No. 15-474

In the Supreme Court of the United States

ROBERT F. MCDONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
SONJA M. RALSTON
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly upheld the jury's finding that petitioner's quid pro quo bribery scheme violated the honest-services statute, 18 U.S.C. 1346, and the Hobbs Act, 18 U.S.C. 1951, because the things petitioner agreed to do in exchange for personal benefits were "official actions."

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes, regulation and rule:

Statutes, regulations and rule—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 15-474

ROBERT F. MCDONNELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. 1349; three counts of honest-services wire fraud, in violation of 18 U.S.C. 1343, 1346; one count of conspiracy to obtain property under color of official right, in violation of 18 U.S.C. 1951; and six counts of obtaining property under color of official right, in violation of 18 U.S.C. 1951. Petitioner was sentenced to 24 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-79a.

A. Petitioner's Bribery Scheme

During 2011 and 2012, while petitioner was the Governor of Virginia, he and his wife Maureen McDonnell solicited and secretly accepted more than

$175,000 in money and luxury goods from Jonnie Williams, a Virginia businessman. In return, petitioner agreed to use the power of his office to help Williams's company.

1. Petitioner takes office facing personal financial difficulties

In December 2009, just before petitioner became governor, Mrs. McDonnell wrote that the couple was "broke" and facing an "unconscionable amount in credit card debt." Gov't Supp. App. 1. When petitioner was inaugurated in January 2010, the couple owed nearly $75,000, an amount that soon exceeded $90,000. Pet. App. 5a. Compounding those debts, petitioner and his sister were losing $40,000 each year on two heavily-mortgaged rental properties in Virginia Beach, and had been forced to borrow $160,000 from family and friends to meet expenses. *Ibid.*; J.A. 6504-6506, 6510-6512.

2. Petitioner meets Jonnie Williams and learns what Williams wants from the Virginia government

Petitioner did not know Williams before he began running for governor, and the two were not friends. Pet. App. 6a. They met during the campaign, but did not see each other during petitioner's first nine months in office. J.A. 2212, 2632. In October 2010, however, Williams arranged to accompany petitioner on a cross-country flight after petitioner used Williams's private jet to travel to a political event in California.[1] Williams did so because he wanted "five or six

[1] Like many other individuals, Williams donated the use of his private plane to petitioner's gubernatorial campaign and subsequent political activities. Pet. App. 6a n.2. None of the charges in

hours with [petitioner]" to explain "that [Williams] needed his help." J.A. 2210.

Williams's company, Star Scientific (Star), was developing a dietary supplement called Anatabloc. Pet. App. 5a-6a. Anatabloc contained anatabine, a purportedly anti-inflammatory compound derived from tobacco. *Ibid.* Star wanted the Food and Drug Administration (FDA) to approve Anatabloc as a pharmaceutical, which would have dramatically enhanced the product's potential profitability. *Id.* at 6a; J.A. 3893-3895. FDA approval requires extensive scientific testing, which Williams and Star hoped to persuade researchers at Virginia's state medical schools to perform. J.A. 3895-3897. The involvement of the state schools was critical to the company's plans: Star could not afford to pay for the required studies by itself, and it believed that the research would carry more weight with the FDA if it came from "two highly reputable institutions" like the University of Virginia (UVA) and Virginia Commonwealth University (VCU). J.A. 3906-3907.

Williams explained this to petitioner on their flight back from California. J.A. 2210-2211, 6037-6040. He then told petitioner that "what [Williams] needed from him was that [Williams] needed testing" and "wanted to have this done in Virginia." J.A. 2211. Williams asked to be referred to the person in the state government who could "move this forward," and petitioner sent him to Dr. William Hazel, Virginia's Secretary of Health and Human Resources. J.A. 2211-2212; Pet. App. 7a.

---

this case are based on those in-kind political contributions—or on political contributions of any sort.

3. Petitioner and Mrs. McDonnell solicit and accept tens of thousands of dollars in gifts and loans from Williams

In April 2011—the beginning of the scheme charged in the indictment (Supp. J.A. 14)—Mrs. McDonnell, who had met Williams only twice before, offered to seat him next to petitioner at an upcoming political event in New York if Williams took her shopping. Pet. App. 7a; J.A. 2222. Williams agreed. He spent approximately $20,000 on designer clothing for Mrs. McDonnell and then sat with the couple at the event that evening. Pet. App. 7a-8a. Five days after the shopping trip, petitioner and Mrs. McDonnell invited Williams to dine with them at the Governor's Mansion. Their discussion at dinner "centered on Anatabloc and [Star's] need for independent testing." Pet. App. 8a; see J.A. 2227-2228.

On May 2, 2011, three days later, Williams returned to the Mansion at Mrs. McDonnell's request. She told him about her family's "financial trouble," including the credit-card debt, the distressed rental properties, and their daughter's upcoming wedding. Pet. App. 9a; see J.A. 2230-2231. She then proposed an exchange, telling Williams: "I have a background in nutritional supplements and I can be helpful to you with this project, with your company. The Governor says it's okay for me to help you * * * but I need you to help me. I need you to help me with this financial situation." J.A. 2231. Mrs. McDonnell asked to borrow $50,000 and added that she and petitioner owed $15,000 for the wedding. Pet. App. 9a. Williams agreed to provide the loan and to make the $15,000 payment. *Ibid.*; J.A. 2231. He testified that he did so because "[petitioner] control[led] the medical schools"

and Williams "needed [petitioner's] help with the testing." J.A. 2234.

Petitioner was not present during the meeting at the Mansion. J.A. 2231-2232. But the day before, Mrs. McDonnell had emailed petitioner about Star, and petitioner had then asked his sister for financial information about their rental properties and asked his daughter "about the payments he still owed for her wedding." Pet. App. 8a-9a. And before Williams provided the money Mrs. McDonnell requested, he spoke to petitioner directly to "make sure [petitioner] knew about it." J.A. 2233. Petitioner did not express surprise; instead, he thanked Williams for his help and confirmed that "the real estate in Virginia Beach" was the source of the family's financial troubles. *Ibid.*

4. Williams continues to provide gifts and loans to secure petitioner's help, and petitioner uses the power of his office to help Williams and Star

During the next 18 months, Williams provided petitioner and his family with another $70,000 in loans and tens of thousands of dollars' worth of luxury goods and services. See Gov't Br. in Opp. 4-5. None of the loans were documented, and petitioner made no payments on any of them until he learned that he was under investigation. J.A. 4276, 6829. While petitioner was soliciting and receiving those personal benefits, and sometimes minutes after doing so, he used the power of his office to assist Williams—principally by seeking to influence the state medical schools to conduct the studies Williams sought.

a. In May 2011, three days after Williams agreed to give his family $65,000, petitioner raised Anatabloc in a meeting with Secretary Hazel and had his assistant send Hazel a laudatory press article about Star.

