Nos. 21-605 and 21-706

In the Supreme Court of the United States

DAVID LYNN ROBERSON, PETITIONER

v.

UNITED STATES OF AMERICA

JOEL IVERSON GILBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was required to instruct the jury that it could find petitioners guilty of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346, and federal-programs bribery, in violation of 18 U.S.C. 666(a)(2), only if the government proved that petitioners gave a thing of value to a public official as part of an "explicit" *quid pro quo*.

2. Whether the district court was required to instruct the jury that "expressing support" for a policy does not amount to an official act under *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), when the court of appeals and district court both found that other aspects of the instruction adequately covered that point.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ala.):

United States v. *Gilbert*, No. 17-cr-419 (Nov. 1, 2018)

United States Court of Appeals (11th Cir.):

United States v. *Roberson*, No. 18-14654 (May 27, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-37a*) is published at 998 F.3d 1237.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2021. Petitions for rehearing were denied on August 12, 2021 (Pet. App. 38a-39a). The petition for a writ of certiorari in No. 21-605 was filed on October 22, 2021. The petition for a writ of certiorari in No. 21-706

* "Pet." and "Pet. App." refer to the petition and appendix in No. 21-605.

was filed on November 10, 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 Northern District of Alabama, petitioners Joel Gilbert and David Roberson were each convicted on one count of conspiring to commit federal-programs bribery and honest-services wire fraud, in violation of 18 U.S.C. 371; one count of federal-programs bribery, in violation of 18 U.S.C. 666(a)(2) and 2; three counts of honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346, and 2; and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Gilbert Judgment 1; Roberson Judgment 1. The district court sentenced Gilbert to 60 months of imprisonment, to be followed by two years of supervised release, and Roberson to 30 months of imprisonment, to be followed by one year of supervised release. Gilbert Judgment 2-3; Roberson Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-37a.

1. Roberson was a corporate executive at a company in Alabama, and Gilbert was a lawyer who represented one of the company's subsidiaries. Pet. App. 2a-3a. The subsidiary faced liability for the cleanup of a Superfund site in Birmingham—a cleanup that could have cost it tens of millions of dollars. *Id.* at 3a; Gov't C.A. Br. 6.

The federal Environmental Protection Agency (EPA) was responsible for overseeing the cleanup, but the cleanup efforts also required the cooperation of the Alabama state government. Pet. App. 4a; see Pet. 6 (acknowledging that, "[a]s a practical matter, * * * the State's concurrence in [EPA's action] carries some weight"). In particular, the EPA was "required to reach an agreement with the State of Alabama" before it could

"access * * * additional federal funds for the cleanup." Pet. App. 4a. The Alabama Department of Environmental Management was responsible for making the final decision whether to enter into an agreement with the EPA, and the Alabama Environmental Management Commission was also involved in the decisionmaking process. *Ibid.*

Petitioners bribed an Alabama state legislator, Representative Oliver Robinson, to thwart the cleanup by hampering the EPA's efforts to reach an agreement with the State. Pet. App. 2a-3a. The bribe consisted of a stream of monthly payments—first $7000 a month, later $20,000 a month—totaling $375,000 over the course of the scheme. *Id.* at 2a, 6a; Gov't C.A. Br. 2, 20. To conceal the payments, petitioners routed them from Roberson's company through Gilbert's law firm to a foundation belonging to Representative Robinson. Pet. App. 17a. The law firm claimed that it was paying the foundation for "consulting and community outreach work," but the evidence—including Representative Robinson's own testimony—indicated that the arrangement was a sham. *Id.* at 16a; see *id.* at 8a. "[T]here was no due diligence done to ensure [that the] Foundation was even able to do the work," and Representative Robinson "did not fulfill, or even attempt to fulfill, many of the designated outreach efforts" that his foundation had supposedly been paid to conduct. *Id.* at 5a n.2, 16a.

