No. 13-392

In the Supreme Court of the United States

STEVEN J. TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
JOHN-ALEX ROMANO
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a conviction for honest-services bribery based on campaign contributions, in violation of 18 U.S.C. 1341 and 1346, requires proof of an express agreement to exchange campaign contributions for official action.

2. Whether such a conviction requires proof of a specific link, at the time the campaign contribution was made, between the contribution and a particular official act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

In the Supreme Court of the United States

No. 13-392

STEVEN J. TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 707 F.3d 607.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17-18) was entered on February 14, 2013. A petition for rehearing was denied on April 29, 2013 (Pet. App. 31-32). On July 11, 2013, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 26, 2013, and the petition was filed on September 23, 2013. 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 Ohio, petitioner

was convicted on one count of conspiring to commit mail fraud and honest-services mail fraud, in violation of 18 U.S.C. 1341, 1346 and 1349, and two counts of honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346. Pet. App. 5, 19-20. He was sentenced to 63 months of imprisonment, to be followed by two years of supervised release. *Id.* at 22-23. The court of appeals affirmed. *Id.* at 1-18.

1. Petitioner is a former state-court judge who was appointed by the Governor of Ohio to fill a vacancy on the Cuyahoga County Court of Common Pleas. Pet. App. 3. Shortly after his appointment, petitioner announced that he would seek reelection. *Ibid.* He sought the assistance of County Auditor Frank Russo, who had originally recommended him for the judgeship and had lobbied in support of his appointment. *Ibid.*

Russo's official staff provided petitioner with political assistance, including by working for his campaign during business hours. Pet. App. 4. In addition, Russo's political action committee donated $500 to petitioner's campaign and purchased about $700 of stationery, envelopes, and car magnets for the campaign. *Ibid.* Russo testified at trial that, in return for his efforts, he expected that petitioner would "answer the phone anytime [Russo] called"; that petitioner would "give * * * special attention, follow through for [Russo], and basically give [Russo] the benefit of the doubt" whenever Russo presented petitioner "with a recommendation, or a problem, or a case"; and that "of course, [petitioner] would do what [Russo] asked him to do," including making rulings requested by Russo in pending litigation. Gov't C.A. Br. 17 (quoting 9/14/11 Tr. 290 (Tr.)).

Unbeknownst to petitioner, federal agents had tapped Russo's phones as part of a corruption investigation. Pet. App. 3. On July 15, 2008, the wiretap recorded a conversation between Russo and a local attorney who had two cases involving bank foreclosures pending before petitioner. *Ibid.* The attorney asked Russo to have petitioner deny the bank's summary-judgment motions in order to force a settlement. *Ibid.*; Gov't C.A. Br. 6-7. Russo responded that he would make sure that petitioner did what he was "supposed to do" with those cases. Pet. App. 3.

Two days later, Russo called petitioner and told petitioner to deny the summary-judgment motions. Pet. App. 3. Petitioner, by responding "[g]ot it," agreed to do so. *Id.* at 3, 14. During the same conversation, petitioner and Russo discussed future fundraising events for petitioner. *Id.* at 3. Later that day, petitioner directed the magistrate judge handling the foreclosure cases to deny the bank's motions. *Id.* at 4. The magistrate judge, who was surprised by the directive, instead passed along the docket to petitioner so that petitioner could deny the motions himself. *Ibid.* Petitioner did so, "even though he never reviewed the case files, never read the motions before denying them and never obtained a recommendation from the magistrate or anyone else (within the court system) about how to rule on the motions." *Ibid.* The next day, petitioner told Russo that he had denied the motions and that "we're all on the same page." Gov't C.A. Br. 7.

2. A federal grand jury indicted petitioner on one count of conspiring to commit mail fraud and honest-services mail fraud, in violation of 18 U.S.C. 1341, 1346 and 1349; one count of mail fraud, in violation of 18

U.S.C. 1341; and three counts of honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346. Gov't C.A. Br. 3. The honest-services mail-fraud statute forbids the use of the mail in furtherance of "any scheme or artifice to defraud," 18 U.S.C. 1341, where the scheme or artifice aims to "deprive another of the intangible right of honest services," 18 U.S.C. 1346. In *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), this Court interpreted the phrase "scheme or artifice * * * to deprive another of the intangible right of honest services" to refer to bribery and kickback schemes. *Id.* at 2927, 2931.