Pet. App. 9a. Four days later, petitioner's scheduler emailed Hazel that petitioner's staff was "evaluating having the Governor go down to Florida to speak" at a Star event. Gov't Supp. App. 16. Petitioner ultimately did not make the trip, but Mrs. McDonnell did. *Id.* at 17; J.A. 2245-2246. During the event, Mrs. McDonnell offered the use of the Governor's Mansion for Star's upcoming launch of Anatabloc for public sale. J.A. 2245-2246, 2249, 3257.

In June 2011, in response to Mrs. McDonnell's request that he "put in writing what it was that [he] wanted," Williams sent petitioner a formal protocol for clinical trials of Anatabloc to be performed at Virginia's state medical schools. J.A. 2252; see J.A. 3423. The cover letter proposed that petitioner "use the attached protocol to initiate the 'Virginia study' of Anatabloc at [VCU] and [UVA]." Gov't Supp. App. 29. Petitioner read the letter, had a "good sense" of what Williams was proposing, and forwarded the letter to Hazel. J.A. 6605-6606; see Pet. App. 11a.

By July 2011, petitioner and Williams had discussed seeking grants for the studies from the Virginia Tobacco Indemnification and Community Revitalization Commission (Tobacco Commission). J.A. 2259-2260. Petitioner advised Williams that the state-run Tobacco Commission "would be a good source of funding for something like this." *Ibid.* By that time, Williams was telling others—including the state-employed researchers he was lobbying to conduct the tests—that "the Governor would like to sponsor these trials" and fund them with Tobacco Commission money. J.A. 3090; see J.A. 3096-3097, 3105.

b. On the night of July 31, 2011, after driving Williams's Ferrari back from an expense-paid weekend at

Williams's vacation home, petitioner directed Hazel to have a deputy meet with Williams and Mrs. McDonnell the next morning "on the Star Scientific [A]natabloc[] trials planned * * * at [VCU] and [UVA]." Gov't Supp. App. 80; see Pet. App. 11a-12a. Hazel and his staff had no interest in the meeting; they were "very skeptical of Mr. Williams and his product." J.A. 3745-3746; see J.A. 3042. But Hazel complied with petitioner's directive, sending a deputy to the Mansion the next morning. J.A. 3041-3043. At the meeting, Williams reiterated his desire to have UVA and VCU study Anatabloc. Pet. App. 12a.

Later that day, Williams and Mrs. McDonnell met at the Mansion with a VCU researcher who "could cause studies to happen" at VCU. J.A. 2273. "[W]ith Maureen McDonnell sitting there," Williams urged the researcher to conduct the studies, emphasizing "how important this was to Virginia, to the Governor." *Ibid.*

c. In August 2011, petitioner followed through on Mrs. McDonnell's offer to host the Anatabloc launch at the Governor's Mansion. Pet. App. 13a. Like his predecessors, petitioner often hosted and attended events to promote Virginia business, including events at the Mansion. J.A. 3588-3589. But it was unusual for those events to focus on a single company, and unprecedented to hold a product launch at the Mansion. J.A. 3593, 3612-3613.

Williams and Star set the guest list for the launch, which included the UVA and VCU officials Williams was lobbying to conduct the studies, as well as doctors to whom Williams hoped to promote Anatabloc. Pet. App. 13a. Mrs. McDonnell explained to the Mansion staff that the purpose of the event was to "encourag[e]

[the] universities to do research on [Anatabloc]." J.A. 3608. The event was planned by state employees on official time, and the invitations bore the Governor's official seal. J.A. 3112-3113, 3591-3592, 4093-4094; see Gov't Supp. App. 105.[2]

During the event, which featured samples of Anatabloc at each place setting, petitioner sat next to Williams and Williams distributed $25,000 checks to the state researchers to help them apply for Tobacco Commission grants to fund the studies. Pet. App. 13a & n.7; J.A. 3612. As a UVA researcher testified, "the tenor of the meeting was that it would be great if we could show that tobacco was a useful product" through studies on Anatabloc, and "[petitioner] and Mrs. McDonnell both were extolling that as something that would be a good thing for the Commonwealth." J.A. 3355.

d. The Tobacco Commission would only fund studies undertaken by nonprofit organizations, so securing the universities' agreement was the crucial first step in Star's plans. J.A. 3919-3920, 4352. In the months following the Mansion event, however, UVA and VCU seemed to lose interest. J.A. 2305-2306. Williams was "furious," telling colleagues that he could not understand the universities' reluctance because "[petitioner] and his wife [we]re so supportive." J.A. 3934; see Pet. App. 14a.

---

[2] Petitioner's senior advisors—who had been leery of holding the launch at the Mansion to begin with, see, *e.g.*, J.A. 3160-3170—ultimately determined that state funds should not be used to pay for the event and used money from petitioner's political action committee instead. J.A. 2880-2882. That decision was not made until after the event, and petitioner did not know about it. J.A. 3613-3614, 4130-4131.

In January 2012, while Williams was arranging to loan petitioner another $50,000, he told Mrs. McDonnell that UVA was dragging its feet. Pet. App. 15a. Mrs. McDonnell, who was also "furious," later reported to Williams that petitioner "want[ed] the contact information" of the UVA officials Star was dealing with. J.A. 2308-2309. Williams sent the information, and Mrs. McDonnell forwarded it to petitioner and his chief counsel, Jacob Jasen Eige, on February 9. Pet. App. 17a. A day later, while sitting next to petitioner, Mrs. McDonnell emailed Eige that petitioner "want[ed] to know why nothing has developed w[ith the] studies" and "want[ed] to get this going w[ith] VCU." Gov't Supp. App. 154. Eige understood that as a request to "reach out and see if there—if we couldn't elicit some type of response from these two universities." J.A. 3214. But Eige did not do so, because even without knowing about Williams's gifts to petitioner, he "didn't think that was an appropriate activity for the Governor's Office." *Ibid.* Six days after Mrs. McDonnell's email—and six minutes after checking with Williams about his pending request for a $50,000 loan—petitioner himself emailed Eige to follow up: "Pl[ease] see me about [A]natabloc issues at VCU and UVA." Gov't Supp. App. 157; see Pet. App. 17a.