In return, Representative Robinson performed three acts to thwart the cleanup. Pet. App. 6a-8a. First, at a meeting with the EPA, he indicated that "the local business community, and potentially local government, were ready to stymie the EPA's * * * efforts." *Id.* at 6a. Second, at a hearing held by the Alabama Environmental Management Commission, before an audience

that included the director of the Department of Environmental Management, he argued that the EPA's plans were not "supported by scientific evidence"; that the site should not "be listed as a Superfund site"; and that "finding additional companies liable for the cleanup would harm residents." *Id.* at 7a. Third, as a member of a state legislative committee, he voted to advance a resolution titled "Urging Increased Oversight of and Opposition to the EPA's Activities in Alabama." *Id.* at 7a-8a (citation omitted). The resolution, which was later adopted by the state legislature, referred to the EPA's actions at the site at issue in this case, "stated that the EPA was operating on the basis of faulty science and was working against [the Alabama Department of Environmental Management], urged the EPA to reconsider its actions, and asked that [the Department of Environmental Management] and the Alabama Attorney General 'combat the EPA's overreach.'" *Id.* at 8a.

2. A grand jury in the Northern District of Alabama indicted each petitioner on one count of conspiring to commit federal-programs bribery and honest-services wire fraud, in violation of 18 U.S.C. 371; one count of federal-programs bribery, in violation of 18 U.S.C. 666(a)(2) and 2; three counts of honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346, and 2; and one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h). Indictment 1-34. The honest-services wire-fraud statute prohibits using the wires to execute a "scheme or artifice to defraud," 18 U.S.C. 1343, including "a scheme or artifice to deprive another of the intangible right of honest services," 18 U.S.C. 1346. This Court has interpreted that prohibition to cover "bribery and kickback schemes." *Skilling* v. *United States*, 561 U.S. 358, 368 (2010). The

federal-programs bribery statute prohibits giving a thing of value "with intent to influence or reward an agent * * * of a State, local or Indian tribal government, or any agency thereof, in connection with any business * * * involving anything of value of $5,000 or more," if that "government * * * receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. 666(a)(2) and (b).

The evidence that petitioners had committed those crimes included direct trial testimony from Representative Robinson, who had pleaded guilty to his involvement in the scheme. Pet. App. 8a. Representative Robinson explained that petitioners had made payments to his foundation in return for his agreement to use his office to hamper the proposed cleanup of the Superfund site. See Trial Tr. 1672-1675, 1683-1684, 2011-2014.

Petitioners asked the district court to instruct the jury that it could find them guilty of federal-programs bribery and honest-services fraud only if the government proved that they had made payments "in return for an *explicit* promise or undertaking by [Representative] Robinson to take official action." D. Ct. Doc. 223, at 41 (July 6, 2018). The court declined to administer that instruction. Trial Tr. 4335. With respect to the federal-programs bribery charges, the court provided the alternative instruction that the government was required to prove, among other elements, that "the defendant gave a thing of value to [Representative Robinson's foundation] with the intent to reward or influence [Representative] Robinson in connection with business or transactions of the State of Alabama." *Id.* at 4371. Turning to the honest-services fraud charges, the court instructed the jury that "bribery involves the exchange of a thing or things of value for an official act," that

"[t]he agreement need not be explicit," and that "the public official need not specify the means he will use to perform his end of the bargain." *Id.* at 4375-4376.

Petitioners also asked the district court to instruct the jury that conviction for federal-programs bribery and honest-services fraud required proof that Representative Robinson had agreed to perform "official acts," as this Court defined that term in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016). See D. Ct. Doc. 223 at 29, 33. The district court provided an official-act instruction with respect to the charges of honest-services fraud, but not with respect to the charges of federal-programs bribery. See Trial Tr. 4370-4372, 4376-4377.

The instruction on the honest-services-fraud charges stated that the public official must have "agreed to make a decision or take an action on a question, matter, cause, suit, proceeding, or controversy" that "involve[s] the formal exercise of governmental power," "similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." Trial Tr. 4376. The instruction further stated that the public official's decision or action "may include using his official position to exert pressure on another official to perform an official act" or "advis[ing] another official, knowing or intending that such advice will form the basis for an official act by another official." *Id.* at 4377. The court cautioned the jury, however, that "setting up a meeting, talking to another official, or organizing an event or agreeing to do so without more is not an official act." *Ibid.* Petitioners had also asked the court to instruct the jury that "expressing support" for a policy, "without more," does not amount to an official act, D. Ct. Doc. 223 at 39, but the court declined to include

that language because it believed that its instruction already "sufficiently address[ed] this point." Trial Tr. 4336; see *id.* at 4335-4336.