At the close of the government's case, petitioner moved for judgment of acquittal on the ground that the evidence failed to prove that he had entered into a *quid pro quo* arrangement with Russo. Tr. 880-890. Petitioner "agree[d]" that "the *quid pro quo* doesn't have to be in express terms," Tr. 886, but argued that the government had not proven a "specific intent" to exchange something of value for an official act "favorable to the donor" that would be "requested in the future," Tr. 881. The district court denied the motion. Tr. 900-901.

The district court subsequently instructed the jury that bribery and kickbacks can constitute honest-services fraud; that bribery and kickbacks "involve the exchange of a thing or things of value for official action by a public official, in other words, a *quid pro quo* (a Latin phrase meaning 'this for that' or 'these for those')"; that the "public 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"; and that "the intent to exchange may be established by circumstantial evi-

dence, based upon the defendant's words, conduct, acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them." Pet. App. 69-70. The court also instructed the jury that to establish the element of "intent to effect an exchange of money or other thing of value for official action, * * * each payment need not be correlated with a specific official act." *Id.* at 70. Instead, "[a]ll that must be shown is that payments were made with the intent of securing a specific type of official action in return. For example, payments may be made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the public official will take specific official actions on the giver's behalf." *Id.* at 71. Before the court charged the jury, petitioner's counsel stated that he was satisfied with the final jury instructions, and counsel did not object to the instructions after they were given. Tr. 1155, 1198-1199.

The jury convicted petitioner on the conspiracy count and two substantive counts of honest-services fraud, which related to checks Russo's political action committee wrote to pay for stationery, envelopes, and car magnets for petitioner's campaign. Pet. App. 5, 68. The jury acquitted petitioner on the two remaining counts. *Id.* at 5. The district court sentenced petitioner to 63 months of imprisonment, to be followed by two years of supervised release. *Id.* at 5, 22-23.

3. The court of appeals affirmed. Pet. App. 1-18. As relevant here, it concluded that the district court had correctly instructed the jury on honest-services bribery. *Id.* at 7-13. The court determined that the

jury instructions had "accurately conveyed that an agreement is the key component of a bribe"; had correctly required the jury to find that petitioner "agreed 'to accept [a] thing of value in exchange for official action'"; and had properly informed the jury that "[a] 'thing of value' could include a campaign contribution, so long as that was 'received in exchange for official acts.'" *Id.* at 12-13 (citations omitted). The court of appeals also determined that the instructions had correctly permitted the jury to infer petitioner's "intent to exchange official acts for contributions" from his words and conduct and had properly stated that each payment need not be tied to a specific official act, "so long as [petitioner] understood that, 'whenever the opportunity presented itself,' [petitioner] would 'take specific official actions on the giver's behalf.'" *Id.* at 13 (brackets and citations omitted).

The court of appeals recognized that, in this prosecution of a public official, "[o]ne element of bribery is that the public official must agree that 'his official conduct will be controlled by the terms of the promise or the undertaking.'" Pet. App. 8 (quoting *McCormick* v. *United States*, 500 U.S. 257, 273 (1991)). The court also recognized that "[t]his agreement must include a quid pro quo—the receipt of something of value 'in exchange for an official act.'" *Ibid.* (quoting *United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 404-405 (1999)). It held, however, that the agreement "need not spell out which payments control which particular official acts," so long as "the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose." *Id.* at 9 (internal quotation marks and citation omitted). "What is needed," the court explained, "is

an agreement, full stop, which can be formal or informal, written or oral," and which can be inferred from the parties' words and actions. *Id.* at 9-10.