e. Around the same time, the Mansion staff was planning an annual reception for leaders in Virginia's healthcare industry. In a departure from past practice, petitioner and Mrs. McDonnell allowed Williams to invite dozens of Star employees and other guests—including the state researchers Williams was lobbying to conduct studies. Pet. App. 16a-17a; J.A. 3618-3641. On the day of the event, Williams and petitioner met

to work out the details of the second $50,000 loan. J.A. 2332-2334.

f. In addition to seeking clinical tests at UVA and VCU, Williams had told state officials and Mrs. McDonnell that he wanted to encourage state employees to take Anatabloc. J.A. 2271, 3054, 3692-3693. In March 2012, a few weeks after securing the second $50,000 loan, petitioner met with the Virginia Secretary of Administration, who oversaw the state employee health plan. Pet. App. 18a. During the meeting, petitioner "reached into his pocket, retrieving a bottle of Anatabloc." *Ibid.* He told the Secretary that Anatabloc was "working well for him, and that he thought it would be good for * * * state employees." J.A. 4227. He then asked her to meet with Star. *Ibid.*

g. Williams testified that he continued providing petitioner with gifts and luxury goods throughout 2011 and 2012 because he expected that, consistent with "what had already happened," petitioner "would continue to help [Williams] move this product forward in Virginia * * * [w]hether it was assisting with the universities, with the testing, or help with government employees, or publicly supporting the product." J.A. 2355. Williams added that he was "100 percent sure" that petitioner "agreed to help * * * because of the loans and gifts that [Williams] gave him and his family." J.A. 2441.

5. Petitioner and Williams conceal the scheme

With the exception of some low-dollar items and vacations that could not have been concealed, petitioner did not tell his staff about the personal benefits he received from Williams. J.A. 2877, 3159-3160, 3473, 3793, 3806-3807. Petitioner's public financial disclosure forms likewise listed a few of Williams's gifts, but

omitted most of them—including the initial $15,000 payment. Pet. App. 15a. Those disclosure forms also did not reveal that Williams had loaned petitioner $120,000.[3] Williams hid the gifts and loans too, believing that they were "wrong" and that he "could be violating laws." J.A. 2322.

B. The Proceedings Below

1. Petitioner and Mrs. McDonnell were charged with honest-services fraud, Hobbs Act extortion, and conspiracy to commit those offenses. The indictment alleged that in exchange for personal benefits from Williams, petitioner agreed to perform "official actions on an as-needed basis, as opportunities arose, to legitimize, promote, and obtain research studies for Star Scientific's products." Supp. J.A. 46.

The "manner and means" by which petitioner carried out the conspiracy were alleged to include performing "favorable official action on behalf of [Williams] and Star Scientific as opportunities arose, including" five examples:

---

[3] The forms listed the first $50,000 loan as a debt that Mrs. McDonnell owed to an individual in the "medical services" or "health care" business, but did not identify Williams by name. J.A. 6349-6350; Gov't Supp. App. 129. Petitioner did not report the other $70,000 in loans at all, apparently on the theory that they were debts owed by the entity through which he and his sister owned their rental properties rather than by him personally. Petitioner and Williams settled on that approach after considering a plan to conceal the second loan through a complicated stock transaction. J.A. 2318-2325, 4033-4034. During their discussions, Williams explained that he wanted the loan to be kept "between us with a handshake." J.A. 2323. Petitioner readily agreed, explaining that "[h]e had his own disclosure issues." *Ibid.*

i. arranging meetings for [Williams] with Virginia government officials, who were subordinates of the Governor, to discuss and promote Anta-bloc®;

ii. hosting, and [petitioner and Mrs. McDonnell] attending, events at the Governor's Mansion designed to encourage Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors for referral to their patients;

iii. contacting other government officials in the [Governor's office] as part of an effort to encourage Virginia state research universities to initiate studies of anatabine;

iv. promoting Star Scientific's products and facilitating its relationships with Virginia government officials by allowing [Williams] to invite individuals important to Star Scientific's business to exclusive events at the Governor's Mansion; and

v. recommending that senior government officials in the [Governor's office] meet with Star Scientific executives to discuss ways that the company's products could lower healthcare costs.

Supp. J.A. 46-48.

2. After a six-week trial, the district court instructed the jury that the honest-services charges required the government to prove that petitioner engaged in a scheme "to defraud the public of its right to a public official's honest services through bribery." Supp. J.A. 66. The court defined bribery as a "quid pro quo" in which a "public official demanded, sought or received [an] item of value corruptly in return for

being influenced in the performance of any official act." Supp. J.A. 66-68. Similarly, the court instructed that the Hobbs Act charges required proof that petitioner "obtained a thing of value to which he was not entitled, knowing that the thing of value was given in return for official action." Supp. J.A. 78.

The jury acquitted petitioner on two counts of making false statements to a bank, but convicted on all 11 corruption charges. Pet. App. 21a & n.9. It convicted Mrs. McDonnell on eight corruption charges, including both conspiracy counts. J.A. 7710-7713.

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-79a. The court explained that the parties had agreed that the "official action" component of the corruption charges should be governed by the definition of "official act" in the federal bribery statute, 18 U.S.C. 201. Pet. App. 45a-47a. Under Section 201, an "official act" includes "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). The court rejected petitioner's challenges to the jury instructions on "official action," noting that the instructions centered on "a near-verbatim recitation" of Section 201's definition. Pet. App. 46a; see *id.* at 55a-65a.

The court of appeals also held that the evidence "was more than sufficient to support the jury's verdict." Pet. App. 74a; see *id.* at 69a-74a. The court explained that the government was not required "to prove that [petitioner] actually took [an] official action." *Id.* at 71a. Instead, all that was necessary was proof that petitioner understood that his receipt of

personal benefits from Williams "carried with it an expectation that some type of official action would be taken." *Ibid.* But the court held that "the Government exceeded its burden" by proving that petitioner "did, in fact, use the power of his office to influence governmental decisions." *Ibid.* The court identified three "questions" or "matters" within the meaning of Section 201(a)(3): whether state universities would study Anatabloc; whether the state Tobacco Commission would fund the studies; and whether the state employee health plan would cover Anatabloc. *Id.* at 69a-70a. The court held that petitioner took action on those matters by "exploit[ing] the power of his office" to "influence the work of state university researchers" and to encourage the relevant state officials to make Anatabloc available under the state employee health plan. *Id.* at 73a-74a.