The jury found petitioners guilty on all counts. Pet. App. 2a, 8a n.8. The district court sentenced Gilbert to 60 months of imprisonment, to be followed by two years of supervised release, and Roberson to 30 months of imprisonment, to be followed by one year of supervised release. Gilbert Judgment 2-3; Roberson Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-37a.

The court of appeals rejected petitioner's contention that the district court should have instructed the jury that the government was required to prove an "explicit" *quid pro quo*. Pet. App. 22a, 26a (citation omitted). The court of appeals recognized that, in *McCormick* v. *United States*, 500 U.S. 257 (1991), this Court had stated that a public official's receipt of campaign contributions amounts to extortion under color of official right only when the contributions are "made in return for an explicit promise or undertaking * * * to perform an official act." Pet. App. 22a (quoting *McCormick*, 500 U.S. at 273). The court of appeals observed, however, that this case did not involve campaign contributions and determined that the "First Amendment concerns" raised in *McCormick* were "not at issue here." *Id.* at 21a-22a. It explained that while petitioners "attempt[ed] to paint the agreement" between Gilbert's law firm and Representative Robinson's foundation "as some sort of permissible advocacy campaign" protected by the First Amendment, the jury could reasonably have found that the foundation was enlisted not to engage in any actual advocacy, but to provide a conduit for bribes. *Id.* at 20a; see *id.* at 20a-21a.

The court of appeals also rejected petitioners' argument that the district court was required specifically to instruct the jury that "'expressing support' without more" does not amount to an official act. Pet. App. 27a. The court observed that, "[a]lthough [petitioners'] proposed jury instruction is not incorrect that expressing support alone is not necessarily enough to sustain a bribery conviction 'without more,' the proposed instruction is vague as to what 'without more' means in this context." *Id.* at 28a. Because the proposed instruction failed to specify what "more" would suffice, the court found it "incomplete or misleading if not legally incorrect." *Ibid.* The court additionally observed that other portions of the jury instructions "ma[de] clear that not all conduct by an official that could in some way influence another official could properly sustain a bribery conviction." *Id.* at 29a. The court accordingly found that, "although the phrase 'expressing support' was not included in the final instruction, the final jury instruction substantially covered the issue." *Id.* at 30a. And the court observed that, in all events, Representative Robinson's vote on the resolution opposing EPA's activities was "undeniably an official act" and could not reasonably be regarded "as merely an expression of support." *Id.* at 24a, 30a.

Finally, the court of appeals rejected petitioners' argument that Section 666, the statute forbidding federal-programs bribery, requires proof of an official act. Pet. App. 10a-14a, 26a. The court observed that it had previously determined that Section 666 includes no such element. *Id.* at 12a (citing *United States* v. *McNair*, 605 F.3d 1152, 1190 (11th Cir. 2010), cert. denied, 562 U.S. 1270 (2011)).

ARGUMENT

Petitioners contend (Pet. 15-35) that the district court erred by declining to instruct the jury that the government was required to prove an "explicit" *quid pro quo* and that "expressing support" for a policy, "without more," does not amount to an official act. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or any other court of appeals. The petitions for writs of certiorari should be denied.

