money to fend off a primary opponent, but also had his advertising company provide more than $148,000 in campaign advertising services without charge, which petitioner instructed the chief deputy to falsely report on a campaign finance report as a $30,000 debt. Ibid. Later, when the campaign was running out of money, petitioner deposited $50,000 into the campaign's account and instructed the chief deputy not to record the deposit on the campaign finance report. Id. at 4a. And when the campaign needed more than $12,000 to attend a charity event and purchase an advertisement, petitioner paid the sum,

hiding the contribution by making the check payable to the chief deputy and falsely indicating that it was for a summer home rental. Ibid. Petitioner also instructed his daughter to donate $2500 to the sheriff's campaign and then repaid her. Ibid.

In exchange for all of the benefits that he received, the sheriff consistently funneled lucrative Sheriff's Office business to petitioner's companies. Pet. App. 4a. From 2002 to 2010, petitioner's advertising company received over $22 million for Sheriff's Office advertising work and the title company received over $12 million for performing real estate services for Sheriff's Office sales. Id. at 4a-5a. That business constituted about 90% of petitioner's approximately $1.9 million in net income from 2004 to 2010. Id. at 5a.

Petitioner and the sheriff took steps to conceal the scope of their arrangement. The contracts between the Sheriff's Office and petitioner's companies were oral, and reduced to writing only after an audit disclosed them. Pet. App. 5a. Even after the contracts were put in writing, they failed to include all the services for which the Sheriff's Office paid. Ibid. The sheriff also failed to disclose the gifts and loans from petitioner on financial-interest forms filed with the city. Ibid.

2. A federal grand jury in the Eastern District of Pennsylvania indicted petitioner on one count of conspiring to commit honest services wire fraud (18 U.S.C. 1343 and 1346) and to obtain property under color of official right (18 U.S.C. 1951), in

violation of 18 U.S.C. 371; four counts of honest services wire fraud, in violation of 18 U.S.C. 1343 and 1346; two counts of filing a false tax return, in violation of 26 U.S.C. 7206(1); and three counts of willfully failing to file a tax return, in violation of 26 U.S.C. 7203. Superseding Indictment 1-32.

The district court instructed the jury that it could find petitioner guilty of honest-services fraud or obtaining property under color of official right (also known as Hobbs Act extortion) based on campaign contributions only if the government could "prove that the contributions were offered, made or accepted in return for an explicit promise or undertaking by the official to perform or not to perform an official act. The agreement must be explicit, but there is no requirement that it be express." C.A. App. 5903, 5914-5915 (capitalization altered). The jury found petitioner guilty on one of the honest-services wire fraud counts and on all counts of the other offenses. Judgment 1-2.

The district court rejected petitioner's posttrial motion for judgment of acquittal. Pet. App. 14a-30a. As relevant here, the court rejected petitioner's contention that the government had failed to prove an "explicit" bribery scheme. Id. at 18a. The court observed that where bribery charges involve campaign contributions, such contributions are illegal only if made in return for an "explicit" promise by the official to perform or not perform an official act. Ibid. (citing McCormick v. United States, 500 U.S. 257, 273 (1991)). The court explained, however, that

such an agreement "can be based on inference" rather than express statements, and it found that in this case "the evidence [wa]s sufficient to show that [petitioner] participated in a quid pro quo and tried to conceal it" through the sheriff's campaign finance report. Id. at 19a.

The district court sentenced petitioner to 121 months of imprisonment, to be followed by one year of supervised release. Judgment 3-4.

3. The court of appeals affirmed. Pet. App. 1a-13a. The court rejected petitioner's argument that insufficient evidence supported the finding of an explicit quid pro quo with respect to petitioner's contributions to the sheriff's campaign. Id. at 6a-7a & n.7. The court observed that, under McCormick v. United States, supra, a campaign contribution is an illegal bribe "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," but explained that "explicit" does not mean "express." Pet. App 7a (citing McCormick, 500 U.S. at 273). The court explained that both direct and circumstantial evidence, "including the context of the arrangement, may be used to prove that there was a 'clear and unambiguous' promise of official action in exchange for payment." Id. at 8a (citation omitted).