SUMMARY OF ARGUMENT

Petitioner was validly convicted of Hobbs Act extortion and honest-services fraud because he engaged in a paradigmatic bribery scheme by soliciting and accepting more than $175,000 in personal benefits in exchange for agreeing to use the power of his office to help his benefactor.

This case has proceeded on the understanding that the "official action" component of the corruption charges against petitioner is governed by 18 U.S.C. 201, which governs the bribery of federal officials. For more than a century, this Court and others have broadly interpreted Section 201 and its predecessors to reach "[e]very action that is within the range of official duty," including—as in this case—an official's exercise of influence over decisions made by others. *United States* v. *Birdsall*, 233 U.S. 223, 230 (1914).

That broad interpretation reflects Congress's sound judgment that no part of a public employee's performance of his official duties should be up for sale.

Petitioner asks this Court to cast aside a century of settled law by adopting two novel limitations on "official action." First, he asserts that the bribery laws reach only "questions" or "matters" that possess some ill-defined measure of importance or formality—in his most common formulation, those that involve the exercise of "sovereign power" (Br. 1, 19, 26-27, 30, 34, 36-40, 46, 48). Second, petitioner asserts that an official does not take action on a matter unless he "direct[s] a particular resolution" (Br. 27, 29, 33, 39, 40, 44) or "pressur[es] others" to do so (Br. 1, 18, 20, 26, 32, 46). Those limitations are contrary to the statutory text and inconsistent with controlling precedent. Section 201 reaches "decisions" *and* "actions," and a construction that requires directing an outcome would read "actions" out of the statute. And *Birdsall*—which petitioner virtually ignores—confirms that seeking to influence the disposition of government matters by others can be official action. Petitioner's proposed limitations would radically restrict the reach of the bribery laws and allow the purchase and sale of much of what government employees do—including virtually any preliminary step and any exercise of influence short of overt "pressure."

Petitioner erroneously suggests that treating his conduct as "official action" would make all elected officials potential targets for a corruption prosecution because they receive campaign contributions and grant access to contributors. This Court has recognized that elected officials will inevitably and appropriately be responsive to their supporters and has

emphasized that the ingratiation and access associated with legitimate contributions is a feature of our democracy. But the Court has carefully distinguished *general* ingratiation and access from quid pro quo exchanges—for example, a governor's demanding a $1000 contribution as the price of an official meeting. In the rare bribery cases involving campaign contributions, the jury can be instructed on the distinction. But no such issue arose here, because the bribes in this case were personal loans and luxury goods, not campaign contributions.

The evidence was more than sufficient to support petitioner's convictions. Under the legal standard that has governed since *Birdsall*, the jury could readily infer that petitioner solicited and accepted personal benefits from Williams on the understanding that he would take official action to assist Williams in return. And although the government was not required to prove that petitioner actually followed through on that quid pro quo, ample evidence established just that. Among other things, petitioner repeatedly sought to influence researchers at Virginia's state universities to study Williams's product. Likewise, the jury was properly instructed on the definition of an official act, and petitioner's proposed additions were forfeited, incorrect, or already covered by instructions as given.

Finally, this Court held just five years ago that the honest-services statute, when limited to bribes and kickbacks, is not facially vague. Petitioner offers no sound reason to revisit that holding. His as-applied vagueness challenge equally lacks merit, especially in light of the jury's unchallenged findings that he acted corruptly, with intent to defraud, and without a good faith belief that he acted lawfully.

ARGUMENT

PETITIONER WAS VALIDLY CONVICTED ON PUBLIC CORRUPTION CHARGES BECAUSE HE ACCEPTED PERSONAL BENEFITS IN EXCHANGE FOR AGREEING TO PERFORM OFFICIAL ACTIONS

Petitioner no longer challenges the jury's findings that he accepted personal benefits from Williams as part of a quid pro quo exchange and that he did so corruptly, in bad faith, and with intent to defraud. Pet. App. 65a-69a, 74a-79a. He contends only that the things he agreed to do in return were not "official actions." He is mistaken.

A. The Corruption Charges In This Case Required Proof That Petitioner Accepted Bribes In Exchange For "Official Acts" As Defined In 18 U.S.C. 201

The Hobbs Act prohibits extortion "under color of official right." 18 U.S.C. 1951(b)(2). The mail- and wire-fraud statutes prohibit use of the mails and wires in furtherance of "any scheme or artifice to defraud," including "to deprive another of the intangible right of honest services." 18 U.S.C. 1341, 1343, 1346. Both the Hobbs Act and the fraud statutes prohibit public officials from soliciting or accepting bribes in return for being influenced in their official acts (or official action). Here, the parties agreed to define "official act" as that term is defined in the federal bribery statute, 18 U.S.C. 201.

1. The Hobbs Act and the honest-services statute prohibit public officials from accepting bribes in exchange for official actions

a. Hobbs Act extortion draws meaning from its common-law ancestor: "an offense committed by a public official who took 'by colour of his office'" things

of value "not due to him for the performance of his official duties." *Evans* v. *United States*, 504 U.S. 255, 260 (1992) (citation omitted). That offense included "the rough equivalent of what we would now describe as 'taking a bribe.'" *Ibid.* Consistent with that understanding, *Evans* held that a public official violates the Hobbs Act if he "obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268.

In *Evans*, the Court upheld the conviction of a county commissioner who accepted a cash payment "knowing that it was intended to ensure that he would vote in favor of [a] rezoning application and that he would try to persuade his fellow commissioners to do likewise." 504 U.S. at 257. *Evans* ratified several decades of lower-court decisions holding that state and local officials violate the Hobbs Act by accepting bribes paid to influence the performance of their official duties. *Id.* at 258-259 & n.2.

b. The honest-services doctrine originated in courts of appeals decisions holding that the mail- and wire-fraud statutes prohibited schemes to deprive others of the intangible right of "honest services," "[m]ost often" through the "bribery of public officials." *Skilling* v. *United States*, 561 U.S. 358, 400-401 (2010) (citation omitted). In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court rejected the honest-services theory and held that the fraud statutes were "limited in scope to the protection of property rights." *Id.* at 360. "Congress responded swiftly" by enacting the honest-services statute, 18 U.S.C. 1346. *Skilling*, 561 U.S. at 402.