1. Petitioners first argue (Pet. 15-23) that the district court contravened this Court's decision in *McCormick* v. *United States*, 500 U.S. 257 (1991), by declining to instruct the jury that the government was required to prove an "explicit" *quid pro quo*. That argument is incorrect; it does not implicate any circuit conflict; and this case would be a poor vehicle for addressing the issue. This Court has previously denied a petition for a writ of certiorari raising a substantially similar issue. *DiMasi* v. *United States*, 571 U.S. 1177 (2014) (No. 13-740). The same result is warranted here.

a. In *McCormick*, the Court addressed the elements of a prosecution for extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. 1951. The defendant in that case, a state legislator, received campaign contributions from a lobbyist; the defendant and the lobbyist also discussed legislation favored by the lobbyist, which the defendant later sponsored. See *McCormick*, 500 U.S. 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. The Court stated that "[t]he receipt of [campaign] contributions" could support a conviction 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." *Ibid.*

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 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 (brackets and citation omitted). The Court held that the instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Id.* at 268. A concurring Justice explained: "The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducment from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it." *Id.* at 274 (Kennedy, J., concurring in part and concurring in the judgment).

More recently, in *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), this Court addressed a prosecution for honest-services bribery against a former state governor who accepted gifts from someone who wanted his help getting state assistance. In describing the elements of that offense, the Court explained, *inter alia*, that "[t]he agreement need not be explicit" to constitute a bribe and that "the public official need not specify the means that he will use to perform his end of the bargain." *Id.* at 2371.

b. The district court's instructions in this case accorded with *Evans* and *McDonnell*. Echoing *Evans*, the court instructed the jury that bribery "involves the exchange of a thing or things of value" for action by the public official. Trial Tr. 4375. And repeating *McDonnell* verbatim, the court instructed the jury that "[t]he agreement need not be explicit" to constitute a bribe and that "the public official need not specify the means he will use to perform his end of the bargain." *Id.* at 4376; see *id.* at 4375-4376.

Petitioners nevertheless assert (Pet. 15) that the court of appeals "defie[d] *McCormick*'s 'explicit' *quid pro quo* standard" by sustaining the jury instructions in this case. They contend (Pet. 15-16) that the courts below should instead have directed the jury to apply a "heightened proof standard" that precludes reliance on "inferences from timing and the like." That argument is incorrect in two respects.

First, petitioners err in suggesting (Pet. 15-16) that, by referring to an "explicit" *quid pro quo*, *McCormick* created a "heightened proof standard" that precludes reliance on "inferences." 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* could be

inferred from the circumstances. See 500 U.S. at 274. *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. And the instructions in this case comported with *Evans*.

Second, petitioners err in suggesting (Pet. 16-17) that any requirement of an "explicit" *quid pro quo* extends to this case on the theory that "issue advocacy" payments enjoy even more First Amendment protection than campaign contributions. *McCormick* turned not on the degree of protection that the First Amendment—which it did not even mention—accorded to the activity at issue, but on the distinctive features of campaign contributions. 500 U.S. at 272. The Court observed that "campaigns must be run and financed," that "[m]oney is constantly being solicited on behalf of candidates," and that recipients of contributions routinely "[s]erv[e] constituents" and support "legislation that will benefit the district and individuals and groups therein." *Ibid.* Thus, in the absence of "statutory language more explicit than the Hobbs Act contains," the Court considered it an "unrealistic assessment of what Congress could have meant" to conclude that legislators commit extortion "when[ever] they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries." *Id.* at 272-273. Petitioners have not shown that the payments in this case share those features of campaign contributions. Outside the campaign-contribution context, a jury can more readily evaluate whether a payment is compensation for services, as

petitioners claim here, or instead a conduit for a bribe to a public official, as the jury evidently found.