The court of appeals found sufficient evidence that, in this case, petitioner and the sheriff "entered into a corrupt bargain." Pet. App. 9a. The court recounted the benefits that petitioner

provided to the sheriff: cash, a renovated home, funds for a retirement home, and contributions and free advertising for the sheriff's 2007 campaign. Ibid. And the court observed that petitioner had provided those benefits in return for an explicit benefit: "multi-million-dollar contracts from the Sheriff's Office." Ibid.

The court of appeals additionally noted that the jury could have inferred that petitioner and the sheriff had made a corrupt bargain based on evidence of their efforts to conceal the scope of their relationship. Pet. App. 9a-10a. The court observed that petitioner's work for the Sheriff's Office was based on an oral agreement, reduced to writing only after an audit revealed the arrangement -- and even then without disclosing the full scope of the arrangement; that the sheriff failed to disclose gifts, loans, and money from petitioner on his city financial interest forms; and that petitioner ensured that the sheriff's campaign finance reports omitted or falsely recorded the funds he provided to the campaign. Ibid. "These acts of concealment," the court found, "provided the jury with a basis to conclude that [petitioner] and [the sheriff] fully understood that [petitioner] would provide [the sheriff] with benefits in the form of campaign contributions and [petitioner] would receive millions of dollars in Sheriff's Office work, and that neither wanted their arrangement to be known." Id. at 10a.

ARGUMENT

Petitioner contends (Pet. 8-10, 13-17) that a conviction for honest-services fraud or Hobbs Act extortion based on campaign contributions to a public official must be supported by proof of an "express" quid pro quo. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. This Court has consistently denied certiorari in cases presenting that issue. See Blagojevich v. United States, 138 S. Ct. 1545 (2018) (No. 17-658); Terry v. United States, 571 U.S. 1237 (2014) (No. 13-392); Siegelman v. United States, 566 U.S. 1043 (2012) (No. 11-955); Scrushy v. United States, 566 U.S. 1043 (2012) (No. 11-972). It should do the same here. Petitioner further contends (Pet. 17-25) that the Court should overrule the interpretation of the Hobbs Act prohibition on extortion, 18 U.S.C. 1951, adopted in Evans v. United States, 504 U.S. 255 (1992). This Court has recently denied certiorari on that issue too, see Silver v. United States, 141 S. Ct. 656 (No. 20-60), and should again do the same here.

1. Petitioner contends (Pet. 13-17) conviction for bribery involving campaign contributions is impossible in the absence of an "express" agreement in which the parties gave direct voice to the quid pro quo arrangement. That contention lacks merit and does not warrant further review.

In McCormick v. United States, 500 U.S. 257 (1991), this Court addressed the elements of a prosecution for extortion under color of official right in violation of the Hobbs Act. In that case, the defendant, a state legislator, received campaign contributions from a lobbyist; the defendant and lobbyist also discussed legislation favored by the lobbyist, which the defendant later sponsored. Id. at 260-261. The defendant was charged with extortion, and the jury was instructed that it could find the defendant guilty if the payment was made "with the expectation that [it] would influence [the defendant's] official conduct, and with knowledge on the part of [the defendant] that they were paid to him with that expectation." Id. at 265 (citation omitted). This Court reversed the resulting conviction on the ground that the instruction had not required proof of an actual quid pro quo. Id. at 273.

One year later, the Court again addressed extortion under color of official right in Evans v. United States, 504 U.S. 255 (1992). The defendant in that case, a county commissioner, was convicted under the Hobbs Act for accepting $8000, purportedly as a contribution to his reelection campaign, knowing that it was intended to secure his vote and lobbying efforts on a particular matter. Id. at 257. The jury had been instructed that "if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act

regardless of whether the payment is made in the form of a campaign contribution." Id. at 258 (citation omitted). The Court held that the instruction "satisfie[d] the quid pro quo requirement of McCormick." Id. at 268.