In *Skilling*, this Court rejected a vagueness challenge to Section 1346 by interpreting it to "criminal-

ize[] *only* the bribe-and-kickback core of the pre-*McNally* case law." 561 U.S. at 409. So construed, the Court held, the statute "defines honest services with clarity." *Id.* at 411 (brackets and citation omitted). The Court noted that the statute's "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes," including 18 U.S.C. 201(b), the bribery statute applicable to federal employees. *Skilling*, 561 U.S. at 412.

2. This case is governed by Section 201's definition of "official act"

The parties have proceeded on the understanding that the Hobbs Act and honest-services charges in this case required the government to show that the actions petitioner agreed to take in exchange for bribes satisfied the definition of "official act" in 18 U.S.C. 201. *E.g.*, J.A. 229-234, 442-443, 841, 893; see Pet. App. 46a (proposed and delivered jury instructions); *id.* at 69a-74a (court of appeals' sufficiency analysis); Supp. J.A. 83-90 (district court's sufficiency analysis). Section 201(a)(3) defines "official act" to include "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."[4]

---

[4] The question presented (Pet. i) likewise assumes that Section 201 supplies the meaning of "official action." Given that assumption, the Court need not decide whether Section 201's definition governs in all bribery cases under the Hobbs Act and the honest-services statute. Cf. *United States* v. *Ganim*, 510 F.3d 134, 142 n.4 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008).

B. Section 201 Broadly Defines "Official Act" To Encompass Any Action On A Matter Within The Scope Of A Public Employee's Official Duties, Including The Exercise Of Influence On Decisions Made By Others

More than a century ago, this Court held that the broad language of Section 201's materially identical predecessors encompassed "[e]very action that is within the range of official duty," including efforts to influence decisions made by other officials. *United States* v. *Birdsall*, 233 U.S. 223, 230 (1914). In the ensuing decades, courts consistently adhered to that understanding. And in 1962, Congress ratified it by reenacting the relevant language.

1. Section 201 is a "comprehensive statute applicable to all persons performing activities for or on behalf of the United States." *Dixson* v. *United States*, 465 U.S. 482, 496 (1984) (citation omitted). It covers everyone from Members of Congress and cabinet secretaries to janitors and filing clerks. 18 U.S.C. 201(a)(1). Section 201(b)(1) prohibits corruptly offering or giving a thing of value to a public official with intent to, *inter alia*, "influence any official act." 18 U.S.C. 201(b)(1)(A). Section 201(b)(2) bars public officials from corruptly seeking or accepting anything of value in return for, *inter alia*, "being influenced in the performance of any official act." 18 U.S.C. 201(b)(2)(A).

Consistent with Section 201's prohibition against bribery involving employees with widely varying responsibilities, Congress used intentionally broad language to define the scope of the "official acts" that may not be bought or sold. An "official act" embraces "*any* decision or action," "on *any* question [or] matter," that "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) (emphases added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). And Congress's use of broad terms and disjunctive formulations—including any "decision" *or* "action" on any "question" *or* "matter"—further confirms the statute's expansive reach.

2. In *Birdsall*, this Court broadly interpreted identical language in Section 201's predecessors.[5] Two officers appointed by the Commissioner of Indian Affairs were charged with accepting bribes in return for recommending leniency in sentencing and clemency. 233 U.S. at 223-224. The officers had no formal authority over those matters; instead, they provided information and made recommendations to the Commissioner, who, in turn, was customarily consulted by sentencing judges and the President. *Id.* at 228-230. The district court dismissed the indictment, concluding that the officers' informal recommendations were not covered by the bribery laws. *Id.* at 227-230.

This Court reversed, holding that "official action" under the bribery statutes includes "[e]very action that is within the range of official duty," even if those duties are not "prescribed by statute" or "by a written rule or regulation." *Birdsall*, 233 U.S. at 230-231. The Court found that the officers' established practice

---

[5] The statutes at issue in *Birdsall* prohibited bribery in connection with an official's "decision or action on any question, matter, cause, or proceeding, which may at any time be pending, or which may by law be brought before him in his official capacity." 233 U.S. at 230 (citation omitted).

of making "reports and recommendations" on sentencing and clemency brought those recommendations within "the sphere of official conduct." *Id.* at 235. Thus, even though the officers had only informal influence over others' decisions, the bribery laws prohibited "the giving and acceptance of bribes to influence their reports and recommendations." *Id.* at 235-236.

In the following decades, the courts of appeals recognized that *Birdsall* established that "every action that is within the range of official duty is within [the] purview" of the federal bribery laws. *McGrath* v. *United States*, 275 F. 294, 298 (2d Cir. 1921); see, *e.g.*, *Wilson* v. *United States*, 230 F.2d 521, 524 (4th Cir.), cert. denied, 351 U.S. 931 (1956); *Nordgren* v. *United States*, 181 F.2d 718, 721 (9th Cir. 1950). Those decisions upheld bribery convictions involving a wide range of conduct, including:

- Inspectors acting "in a preliminary or in an advisory capacity, and without final power to reject or accept" goods provided to the government under procurement contracts. *Sears* v. *United States*, 264 F. 257, 261 (1st Cir. 1920).
- Tax inspectors bribed not to report facts discovered in examining tax returns. *McGrath*, 275 F. at 299.
- An investigator bribed to expedite a visa. *Martin* v. *United States*, 278 F. 913, 913-914, 917 (2d Cir. 1922).
- A prohibition agent bribed to release seized liquor. *Rembrandt* v. *United States*, 281 F. 122, 123-124 (6th Cir.), cert. denied, 260 U.S. 731 (1922).

- A clerk bribed to influence his work "assembling the necessary data" to inform other officials' recommendations on the release of money held in trust by the government. *Whitney* v. *United States*, 99 F.2d 327, 330 (10th Cir. 1938).
- A military officer bribed to influence his recommendation on the disposal of surplus property. *Krogmann* v. *United States*, 225 F.2d 220, 225 (6th Cir. 1955).

3. In 1962, Congress consolidated the federal bribery laws and adopted the present definition of "official act," which preserves the language interpreted in *Birdsall*. Pub. L. No. 87-849, 76 Stat. 1119; see *Dixson*, 465 U.S. at 491-492. In general, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). And here, the 1962 Congress was unquestionably "aware of previous federal bribery statutes, as well as the judicial interpretation given those statutes." *Dixson*, 465 U.S. at 492.