c. The court of appeals' rejection of petitioners' argument is consistent with the decisions of other courts of appeals. Even in the context of campaign contributions, courts of appeals have rejected efforts to read *McCormick*'s reference to an "explicit" *quid pro quo* to cover only express agreements and to foreclose reliance on inferences. See, *e.g.*, *United States* v. *Terry*, 707 F.3d 607, 613 (6th Cir. 2013), cert. denied, 571 U.S. 1237 (2014); *United States* v. *Carpenter*, 961 F.2d 824, 827 (9th Cir.), cert. denied, 506 U.S. 919 (1992); *United States* v. *Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) (per curiam), cert. denied, 566 U.S. 1043 (2012). The courts of appeals also have rejected efforts to extend any requirement of an "explicit" *quid pro quo* beyond cases involving campaign contributions. See, *e.g.*, *United States* v. *Salahuddin*, 765 F.3d 329, 343-344 (3d Cir. 2014), cert. denied, 575 U.S. 1009 (2015); *United States* v. *Torcasio*, 959 F.2d 503, 506 (4th Cir. 1992), cert. denied, 507 U.S. 909 (1993); *United States* v. *Whitfield*, 590 F.3d 325, 353 (5th Cir. 2009), cert. denied, 562 U.S. 833 (2010); *United States* v. *Abbey*, 560 F.3d 513, 516-521 (6th Cir.), cert. denied, 558 U.S. 1051 (2009); *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 937 (9th Cir.), cert. denied, 558 U.S. 1077 (2009); *United States* v. *Ring*, 706 F.3d 460, 466 (D.C. Cir.), cert. denied, 571 U.S. 827 (2013). Petitioners do not contend otherwise.

Petitioners' claim of a circuit conflict is instead premised on the assertion (Pet. 19) that the court of appeals adopted an "additional holding that *McCormick* does not apply *at all* to federal-programs bribery." But the court made no such "additional holding." The court

simply noted that its prior decision in *United States* v. *Siegelman*, *supra*, on which petitioners sought to rely—and which the court had already found "distinguishable" on its facts—"did not explicitly extend *McCormick*'s express *quid pro quo* requirement to all convictions made under section 666." Pet. App. 22a-23a. The court described *Siegelman* as "assuming but not deciding * * * that a *quid pro quo* instruction was required to convict under section 666." *Id.* at 23a. In describing the limits of *Siegelman* as a "[f]urther" reason for rejecting petitioners' claim that *Siegelman* supported them, the court of appeals did not adopt its own holding directly contrary to the "assum[ption]" that it had made in *Siegelman*. *Ibid.*

Even if the court of appeals had issued such a holding, moreover, petitioners would be wrong to suggest (Pet. 20) that it conflicts with the Seventh Circuit's decision in *United States* v. *Allen*, 10 F.3d 405 (1993). That case did not involve Section 666 at all; rather, it involved a racketeering charge based in part on alleged violations of a state bribery statute. *Id.* at 409-410. The defendant, claiming that the payments he received were legitimate campaign contributions rather than bribes, argued that *McCormick* entitled him to an instruction that conviction required an explicit *quid pro quo*. *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; see *id.* at 411-

412. The Seventh Circuit accordingly had no occasion to consider the question petitioners raise here.

d. At all events, this case would be a poor vehicle for reviewing petitioners' contentions about *McCormick*. Petitioners' invocation of that decision rests (Pet. 4) on the premise that their payments to Representative Robinson's foundation were part of a bona fide "public-advocacy campaign." But the court of appeals rejected petitioners' efforts to "paint" the foundation's activities as "some sort of permissible advocacy campaign," on the ground that the jury had found otherwise. Pet. App. 20a. The court observed that Representative Robinson's foundation was "the only one considered for the community work"; that "there was no due diligence done to ensure" that the foundation "was even able to do the work"; and that "Representative Robinson testified that he did not fulfill, or even attempt to fulfill, many of the designated outreach efforts" he had ostensibly been hired to perform. *Id.* at 5a n.2, 16a. The court also noted that petitioners took elaborate steps, such as "scrubbing invoices," to "hid[e] the relationship" with the foundation. *Id.* at 17a. The court accordingly found it reasonable for the jury to have found that the foundation "was enlisted not for its outreach capacity" but because it provided a conduit for a bribe. *Id.* at 21a. At a minimum, the court of appeals' understanding of this case as not involving payments genuinely meant to fund a protected advocacy campaign makes the case an unsuitable vehicle for reviewing petitioners' legal contentions.