The court of appeals also explained that a bribe is not "insulate[d] * * * from scrutiny" simply because it "doubles as a campaign contribution." Pet. App. 10. It observed, in particular, that this Court's decision in *Evans* v. *United States*, 504 U.S. 255 (1992), had upheld the conviction of a state legislator for a criminal scheme involving asserted campaign contributions. Pet. App. 10-11. Although a "donor who gives money in the hope of unspecified future assistance does not agree to exchange payments for actions," the court explained that a "donor and [an] official have formed a corrupt bargain," which converts what would otherwise be "a run-of-the-mine contribution" into a "bribe," when "a donor (like Russo) makes a contribution so that an elected official will 'do what I asked him to do,' [Tr. 290], and the official (like [petitioner]) accepts the payment with the same understanding." *Id.* at 11.

The court of appeals rejected petitioner's argument that, in the campaign-contribution context, "a payment becomes a bribe only if it is made in exchange for a *specific* official act or omission." Pet. App. 11 (internal quotation marks and citation omitted). The court recognized that this Court's decision in *McCormick* v. *United States*, *supra*, had held that a public official's receipt of campaign contributions can be punished as extortion "under color of official right" in violation of the Hobbs Act, 18 U.S.C. 1951(a) and (b)(2), only if the contributions "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; see Pet. App. 12. But the court declined to read that decision to "give an elected judge the First Amendment right to sell a case so long as the buyer has not picked out *which* case at the time of sale." Pet. App. 12.

Applying all of those principles, the court of appeals found that the evidence in this case was sufficient to support petitioner's conviction. Pet. App. 13-16. Citing *McCormick*, 500 U.S. at 272, the court recognized that "[w]ithout anything more, a jury could not reasonably infer that a campaign contribution is a bribe solely because a public official accepts a contribution and later takes an action that benefits a donor." Pet. App. 15. But where, as here, "a public official acts as a donor's marionette, * * * a jury can reject legitimate explanations for a contribution and infer that it flowed from a bribery agreement." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 9-27, 32-35) that this Court's decision in *McCormick* v. *United States*, 500 U.S. 257 (1991), requires that an honest-services-bribery prosecution based on campaign contributions to a public official be supported by proof of an "explicit" or "expressed" *quid pro quo*, which may not be inferred from circumstantial evidence. Petitioner also contends (Pet. 28-32) that such a prosecution requires proof linking the campaign contribution to a specific official act. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or any other court of appeals. This Court has recently denied certiorari in cases presenting similar or identical issues. See *Siegelman* v. *United States*, 132 S. Ct. 2711 (2012) (No. 11-955) (presenting question of express agree-

ments); *Scrushy* v. *United States*, 132 S. Ct. 2712 (2012) (No. 11-972) (same, in a companion case); *Minor* v. *United States*, 131 S. Ct. 124 (2010) (No. 09-1422) (presenting question of specific official acts); *Teel* v. *United States*, 131 S. Ct. 134 (2010) (No. 09-11039) (same, in a companion case); *Whitfield* v. *United States*, 131 S. Ct. 136 (2010) (No. 09-11067) (same, in a companion case). It should do the same here.

1. Petitioner argues that the district court was required to instruct the jury that it could find him guilty of the honest-services-fraud charges only if the government proved an "explicit or expressed" *quid pro quo*, Pet. 27, by which petitioner means "articulated commitments, not inferences or implications," Pet. 11.[1] That argument lacks merit and does not warrant further review.

a. In *McCormick*, this Court held that a Hobbs Act prosecution based on campaign contributions to a public official requires proof of a *quid pro quo*. Petitioner relies on *McCormick*'s reference to a political contribution "made in return for an explicit promise or undertaking by the official to perform or not to perform an official act" and its statement that, "[i]n such situations the official *asserts* that his official conduct will be controlled by the terms of the promise or undertaking." 500 U.S. at 273 (emphasis added); see Pet. 10-11, 21-25. But those statements do not address the manner in which an agreement must be

[1] Petitioner also contends (Pet. 27) that the evidence failed to prove an "explicit or expressed *quid pro quo* agreement." He does not dispute, however, that the evidence was sufficient to prove a *quid pro quo* under the standard as instructed by the district court.

proved at trial. And in *McCormick* itself, the jury had not been instructed to find a *quid pro quo* at all, explicit or otherwise. 500 U.S. at 274. *McCormick*, therefore, does not impose petitioner's desired requirement.