The relevant legislative history "emphasized that the new bribery laws made 'no significant changes of substance' and 'would not restrict the broad scope of the present bribery statutes as construed by the courts.'" *Dixson*, 465 U.S. at 494 (quoting S. Rep. No. 2213, 87th Cong., 2d Sess. 4 (1962) (Senate Report)); see H.R. Rep. No. 748, 87th Cong., 1st Sess. 17 (1961) (House Report) ("The bill does not limit in any way the broad interpretation that the courts have given to the bribery statutes."). That legislative history also specifically endorsed the broad understanding of "official act" that had prevailed since *Birdsall*, ex-

plaining that "[t]he term 'official act' is defined to include any decision or action taken by a public official in his capacity as such." Senate Report 8; see House Report 18 ("The definition of 'official act' is based upon the present [bribery statutes] and is meant to include any activity that a public official undertakes for the Government.").

Consistent with that history, courts have continued to apply "the broad definition of 'official act' set forth in *Birdsall*" to a wide range of activities done in the course of federal employees' official duties. *United States* v. *Moore*, 525 F.3d 1033, 1041 (11th Cir. 2008). For example:

- Prison guards take official action when they "switch[] unit assignments" or grant privileges to inmates. *Moore*, 525 F.3d at 1041.
- A manager takes official action when he "approv[es] [a] promotion" for a subordinate. *United States* v. *Bishton*, 463 F.2d 887, 889, 892 (D.C. Cir. 1972).
- Law enforcement officers take official action when they "fail[] to report" a violation. *United States* v. *Ahn*, 231 F.3d 26, 32 (D.C. Cir. 2000), cert. denied, 532 U.S. 924 (2001); see, *e.g.*, *United States* v. *Romano*, 879 F.2d 1056, 1057 (2d Cir. 1989).
- Produce inspectors take official action when they grade fruits and vegetables. *United States* v. *Alfisi*, 308 F.3d 144, 150-151 (2d Cir. 2002).
- An immigration official takes official action when he "alter[s] [immigration] records."

United States v. *Ozcelik*, 527 F.3d 88, 94 (3d Cir. 2008), cert. denied, 555 U.S. 1153 (2009).

4. One particularly common variety of official action is the use of an official's position to influence other officials. As *Birdsall* illustrates, government employees need not direct the ultimate disposition of a matter to take official action. The officers in *Birdsall* had no binding authority over sentencing and clemency, yet this Court had no difficulty concluding that their twice-removed recommendations were "official action." 233 U.S. at 235.

Since *Birdsall*, therefore, "no doubt" has existed that the federal bribery laws embrace "any situation in which the advice or recommendation of a Government employee would be influential," even if the employee does not or cannot "make a binding decision." *United States* v. *Carson*, 464 F.2d 424, 433 (2d Cir.), cert. denied, 409 U.S. 949 (1972). As in *Birdsall* itself, that rule applies to employees "charged with making preliminary investigations" or recommendations. *Whitney*, 99 F.2d at 330; see, *e.g.*, *Sears*, 264 F. at 261-262. It also includes the exercise of influence through informal channels. For example, a Department of Justice attorney was found to have engaged in official action when he called an administrative assistant at another agency to request expedited consideration of a visa because he "acted in his official capacity to *influence* the visa application process." *United States* v. *Ring*, 706 F.3d 460, 470 (D.C. Cir.), cert. denied, 134 S. Ct. 175 (2013). Similarly, courts have long held that Members of Congress and their staff take official actions when they seek to influence officials in the Executive Branch. See, *e.g.*, *United States* v. *Bustamante*, 45 F.3d 933, 935-938 (5th Cir.), cert.

denied, 516 U.S. 973 (1995); *United States* v. *Biaggi*, 909 F.2d 662, 683 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991); *Carson*, 464 F.2d at 433.

C. This Court Should Reject Petitioner's Cramped Interpretation Of "Official Act"

Petitioner asserts (*e.g.*, Br. 26-27) that the bribery laws reach only "questions" or "matters" that involve the exercise of "actual sovereign power" and that an official does not take official action on such a matter unless he "direct[s] a particular resolution" or "pressur[es] others" to do so. Those limitations have no basis in the statutory text and would radically narrow the long-settled scope of the bribery laws.

1. Section 201's text and history refute petitioner's narrow reading

a. Petitioner asserts (Br. 32-35) that his proposed limitations are compelled by Section 201(a)(3)'s text. But he scarcely acknowledges this Court's controlling interpretation of that text in *Birdsall*, and his novel interpretation is unpersuasive.

First, petitioner contends (Br. 32-33) that a "decision" on a matter must "*resolv*[*e*]" that matter and that an "'action on' a matter likewise means directing its *disposition*." But "the statute states that 'official acts' include *both* 'decisions' *and* 'actions,'" and courts have thus correctly rejected efforts to "import a requirement that the official in question have ultimate decisionmaking authority" by reading those two terms to mean the same thing. *Ring*, 706 F.3d at 470 (brackets and citation omitted); see, *e.g.*, *Krogmann*, 225 F.2d at 225.

Birdsall's holding that junior officials' advisory recommendations qualified as official acts confirms

that an official need not direct the disposition of the relevant matter (or exert any "pressure") in order to take official action. Instead, *Birdsall* instructs that an official takes action on a government matter if he attempts to *influence* that matter. Petitioner previously acknowledged that point, repeatedly stating in the courts below that "influence" is sufficient. *E.g.*, Pet. C.A. Br. 28; J.A. 164-165, 195, 785, 893, 5136. But his brief in this Court abandons that concession and cites *Birdsall* just once. Tellingly, petitioner's description of *Birdsall*'s holding—that official action includes "official advocacy regarding another official's governmental decision" (Br. 31)—squarely contradicts the rule the rest of his brief asks this Court to adopt.

Second, petitioner contends (Br. 33-34) that "the relevant 'question' or 'matter' must be a decision *the sovereign* makes; it does not encompass every decision *officials* make." But the government acts only through its officers and employees, and the actions those officers and employees take in executing their official duties are, by definition, on behalf of the government. Petitioner is therefore not helped by asserting that Section 201(a)(3) "refers to a class of questions or matters whose answer or disposition is determined by the government." Pet. Br. 34 (quoting *Valdes* v. *United States*, 475 F.3d 1319, 1324 (D.C. Cir. 2007) (en banc)). That formulation performs no work "beyond that already accomplished by the express requirement of subsection 201(a)(3) that the question or matter must be one that 'may at any time be pending, or [that] may by law be brought before any public official, in such official's official capacity.'" *Valdes*, 475 F.3d at 1336 (Garland, J., dissenting) (brackets in original). Most public employees are not readily de-

scribed as making "sovereign" decisions, yet they are still within reach of the bribery statutes.

b. Petitioner also invokes (Br. 35-37) "[t]he history of the federal bribery prohibition." But petitioner's version of that history stops in 1866, when the language at issue here was first adopted. He omits any discussion of *Birdsall* or the decades of precedent broadly interpreting that language, and he thus draws exactly the wrong inference (Br. 37) from Congress's ratification of existing judicial interpretations when it re-enacted the relevant language in 1962.