In addition, even assuming that the district court should have instructed the jury that the government was required to prove an "explicit" *quid pro quo*, the omission of that requirement was harmless. See *Neder*

v. *United States*, 527 U.S. 1, 15 (1999). Representative Robinson testified that the payments to his foundation were bribes given in return for his use of his office to benefit petitioners. See, *e.g.*, Trial Tr. 1672-1675, 1683-1684, 2011-2014. Given that testimony and the other evidence introduced at trial, a reasonable jury would necessarily have found an explicit *quid pro quo*. And contrary to petitioners' claim (Pet. 19) that the government did "not argu[e] harmless error below," the government did expressly argue (Gov't C.A. Br. 70) that "any error would be harmless because the evidence sufficiently proved an explicit *quid pro quo*."

2. Petitioners next contend (Pet. 23-35) that the court of appeals misapplied this Court's decision in *McDonnell*. That contention appears to include three subsidiary arguments: (1) the court of appeals erred in upholding the jury instructions on the honest-services charges (Pet. 23-28), (2) the court erred in finding any omission in those instructions harmless (Pet. 28-29), and (3) the court erred in concluding that Section 666 does not contain an official-act requirement (Pet. 30-33). None of those arguments warrants this Court's review.

a. In *McDonnell*, the government prosecuted a former state governor for honest-services fraud in violation of Sections 1343 and 1349, and Hobbs Act extortion in violation of Section 1951(a), based on his acceptance of things of value in exchange for setting up meetings with other public officials. 136 S. Ct. at 2361-2364. The parties agreed that the elements of the honest-services fraud and Hobbs Act extortion charges should be defined by reference to the federal-official bribery statute, 18 U.S.C. 201. *McDonnell*, 136 S. Ct. at 2365. That statute makes it a crime for a person to pay a public official to accept anything of value in return for being "in-

fluenced in the performance of any official act." 18 U.S.C. 201(b)(2)(A). The statute defines an official act as "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." 18 U.S.C. 201(a)(3).

This Court explained that Section 201 sets out two requirements for an official act. *McDonnell*, 136 S. Ct. at 2368. First, the government must identify a "focused and concrete" question or matter that involves "a formal exercise of governmental power." *Id.* at 2369-2370. Second, the government must show that the public official made a decision or took an action "on" that question or matter. *Id.* at 2368. The Court concluded that merely "[s]etting up a meeting, hosting an event, or calling an official" does not satisfy that latter requirement, but that "using [one's] 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,'" does suffice. *Id.* at 2371-2372. The Court additionally stated that "[s]imply expressing support" does not qualify as an official act, "as long as the public official does not intend to exert pressure on another official or provide advice, knowing or intending such advice to form the basis for an 'official act.'" *Id.* at 2371.

b. This case involves no dispute about the meaning of *McDonnell* or of the governing statute. The court of appeals acknowledged that, under this Court's decision in *McDonnell*, "merely expressing support" for a policy does not constitute "an official act." Pet. App. 28a. Instead, the case involves a dispute about whether the

district court's instructions accurately conveyed the law as set out in *McDonnell*.

McDonnell itself did not specify any particular form of words that district courts must use to instruct juries about the official-act requirement. And the Court has made clear 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). The court of appeals accordingly found that in the circumstances of this case, "although the phrase 'expressing support' was not included in the final instruction, the final jury instruction substantially covered the issue." Pet. App. 30a.

The court of appeals reviewed the jury instructions as a whole and explained that they made clear that "not all conduct by an official could properly sustain a bribery conviction"; that "not everything an official does or says can sustain the charge"; and that "any advice renderd must have been intended to alter the other official's conduct, not merely to express support." Pet. App. 29a-30a. The court also found that petitioners' proposed alternative instruction—that "expressing support," "without more," did not constitute an official act—was insufficiently specific to provide useful guidance here, because it failed to spell out what "without more" meant in this context. *Id.* at 29a. The court of appeals thus found no error in the district court's decision to give its instruction rather than the "incomplete or misleading" instruction that petitioners preferred. *Id.* at 28a.