In petitioner's case, the jury instructions stated that, to obtain a conviction based on campaign contributions, the government was required to prove that the payments were made in return for an "explicit" promise by the sheriff to take official action, while clarifying that such an agreement need not be "express." C.A. App. 5903, 5914-5915 (capitalization altered). That instruction accords with Evans and McCormick, and the court of appeals correctly rejected petitioner's claim that the evidence was insufficient unless it showed that the quid pro quo agreement was the sort of "express" agreement that he envisions. As the court explained, both direct and circumstantial evidence, "including the context of the arrangement, may be used to prove that there was a 'clear and unambiguous' promise of official action in exchange for payment." Pet. App. 8a (citation omitted). And the court correctly determined that sufficient evidence existed to satisfy that standard based on the "stream of benefits" petitioner provided to the sheriff in exchange for "multi-million-dollar contracts from the Sheriff's Office" -- an arrangement that both parties tried to conceal. Id. at 8a-9a.

Contrary to petitioner's contention (Pet. 15), McCormick's statement that "The receipt of [campaign] contributions is also

vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," 500 U.S. at 273, does not preclude conviction in a campaign-contributions bribery case so long as the parties to the bribe are careful never to directly articulate (at least around others) their otherwise evident quid pro quo arrangement. The pivotal issue in McCormick was whether the jury was required to find a quid pro quo at all, not whether that quid pro quo had to be express rather than implied. See id. at 274. The Court's subsequent decision in Evans, in contrast, did present the question of what an "instruction" must say to "satisf[y] the quid pro quo requirement of McCormick," and the Court upheld an instruction that did not require an express quid pro quo. Evans, 504 U.S. at 268.

Petitioner's proposed requirement of an "express" promise or undertaking between the payor and the official would allow the evasion of criminal liability through "knowing winks and nods," Evans, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment), even where (as the jury found here) the parties had a meeting of the minds and agreed to exchange things of value for official action. See, e.g., United States v. Carpenter, 961 F.2d 824, 827 (9th Cir.) ("When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond 'anticipation'

and into an arrangement that the Hobbs Act forbids."), cert. denied, 506 U.S. 919 (1992). Under a standard that requires not just a quid pro quo, but one that is verbally spelled out, all but the most reckless public officials will be able to avoid criminal liability for exchanging official action for campaign contributions. The instructions approved in Evans belie such an approach.

b. Petitioner errs in asserting that the decision below conflicts with decisions of other circuit courts. He contends (Pet. 10-13) that the circuits are divided on whether McCormick's requirement of an "explicit" quid pro quo promise of official action must be "express" in cases where the benefit received by the public official is a campaign contribution. But on that issue, petitioner identifies no circuit decision that reaches a different result on substantially similar facts. The First, Second, Sixth, Ninth, and D.C. Circuit decisions cited by petitioner (Pet. 11-13) do not establish any conflict on the facts of this case because they address proof requirements in circumstances not involving campaign contributions. See United States v. Turner, 684 F.3d 244, 253 (1st Cir.) ("Turner does not argue that this is a campaign contribution case."), cert. denied, 568 U.S. 1018 (2012); United States v. Ganim, 510 F.3d 134, 137-144 (2d Cir. 2007) (Sotomayor, J.) (discussing proof requirement "in the non-campaign context"), cert. denied, 552 U.S. 1313 (2008); United States v. Rosen, 716 F.3d 691, 701 (2d Cir. 2013) (declining to expand any requirement

of an express promise outside of the campaign contribution context); United States v. Abbey, 560 F.3d 513, 518 (6th Cir.) (stating that facts arose "outside the campaign context"), cert. denied, 558 U.S. 1051 (2009); United States v. Kincaid-Chauncey, 556 F.3d 923, 936-938 (9th Cir.) (discussing proof requirements "for counts involving non-campaign contributions"), cert. denied, 558 U.S. 1077 (2009); United States v. Ring, 706 F.3d 460, 465-466 (D.C. Cir.) (discussing proof requirement "outside the campaign contribution context"), cert. denied, 571 U.S. 827 (2013). And all of them, like the decision below, affirm the relevant convictions at issue. See Turner, 684 F.3d at 265; Ganim, 510 F.3d at 137; Rosen, 716 F.3d at 705; Abbey, 560 F.3d at 519; Kincaid-Chauncey, 556 F.3d at 926; Ring, 706 F.3d at 463.