Moreover, petitioner's argument is foreclosed by *Evans* v. *United States*, 504 U.S. 255 (1992), which was decided just one year after *McCormick*. 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 defendant argued in this Court (among other things) that this instruction had failed to "properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution." *Id.* at 267-268. The Court rejected that argument, holding that the instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Ibid.*

The instructions given in this case covered the essential aspects of the instruction approved in *Evans*. Petitioner asserts (Pet. 32) that the instructions "focus[ed] solely on Russo's unilateral intent," but they in fact required the jury to find that petitioner himself intended an exchange of official action for campaign contributions. In order to convict, the jury had to

determine that "the public official" (*i.e.*, petitioner) "solicit[ed] or agree[d] to accept a thing of value in exchange for official action"; that "payments were made with the intent of securing a specific type of official action in return" (even though "each payment need not be correlated with a specific official act"); and that, "whenever the opportunity present[ed] itself," the public official intended to take "specific official actions on the giver's behalf." Pet. App. 70-71.

As the court of appeals correctly explained, a *quid pro quo* agreement "can be formal or informal, written or oral." Pet. App. 10. The court of appeals was likewise correct that, because "most bribery agreements will be oral and informal, the question" whether one existed in a particular case "is one of inferences taken from what the participants say, mean and do, all matters that juries are fully equipped to assess." *Ibid.* As Justice Kennedy observed in *Evans*, "[t]he criminal law in the usual course concerns itself with motives and consequences, not formalities. And 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." 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, "matters of intent are for the jury to consider." *McCormick*, 500 U.S. at 270; see *United States* v. *Williams*, 553 U.S. 285, 306-307 (2008).

Petitioner attempts (Pet. 12) to distinguish *Evans* by arguing that it "was not a campaign contribution case with any 'free speech' concerns under the First Amendment." That is incorrect. In fact, the defendant in *Evans* contended that all of the payments were contributions; the instructions required the jury to

apply the same standard regardless of whether the payments were contributions; and this Court assessed the adequacy of the instructions under *McCormick*, a case about campaign contributions. See *Evans*, 504 U.S. at 257-258, 267-268; see also *id.* at 278 (Kennedy, J., concurring in part and concurring in the judgment) ("Readers of today's opinion should have little difficulty in understanding that the rationale underlying the Court's holding applies *not only* in campaign contribution cases, but in all § 1951 prosecutions.") (emphasis added).

Similarly unavailing is petitioner's effort (Pet. 12) to distinguish *Evans* on the theory that the question presented was whether an affirmative act of inducement (such as a demand) by a public official is an element of extortion under color of official right. The defendant in *Evans* directly challenged the adequacy of the jury instructions under *McCormick* on the ground that passive acceptance of a campaign contribution based on a specific requested exercise of official power is not a *quid pro quo* unless the official complies or attempts to comply with the request. Pet. Br. at 23, 45-47, *Evans*, *supra* (No. 90-6105). Rejecting that challenge, the Court concluded that the instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Evans*, 504 U.S. at 268. By clarifying that "knowing that the payment was made in return for official acts" is enough to support conviction, *Evans* "gave content to what the *McCormick quid pro quo* entails." *United States* v. *Blandford*, 33 F.3d 685, 696 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995).[2]

---

[2] Petitioner contends in a footnote that this Court's decision in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), "mandates that the instructions for wire fraud, bribery and extortion cases require

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 and the evidence proved 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 with all "i's" dotted and "t's" crossed, all but the most reckless public officials will be able to avoid criminal liability for exchanging official action for campaign contributions.

b. Petitioner errs in asserting (*e.g.*, Pet. 26) that the decision below conflicts with decisions of other circuit courts. He contends (Pet. 14) that "[c]ircuit courts are uncertain whether the *McCormick* and *Evans* pair of cases creates a special rule for cam-

---

the jury to find that a defendant engaged in an express quid pro quo." Pet. 31 n.6 (citing *Skilling*, 130 S. Ct. at 2931). That is incorrect. *Skilling* "did not eliminate from the definition of honest services fraud any particular type of bribery, but simply eliminated honest services fraud theories that go beyond bribery and kickbacks." *United States* v. *Bryant*, 655 F.3d 232, 245 (3d Cir. 2011); see *Skilling*, 130 S. Ct. at 2931. Neither the portion of *Skilling* cited by petitioner nor any other portion of the decision mentions a *quid pro quo* requirement, let alone discusses how a *quid pro quo* might be proved in an honest-services prosecution.

paign contributions alleged to be bribes or a general rule for all bribery cases." But because the bribes here involved only campaign contributions, this case does not implicate any potential disagreement in the circuits about whether or to what extent *McCormick* and *Evans* apply outside the campaign-contribution context.