Petitioners argue (Pet. 26-28) that the court of appeals erred in finding that the instructions adequately covered the issue of expressing support. But that

factbound, case-specific dispute about the meaning of the instructions in this case 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 erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is particularly so here, given that both courts below agreed that the instructions adequately covered the issue raised by petitioners. See *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

Petitioners' suggestion (Pet. 27) that the question presented transcends this case because "the model jury instructions in the Eleventh Circuit also omit the 'mere support' clarification" is misplaced. The district court in this case went beyond the Eleventh Circuit's model instructions, adding clarifying language in response to petitioners' requests. Compare Trial Tr. 4377 (instructing the jury to "consider what the public official actually did, not simply what his title or position was"), with 11th Cir. Pattern Jury Instructions O5.1 (2020) (omitting that language). The court of appeals thus had no occasion to—and did not—hold that the model instructions alone would have been adequate even in the context of this case, let alone the context of any other. This case therefore would not be an appropriate vehicle for reviewing any claims concerning the model instructions.

Finally, petitioners err in asserting (Pet. 26-28) that the decision below conflicts with *United States* v. *Fattah*, 914 F.3d 112 (3d Cir. 2019), and *United States* v. *Silver*, 864 F.3d 102, 122 (2d Cir. 2017), cert. denied, 138 S. Ct. 738 (2018). Each of those cases involved a trial held before *McDonnell*, and the court of appeals in each case found the instructions inadequate because they contradicted *McDonnell*. See *Fattah*, 914 F.3d at 156; *Silver*, 864 F.3d at 118-119. Neither court, however, insisted that jury instructions include specific words such as "expressing support." To the contrary, each court recognized that instructions are permissible if "the instructions as a whole * * * make clear to the jury all the necessary elements." *Fattah*, 914 F.3d at 172; see *Silver*, 864 F.3d at 118 ("[W]e examine the charges as a whole to see if the entire charge delivered a correct interpretation of the law.") (citation omitted). The instructions in those cases did not do so, but the court of appeals found that the different instructions given here did.

c. Petitioners next argue (Pet. 28) that the court of appeals erroneously adopted an "alternative holding" that "[a]ny error was harmless because Robinson's vote on [the resolution opposing EPA's activities] was undeniably official." That argument likewise lacks merit.

As an initial matter, the court of appeals never adopted the "alternative holding" (Pet. 28) that petitioners attribute to it. The court observed that, under its precedent, an appellate court considering a district court's denial of a requested instruction should consider, among other factors, whether the instruction "deals with some point in the trial so 'vital' that the [omission] seriously impaired" the defense. Pet. App. 26a (citation omitted). In the course of explaining that

the instruction requested here did not satisfy that standard, the court of appeals remarked that "[n]o reasonable jury could have found that the vote on [the resolution] was merely expressing support." *Id.* at 30a. Petitioners interpret that statement (Pet. 28) as an "alternative holding" that "[a]ny error was harmless," but the court said nothing about harmless error in that portion of its opinion.

Even accepting petitioners' interpretation, the court of appeals' "alternative holding" (Pet. 28) would not conflict with any decision of this Court or any other court of appeals. Petitioners argue (*ibid.*) that "this Court has long held that a new trial is required if there were multiple theories instructed to a jury, one [of which] is legally invalid." But this Court has rejected that view, explaining that ordinary harmless-error review applies even "in the context of a jury instructed on multiple theories of guilt, one of which is improper." *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61 (2008) (per curiam); see *ibid.* (explaining that "drawing a distinction between alternative-theory error and [other] instructional errors * * * would be 'patently illogical'") (citation omitted). Petitioners cite (Pet. 28) this Court's decisions in *Yates* v. *United States*, 354 U.S. 298 (1957), and *Stromberg* v. *California*, 283 U.S. 359 (1931), but this Court has already rejected reliance on those decisions in this context. See *Pulido*, 555 U.S. at 60 (explaining that *Yates* and *Stromberg* predate the development of the Court's modern harmless-error juisprudence). Petitioners also cite (Pet. 28) *McDonnell*, *United States* v. *Silver*, *supra*, and *United States* v. *Fattah*, *supra*, but those cases did not reject the application of harmless-error review in the present context. Rather, they simply applied the usual harmless-error standard and found that the

government had not satisfied it on the facts of those cases. See *McDonnell*, 136 S. Ct. at 2375; *Fattah*, 914 F.3d at 514; *Silver*, 864 F.3d at 120-121. And to the extent petitioners mean to challenge what they regard (but the court of appeals itself did not identify) as the court of appeals' application of the harmless-error standard to the facts of this case, that factbound issue does not warrant this Court's review. See Sup. Ct. R. 10; *Johnston*, 268 U.S. at 227.