Although the decisions make passing mention of the campaign-contribution context, those references do not establish that those courts would have found the standard applied in petitioner's case to be erroneous or the evidence insufficient. To the contrary, the Ninth Circuit has long recognized that a quid pro quo agreement in the campaign-contribution context "need not be verbally explicit" and that the jury "may consider both direct and circumstantial evidence" in determining its existence. Carpenter, 961 F.2d at 827; see United States v. Inzunza, 638 F.3d 1006, 1013-1014 (2011) (adhering to Carpenter), cert. denied, 132 S. Ct. 997 (2012). The Eleventh Circuit has likewise observed that a quid pro quo agreement in a campaign-contribution case "may be 'implied

from [the official's] words and actions.'" United States v. Siegelman, 640 F.3d 1159, 1172 (2011) (quoting Evans, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment)), cert. denied, 566 U.S. 1043 (2012). And the Sixth Circuit has similarly explained that "[w]hat is needed is an agreement, full stop, which can be formal or informal, written or oral. As most bribery agreements will be oral and informal, the question is one of inferences taken from what the participants say, mean and do, all matters that juries are fully equipped to assess." United States v. Terry, 707 F.3d 607, 613 (2013), cert. denied, 571 U.S. 1237 (2014).

Finally, the Seventh Circuit's decision in United States v. Allen, 10 F.3d 405 (1993) (cited at Pet. 11-12) has no direct bearing here. That case involved a racketeering charge based in part on alleged violations of a state bribery statute, where the defendant claimed that he had received campaign contributions rather than bribes. Id. at 409-410. The defendant argued that he was entitled to an instruction that conviction required an explicit quid pro quo under McCormick. Ibid. The Seventh Circuit framed the relevant question as whether "Indiana's courts [would] follow McCormick in interpreting Indiana's bribery statute," and then concluded that it did not need to answer that question because (1) the defendant's conviction had not, in fact, depended on the bribery charge, and (2) the district court had given an instruction substantially similar to the one the defendant had requested. Id.

at 411-412. The Seventh Circuit accordingly had no occasion to consider the question presented here.

c. Even if the question presented warranted review, this case would be a poor vehicle for addressing it. The district court instructed the jury that, to obtain a conviction based on campaign contributions, "the government must prove that the contributions were offered, made or accepted in return for an explicit promise or undertaking by the official to perform or not to perform an official act. The agreement must be explicit, but there is no requirement that it be express." C.A. App. 5903, 5914-5915 (capitalization altered). If petitioner believed that the jury needed to find an express agreement, he should have objected to the jury instruction. Petitioner failed to do so. In fact, petitioner's own proposed instructions made clear that, in petitioner's view at that time, "explicit" did not mean "express." See D. Ct. Doc. 101, at 54 (Feb. 13, 2018) ("To be explicit, the promise or solicitation need not be in writing but must be clearly set forth. An explicit promise can be inferred from both direct and circumstantial evidence, including the defendant's words, conduct, acts, and all the surrounding circumstances disclosed by the evidence, as well as the rational or logical inferences that may be drawn from them."). Under a number of doctrines, petitioner's previous acceptance of and failure to object to that view preclude him from obtaining relief in this Court. See, e.g., United States v. Olano, 507 U.S. 725, 733 (1993) (waiver and

forfeiture); United States v. Wells, 519 U.S. 482, 488 (1997) (invited error); City of Springfield v. Kebbe, 480 U.S. 257, 259-260 (1987) (per curiam) (prudential concerns about entertaining arguments inconsistent with a party's proposed jury instructions).

Petitioner acknowledges (Pet. 5 & n.3, 6 & n.5) that he failed to object to the jury instructions, but observes that the court of appeals agreed to review his contention through the lens of a sufficiency-of-the-evidence challenge. Pet. App. 7a n.5. The government, however, preserved its waiver argument in the court of appeals, see Gov't C.A. Br. 12-20, and may rely on it here irrespective of whether the court of appeals agreed with it, see Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979). Furthermore, the need to examine petitioner's case through the lens of a challenge to the sufficiency of the evidence, rather than a challenge to the instructions themselves, in itself makes this case a poor vehicle for reviewing the question presented.