Rather than addressing the history of the language at issue here, petitioner focuses on differently worded statutes enacted earlier. In particular, he suggests that the present statute covering any "decision or action" on a government matter should not be read more broadly than an 1853 bribery law that applied to the "vote or decision" of a Member of Congress or federal officer. Ch. 81, § 6, 10 Stat. 171. But that 1853 statute proved too narrow to prevent abuses such as a Senator's acceptance of a bribe in exchange for the "exercise[] [of] his official influence" to procure a government contract. John T. Noonan, Jr., *Bribes* 453 (1984) (citation omitted). In 1862, Congress responded by passing "stronger legislation" using far broader language. *Ibid.* Among other things, that legislation made it unlawful for a Member of Congress to accept anything of value in exchange for aiding in the procurement of a government contract or "for his attention to, services, action, vote, or decision on any question, matter, cause or proceeding which may then be pending, or may by law * * * be brought before him in his official capacity." Ch. 180, 12 Stat. 577. That broader intervening statute refutes petitioner's specu-

lation that the 1866 Congress intended "decision or action" to mean the same thing as "vote or decision" in the 1853 law.

2. Dicta in this Court's decision in* Sun-Diamond *provides no reason to adopt petitioner's narrow reading

Petitioner is not helped by his reliance (Br. 37-39) on dicta in *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999) (*Sun-Diamond*).

a. *Sun-Diamond* was not a bribery case. It involved the illegal-gratuity offense defined in 18 U.S.C. 201(c)(1)(A), which makes it unlawful for a person to give to a public official, or for a public official to receive, anything of value "for or because of any official act." *Sun-Diamond* held that Section 201(c) does not criminalize a gift given merely "because of the recipient's official position." 526 U.S. at 400. Instead, the Court explained, the statute requires proof that the gift was tied to a specific official act. *Id.* at 414. In adopting that interpretation, the Court suggested that reading the statute to reach items given merely "by reason of the donee's office" could criminalize de minimis gifts, such as the President's receipt of a jersey from a sports team visiting the White House, "a high school principal's gift of a school baseball cap to the Secretary of Education" during a school visit, or "a group of farmers * * * providing a complimentary lunch for the Secretary of Agriculture in conjunction with [a] speech." *Id.* at 406-408.

In the portion of *Sun-Diamond* on which petitioner relies, the Court suggested that even its narrower interpretation requiring a connection between a gift and a specific official act could yield "peculiar results" if those hypothetical gifts were viewed as having been

given "'for or because of' the official acts of receiving the sports teams at the White House, visiting the high school, and speaking to the farmers." 526 U.S. at 406-407 (citation omitted). But the Court stated, without elaboration, that "those actions—while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of the statute." *Ibid.* (citation omitted).

As the court of appeals noted, this unexplained dicta may indicate that participating in certain purely ceremonial or educational events would not, without more, qualify as an "official act." Pet. App. 54a. But nothing in *Sun-Diamond* calls into question *Birdsall*'s broad interpretation of the relevant language in other contexts. *Sun-Diamond* did not even cite *Birdsall*, and the Court had no occasion to analyze Section 201(a)(3) in any detail because the meaning of "official act" was not at issue in that case. *Sun-Diamond*'s dicta thus casts no doubt on *Birdsall*'s holding that an official takes official action where, as here, he uses his official position to influence the disposition of government matters by other officials. *Id.* at 54a-55a.

b. In any event, *Sun-Diamond*'s dicta is erroneous. Whether to hold a White House event and whether a cabinet secretary should make an official visit or speech are unquestionably "question[s]" or "matter[s]" "which may at any time be pending, or which may by law be brought before [a] public official, in such official's official capacity." 18 U.S.C. 201(a)(3). Criminalizing the hypothetical conduct discussed in *Sun-Diamond* seemed "peculiar" or "absurd[]," 526 U.S. at 407-408, only because that conduct involved de minimis gratuities rather than quid pro quo bribes. It is not absurd to prohibit a White House scheduler

from accepting a $5000 payoff to secure a Rose Garden event or to bar a cabinet secretary from auctioning off his official appearances to the companies willing to pay him the most. Indeed, it would be startling if such conduct were *not* prohibited by Section 201(b)—particularly in light of Congress's "longstanding commitment to a broadly-drafted federal bribery statute." *Dixson*, 465 U.S. at 496.

The Court need not contort the statutory definition of "official act" to avoid criminalizing small gratuities like those contemplated in *Sun-Diamond*. Regulations promulgated by the Office of Government Ethics (OGE) allow federal employees to accept gifts under certain circumstances and specifically provide that a gift permitted by those regulations "shall not constitute an illegal gratuity otherwise prohibited" by Section 201(c). 5 C.F.R. 2635.202(b).

The Court acknowledged those regulations in another portion of its opinion in *Sun-Diamond*, but stated that it was "unaware of any law empowering OGE to decriminalize acts prohibited by Title 18." 526 U.S. at 411. By its terms, however, Section 201(c)(1) does not apply to gifts given or accepted "as provided by law for the proper discharge of official duty." The OGE regulations thus do not purport to "decriminalize acts prohibited by Title 18" because a gift authorized under lawfully promulgated regulations does not fall within the statutory prohibition in the first place.

This point is confirmed by the statute authorizing the regulations, which specifies that federal employees "may accept a gift pursuant to rules or regulations" established by OGE so long as it is not accepted "in return for being influenced in the performance of any official act"—that is, so long as it is not a bribe. 5

U.S.C. 7353(b)(2). That provision was specifically intended to "bar any possible prosecution under the illegal gratuities statute for acceptance of a gift of minimal value that may bear some relation to official actions." 135 Cong. Rec. 30,743-30,744 (1989) (Report of the Bipartisan Task Force on Ethics); see *id.* at 29,494-29,495 (1989) (statements of Reps. Fazio and McCollum).