d. Finally, petitioners argue (Pet. 30-33) that Section 666, the federal-programs bribery statute, requires proof of an agreement to exchange a thing of value for an "official act," as defined in *McDonnell*. This Court has recently and repeatedly denied petitions for writs of certiorari raising the question whether Section 666 requires proof of an "official act," as that term was defined in *McDonnell*. See *Winfield* v. *United States Probation & Pretrial Services*, 141 S. Ct. 1076 (2021) (No. 20-731); *Ng Lap Seng* v. *United States*, 141 S. Ct. 161 (2020) (No. 19-1145); *Robles* v. *United States*, 140 S. Ct. 2761 (2020) (No. 19-912); *Boyland* v. *United States*, 138 S. Ct. 938 (2018) (No. 17-7192). The same result is warranted here.

As discussed above, the Court in *McDonnell* interpreted the "official act" requirement in Section 201, which makes it a crime for a person to pay or a public official to accept anything of value in return for being "influenced in the performance of any official act." 18 U.S.C. 201(b)(2)(A). But unlike Section 201, Section 666 does not specifically refer to an "official act." Petitioners observe that Section 666 "forbids any payments 'to influence or reward an agent' of the state * * * 'in connection with' state business." Pet. 31 (citation omitted). But petitioners identify no sound reason to believe

that those words in Section 666 bear exactly the same meaning as the phrase "official act," as explicitly defined in 18 U.S.C. 201. And the district court did instruct the jury that the government was required to prove that "the defendant gave a thing of value to [Representative Robinson's foundation] with the intent to reward or influence [Representative] Robinson in connection with business or transactions of the State of Alabama." Trial Tr. 4371.

No circuit conflict exists on whether Section 666 requires proof of an "official act," as that term is used in Section 201 and as it was defined in *McDonnell*. Rather, the courts of appeals that have addressed the issue after *McDonnell* have held that it does not. See Pet. App. 14a; *United States* v. *Ng Lap Seng*, 934 F.3d 110, 134 (2d Cir. 2019), cert. denied, 141 S. Ct. 161 (2020); *United States* v. *Porter*, 886 F.3d 562, 565 (6th Cir. 2018). Those courts have reasoned that, "[i]n addressing various manifestations of bribery under the federal criminal law, Congress may, of course, define the particular *quids* and *quos* prohibited" in different ways. *Ng Lap Seng*, 934 F.3d at 132; see *Porter*, 886 F.3d at 565.

Petitioners cite (Pet. 32) three cases that predate *McDonnell*, but none of those cases establishes a circuit conflict. In each, the court of appeals used the phrase "official act" or "official action" in the course of addressing a different issue about the meaning of Section 666—specifically, whether that provision covers not just bribes but also illegal gratuities. See *United States* v. *Fernandez*, 722 F.3d 1, 23 (1st Cir. 2013); *United States* v. *Zimmerman*, 509 F.3d 920, 927 (8th Cir. 2007); *United States* v. *Jennings*, 160 F.3d 1006, 1017-1018 (4th Cir. 1998). In none of those cases did the court hold that Section 666 requires proof of an "official act" as

that term is used in Section 201 or as this Court would later construe it in *McDonnell*.

This case would in any event be a poor vehicle for considering such an element. Although the district court did not include an official-act instruction when charging the jury on the elements of federal-programs bribery under Section 666, it did include such an instruction when charging it on the elements of honest-services fraud. See pp. 6-7, *supra*. And the jury found petitioners guilty on the honest-services charges. See p. 7, *supra*. Given that the evidence supporting the honest-services-fraud-by-bribery convictions on that issue would apply equally to the Section 666 counts, no sound basis exists to believe that the same jury would have found an official act with respect to one set of counts but not with respect to the other. Any error in the Section 666 instructions was thus harmless.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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