2. Certiorari is also not warranted to review petitioner's contention (Pet. 17-25) that Evans should be overruled.

a. In Evans, this Court interpreted the Hobbs Act's provisions prohibiting extortion under color of official right in light of the common-law meaning of extortion. 504 U.S. at 259-260. The Court explained that, "[a]t common law, extortion was an offense committed by a public official who took 'by colour of his office' money that was not due to him for performance of his

official duties." Id. at 260 (footnote omitted). The Court stated that the common-law offense included "the rough equivalent of what we would now describe as 'taking a bribe.'" Ibid. More specifically, the Court held that the common-law offense -- and thus the modern statute -- encompasses "a public official [who] has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." Id. at 268.

The dissent in Evans agreed that the Court should read the extortion statute against the backdrop of the common law, but disagreed with the Court's view of the common law. 504 U.S. at 278 (Thomas, J., dissenting). In particular, the dissent maintained that, at common law, extortion "was understood to involve not merely a wrongful taking by a public official, but a wrongful taking under a false pretense of official right." Id. at 281 (emphasis omitted). The Court, however, explained that although "wrongful takings under a false pretense of official right" constituted "a well-recognized type of extortion," common-law extortion was not "limited" to that type of wrongdoing. Id. at 269 (emphasis omitted); see id. at 269-270 (discussing cases).

b. Overruling precedent generally requires a "special justification, not just an argument that the precedent was wrongly decided." Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014) (citation and internal quotation marks omitted). The Court has applied that principle with "special force in the area of statutory interpretation," where, "unlike in the context

of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court] ha[s] done." Patterson v. McLean Credit Union, 491 U.S. 164, 172-173 (1989). Evans itself noted that its holding was "buttressed by" Congress's evident "aware[ness] of the prevailing view that common-law extortion is proscribed by the Hobbs Act" and its response of "silence" rather than "contrary direction." 504 U.S. at 268-269. Neither the statute nor the common law has changed since Evans, and the Court has decided a case in which the correctness of Evans was undisputed by the parties and taken as a given by the Court itself. See Ocasio v. United States, 136 S. Ct. 1423 (2016).

Petitioner principally argues (Pet. 17-25) that Evans should be overruled because it was wrongly decided. The Court has already carefully considered and rejected each of the arguments against its reading of the statute. For example, petitioner invokes (Pet. 20-21) the statutory text, but the Court in Evans analyzed the text of the Hobbs Act with care before holding that the statute covered bribery. See 504 U.S. at 263-266. Petitioner also cites (Pet. 21-22) the common law, but the Court in Evans surveyed numerous common-law cases before finding a "complete absence of support" for the theory petitioner now advances. 504 U.S. at 270. Last, petitioner raises (Pet. 22-23) concerns about federalism, but the Court considered and rejected such concerns in both Evans itself and its subsequent decision applying Evans in Ocasio v.

United States. See Ocasio, 136 S. Ct. at 1434 n.9 ("We are not unmindful of the federalism concerns implicated by this case, but those same concerns were raised -- and rejected -- in Evans.").

Petitioner also errs in arguing (Pet. 23) that Evans warrants overruling because it "was decided without full briefing." Petitioner's argument rests (ibid.) on Hohn v. United States, 524 U.S. 236 (1998), but that case addressed the precedential force of a per curiam opinion "rendered without full briefing or argument." Id. at 251. Evans was a full merits opinion that followed briefing and argument, not simply a per curiam disposition "rendered without full briefing or argument." Ibid. Petitioner also is wrong in suggesting (Pet. 23) that the parties in Evans had failed to brief the specific issue whether the common law supported the Court's definition of extortion. While that may be true as to the petitioner in Evans, see 504 U.S. at 272 (O'Connor, J., concurring), the government's brief did address common-law extortion, see Gov't Br. at 22-26, Evans, supra (No. 90-6105). It also is unlikely that additional briefing would have changed the result, given that the Court and the dissent both reviewed the common law in detail. Evans, 504 U.S. at 269-271; id. at 280-287 (Thomas, J., dissenting).

Petitioner's contention (Pet. 23-24) that Evans has proved "pernicious in practice" likewise lacks merit. In the mine-run case, "the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the

reasonable construction given to them by the official and the payor." Evans, 504 U.S. at 274 (Kennedy, J., concurring). Petitioner cites no evidence that Evans's application has led to arbitrary or unjust results, or that courts or juries have struggled with the decision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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