On the specific issue of whether an "express" or "articulated" *quid pro quo* is required in campaign-contribution cases, petitioner identifies no circuit decision that reaches a different result on substantially similar facts. The Second, Third, Ninth, and D.C. Circuit decisions cited by petitioner (Pet. 14-15, 18, 26-27) 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. *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. *Antico*, 275 F.3d 245, 257-260 (3d Cir. 2001) (discussing proof requirements "outside the context of campaign contributions"), cert. denied, 537 U.S. 821 (2002); *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, 134 S. Ct. 175 (2013). And all of them, like the decision below, affirm the relevant convictions at issue. See *Ganim*, 510 F.3d at 137; *Kincaid-Chauncey*, 556 F.3d at 926; *Ring*, 706 F.3d at 463; see also *Antico*, 275

F.3d at 248 (vacating other convictions on unrelated grounds).

Although the decisions make passing mention of the campaign-contribution context, those references are dicta and do not establish that those courts would have found the jury instructions to be erroneous, or the evidence to be insufficient, in this particular case. Indeed, the Third Circuit's discussion in *Antico* accords with the court of appeals' approach here. See *Antico*, 275 F.3d at 257 ("In *Evans*, decided one year after *McCormick*, the Supreme Court ruled that a jury instruction containing an implicit, as opposed to an explicit, *quid pro quo* requirement in the context of campaign contributions passed muster under *McCormick*."). And the Ninth Circuit has long held 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 concluded 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, 132 S. Ct. 2711, and 132 S. Ct. 2712 (2012).

The Fourth Circuit's decision in *United States* v. *Taylor*, 993 F.2d 382, cert. denied, 510 U.S. 891 (1993) (cited at Pet. 26), does not hold otherwise. The defendant in that case was convicted of several Hobbs Act charges as a result of monetary payments he

received while serving as a state legislator, which he claimed were simply campaign contributions. 993 F.2d at 382-383. The Fourth Circuit concluded that the jury instructions, which were given before the decisions in *McCormick* and *Evans*, were inconsistent with those decisions because they allowed conviction merely on the theory that "payments were made because of [the defendant's] public office" and did not require proof that the defendant "received a payment to which he was not entitled, knowing that the payment was made in return for his official acts." *Id.* at 385; see *United States* v. *Taylor*, 966 F.2d 830, 831-832 (4th Cir. 1992) (noting that trial occurred in 1990). The jury instructions here, which required the jury to find a *quid pro quo* (see Pet. App. 70-71) contained no similar error.

The Seventh Circuit's decision in *United States* v. *Allen*, 10 F.3d 405 (1993) (cited at Pet. 18), likewise 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 "would Indiana's courts follow *McCormick* in interpreting Indiana's bribery statute?" and then concluded that it did not need to answer that question because (1) petitioner'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.

Petitioner finally contends (Pet. 26) that the decision in this case conflicts with the Sixth Circuit's own prior precedent in *United States* v. *Abbey*, 560 F.3d 513, cert. denied, 558 U.S. 1051 (2009). That case, however, did not involve campaign contributions, *id.* at 515, 518, so any reference to the campaign-contribution context was dicta. In any event, any intra-circuit tension counsels against intervention by this Court at this time, because such tension would be best resolved in the first instance by the court of appeals itself. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

c. Contrary to petitioner's contention (Pet. 16-17, 19), the absence of a heightened standard of a verbally explicit *quid pro quo* in campaign-contribution cases does not raise due process concerns. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling* v. *United States*, 130 S. Ct. 2896, 2927-2928 (2010) (brackets in original) (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)). A defendant convicted under a *quid pro quo* standard requiring the jury to find an exchange of a specific type of official action for a contribution cannot complain that he lacked notice that his conduct was illegal, particularly since the applicable mens rea requirement "further blunts any notice concern." *Id.* at 2933.

Nor do the facts of this case bear out petitioner's concerns over lack of sufficient notice, arbitrary pros-

ecutions, and a potential chilling effect on First Amendment activity. See Pet. 16-17, 19. Petitioner's unusual conduct in denying the bank's summary judgment motions—less than 24 hours after Russo directed him to do so, without reviewing the motions or case files, and without receiving the recommendation of any person within the court system—provided ample proof that petitioner was performing his end of a corrupt bargain struck with Russo. Pet. App. 3-4, 14-15. Petitioner could not reasonably have believed that such conduct was lawful. See *Skilling*, 130 S. Ct. at 2934 ("A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under [the honest-services statute] on vagueness grounds.").

d. Even if the question presented otherwise warranted review, this case would be a poor vehicle for considering it, for several reasons.

First, petitioner waived, or at least forfeited, his claim of error in the district court. When arguing his motion for entry of judgment of acquittal, petitioner agreed with the court that "the *quid pro quo* doesn't have to be in express terms." Tr. 886. He also agreed to the jury instructions given by the district court, Tr. 1155, 1198-1199, and did not offer an alternative instruction that reflected his current argument, see 10-cr-00390-SL Docket entry No. 49 (May 21, 2011) (Petitioner's Proposed Jury Instructions). Although the government did not argue either waiver or forfeiture in the court of appeals, petitioner's failure to preserve his argument in the district court raises substantial questions about whether his claim is reviewable at all (if it was waived) or reviewable only for plain error (if

it was forfeited). See *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993).

Second, in order for petitioner to obtain relief in this case, this Court would first have to conclude, as a threshold matter, that *McCormick*'s *quid pro quo* standard, developed in the context of the Hobbs Act's proscription of extortion under color of official right, 18 U.S.C. 1951(a) and (b)(2), applies to prosecutions under the honest-services-fraud statute. Unlike Hobbs Act extortion, honest-services fraud requires proof that petitioner acted "knowingly and with an intent to defraud." Pet. App. 68 (jury instructions). The court of appeals assumed without discussion that *McCormick* applied, but other courts have expressly reserved the question, see *Ring*, 706 F.3d at 466; *Siegelman*, 640 F.3d at 1172-1173 & 1173 n.21; *United States* v. *Whitfield*, 590 F.3d 325, 352-353 (5th Cir. 2009), cert. denied, 131 S. Ct. 124, 131 S. Ct. 134, and 131 S. Ct. 136 (2010), and no court of appeals has expressly resolved it in petitioner's favor. Indeed, the Ninth Circuit has specifically held that *McCormick* does not apply to a state bribery statute, and it has rejected the contention that the First Amendment invariably requires an explicit *quid pro quo* instruction in campaign-contribution cases. *United States* v. *Jackson*, 72 F.3d 1370, 1374-1376 (1995), cert. denied, 517 U.S. 1157 (1996). At a minimum, *McCormick*'s application to the honest-services-fraud statute presents a significant threshold question. The lack of analysis on that question by the court of appeals below (or by any other court of appeals) makes this case a poor vehicle for considering the scope of the *quid pro quo* requirement under *McCormick* and *Evans*.

Third, this case presents an additional threshold question of whether the analysis in *McCormick* would apply in the same way when the recipient of the campaign contributions is a judge. The defendant in *McCormick* was a legislator, and the Court's analysis accordingly focused on the role that campaign contributions play in the legislative context. 500 U.S. at 259, 272. The Court reasoned that Congress did not intend that "legislators commit the federal crime of extortion when 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," observing that "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator." *Id.* at 272. The "everyday business" of a judge, in contrast, is to decide cases impartially. Accordingly, while "favoritism" towards supporters may be "[un]avoidable" in "representative politics," *Citizens United* v. *FEC*, 558 U.S. 310, 359 (2010) (citation omitted), judicial proceedings require "fairness and disinterest and neutrality," *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009). The particular expectation of neutrality, which has no analogue in the legislative context, may alter the analysis of assertedly corrupt campaign contributions given to judges rather than legislators.

2. Although the body of the petition mentions the issue only briefly (Pet. 28-32), the petition presents a question about whether the government was required to show a "specific link with or connection between the giving of a campaign contribution" and petitioner's "performance of a specific and particular official act"

in order to sustain petitioner's conviction. Pet. i-ii. That issue does not warrant further review.

The court of appeals correctly concluded that the jury instructions in this case defined the requisite *quid pro quo* with sufficient specificity. Pet. App. 11-13. The instructions stated that "[b]ribery and kickbacks require the intent to effect an exchange of money or other thing of value for official action, but each payment need not be correlated with a specific official act." *Id.* at 70. "[A]ll that must be shown," the instructions continued, "is that payments were made with the intent of securing a *specific type* of official action in return. For example, payments may be made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the public official will take *specific official actions* on the giver's behalf." *Id.* at 71 (emphasis added).

Those instructions were consistent with the instructions in three honest-services-bribery cases cited with approval in *Skilling*, 130 S. Ct. at 2934, each of which rejected a requirement that a specific official act be identified at the time of payment and found it sufficient that the corrupt agreement would cover official acts as the occasions arose. *Whitfield*, 590 F.3d at 353; *Ganim*, 510 F.3d at 147-149; *United States* v. *Kemp*, 500 F.3d 257, 281-282 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008). Indeed, in one of those cases, the Fifth Circuit specifically held, in the context of judicial bribery, that the government need not prove that the payor "and the judges had identified a particular case that would be influenced at the time" the payment was made. *Whitfield*, 590 F.3d at 353. This Court's decision in *McCormick* (even as-

suming it applies to bribery of a judge) does not require a different result in the campaign-contribution context. As the court of appeals correctly reasoned, "[w]hatever else *McCormick* may mean, it does not give an elected judge the First Amendment right to sell a case so long as the buyer has not picked out *which* case at the time of sale." Pet. App. 12 (emphasis in original).

Petitioner's reliance (Pet. 28-30) on *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999), is misplaced. In *Sun-Diamond*, the Court interpreted 18 U.S.C. 201(c)(1)(A) to require that an illegal gratuity be given in connection with "some particular official act." 526 U.S. at 406. The Court reasoned, in part, that to hold otherwise would cause "peculiar results," such as criminalizing "token gifts to the President based on his official position and not linked to any identifiable act." *Ibid.* *Sun-Diamond* does not govern here because, as this Court specifically noted, bribery statutes contains a mens rea different from gratuity statutes, requiring an "intent 'to influence' an official act or 'to be influenced' in an official act." *Id.* at 404. Accordingly, as the Second Circuit has concluded, no "principled reason" exists to extend *Sun-Diamond* "beyond the illegal gratuity context." *Ganim*, 510 F.3d at 146. In any event, *Sun-Diamond* did not involve, and thus did not address, the question whether bribery can be established by an intent to exchange something of value for official acts, even where the official acts to be undertaken have not been determined with precision. The instructions in this case on that issue were consistent with "the overwhelming weight of authority" in the circuit courts, *Whitfield*, 590 F.3d at 353 (citing decisions in six circuits), and

petitioner identifies no circuit decision that would require invalidation of those instructions.

Finally, even if review were otherwise warranted on the question whether a specific official act must be identified at the time the public official accepts a thing of value, this case would be an unsuitable vehicle for considering it. Petitioner did not object to the district court's instruction (Pet. App. 70-71) that honest-services bribery may be proven through an ongoing course of conduct. See Tr. 1155, 1198-1199. In fact, his own proposed jury instructions were to the same effect. See, *e.g.*, Petitioner's Proposed Jury Instructions 4 ("If the public official knows that he or she is expected as a result of the payment to exercise particular kinds of influence or decision making to the benefit of the payor, and, at the time the payment is accepted, intended to do so as specific opportunities arise, that is bribery."). Although the government did not raise a waiver or forfeiture argument in the court of appeals, petitioner's position in the district court could preclude or constrict this Court's consideration of this issue. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
JOHN-ALEX ROMANO
Attorney

JANUARY 2014