3. This Court's broad interpretation of "official act" does not criminalize routine political activity

The bribes at issue here were personal payoffs, not campaign contributions. Nonetheless, petitioner and his amici focus almost entirely on hypothetical cases involving political contributions, declaring (*e.g.*, Pet. Br. 24-25, 40-43) that a decision reaffirming the broad interpretation of official action that has prevailed since *Birdsall* would trample upon "First Amendment rights" and "upend the political process" by criminalizing routine political fundraising. Those arguments rest on a distortion of this Court's campaign finance decisions.

a. This Court has explained that the "[i]ngratiation and access" commonly associated with political contributions and independent expenditures "are not corruption." *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1441 (2014) (plurality opinion) (quoting *Citizens United* v. *FEC*, 558 U.S. 310, 360 (2010)). Instead, "[t]hey embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Ibid.*

According to petitioner, the Court's statements mean that any benefit that can be characterized as "ingratiation or access" may be sold in a quid pro quo

exchange for a campaign contribution—or, by necessary implication, for a personal payoff. By that logic, a Member of Congress could condition the performance of routine constituent services on a $100 campaign contribution, and a Governor seeking re-election could demand a $1000 contribution—or a personal loan—as the price of any official meeting with a senior member of his administration.

Such exchanges plainly are not "a central feature of democracy," *McCutcheon*, 134 S. Ct. at 1441, and they are not what this Court's decisions meant by "ingratiation and access." Those decisions referred instead to "the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *Ibid.* Thus, a donor may contribute to an official's campaign with the hope that the official will be responsive to her concerns, and the official may thereafter take the donor's meetings and calls or take official actions that assist the donor. That is perfectly lawful—just as it is perfectly lawful for a Member of Congress to *vote* in a manner consistent with her supporters' preferences after accepting their contributions. But this Court has carefully distinguished that sort of *general* gratitude and access from quid pro quo arrangements, explaining that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Ibid.* (citation omitted). And the Court has emphasized that "few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*, 558 U.S. at 357.

The existence of a quid pro quo is thus the critical distinction between a lawful campaign contribution and an unlawful bribe. "A donor who gives money in the hope of unspecified future assistance does not

agree to exchange payments for actions. No bribe thus occurs if the elected official later does something that benefits the donor." *United States* v. *Terry*, 707 F.3d 607, 613 (6th Cir. 2013), cert. denied, 134 S. Ct. 1490 (2014). Instead, "[i]t is the corrupt *agreement*," made at the time of the campaign contribution, "that transforms the exchange from a First Amendment protected campaign contribution and a subsequent [action] by a grateful [official] into an unprotected crime." *United States* v. *Siegelman*, 640 F.3d 1159, 1173 n.21 (11th Cir. 2011), cert. denied, 132 S. Ct. 2711, 2712 (2012); see *Ring*, 706 F.3d at 468 ("[I]t is this *mens rea* element that distinguishes criminal corruption from commonplace political and business activities.").[6]

b. The presence of a quid pro quo distinguishes unlawful bribery from most of petitioner's examples (Br. 40-42) of benefits conferred on political contributors. Petitioner also observes (Br. 41) that some "invitations to fundraisers" propose "an explicit *quid pro quo* trading campaign contributions for 'access' to officials" *at the fundraising events themselves*. But such events do not involve any "official action" because the candidates and other participating officials are not acting in their official capacities. The bribery laws reach only actions "within the range of official duty," *Birdsall*, 233 U.S. at 230, and an official's attendance at and participation in a campaign fundraiser does not involve the performance of any official duty.

---

[6] The gratuities offense in 18 U.S.C. 201(c) does not require a quid pro quo, but it does not reach campaign contributions because it applies only to things of value given to public officials personally. *United States* v. *Brewster*, 506 F.2d 62, 77 (D.C. Cir. 1974).

c. Petitioner also suggests (Br. 40-41) that the quid pro quo requirement is an insufficient safeguard for legitimate fundraising because a jury could infer an unlawful exchange based solely on a "close temporal proximity" between campaign contributions and favorable official actions. But courts have recognized that in cases involving campaign contributions, the instructions should "carefully focus the jury's attention on the difference between lawful political contributions and unlawful extortionate payments and bribes" to ensure that the jury does not infer a quid pro quo merely because an elected official took actions favorable to a contributor. *Biaggi*, 909 F.2d at 695; cf. *McCormick* v. *United States*, 500 U.S. 257, 271-273 (1991).

A jury might be instructed, for example, that "[c]ampaign contributions and fundraising are an important, unavoidable, and legitimate part of the American system"; that contributions may be given "to reward public officials with whom the donor agrees, and in the generalized hope that the official will continue to take similar official actions in the future," and that "[o]fficial acts that advance the interests of a [donor], taken shortly before or after campaign contributions are solicited or received * * * can, depending on the circumstances, be perfectly legal and appropriate."[7] A court may also instruct that, although timing may be relevant, "[a] close-in-time relationship between the donation and

---

[7] Court's Instructions to the Jury, *United States* v. *McGregor*, No. 10-cr-186, Docket entry No. 2388, at 20-21 (M.D. Ala. Feb. 29, 2012) (*McGregor* Instructions); see also, *e.g.*, Jury Instructions, *United States* v. *Ring*, No. 08-cr-274, Docket entry No. 222, at 28 (D.D.C. Nov. 4, 2010).

the act," without more, "is not enough" to establish an unlawful quid pro quo agreement.[8]

d. Petitioner's campaign-finance hypotheticals thus provide no sound reason to thwart the application of the corruption statutes in the vast majority of cases that do *not* involve campaign contributions by adopting an artificially narrow interpretation of "official act." Instead, the special considerations present in the campaign-finance context can and should be addressed through appropriate instructions on the quid pro quo element. But this case raises no such concern: The charged payoffs were personal loans and luxury goods, not campaign contributions. And petitioner no longer challenges the jury's finding that his arrangement with Williams was a corrupt quid pro quo. Pet. App. 74a-79a & n.23.

4. Petitioner's remaining arguments lack merit

a. Petitioner contends (Br. 23-24) that "[b]asic principles of federalism" require a narrow construction of "official act." But petitioner has litigated this case on the understanding that "the federal bribery statute," Pet. i., supplies the meaning of that term here. See p. 19, *supra*. The interpretation of that statute raises no federalism issue.

Congress has, moreover, clearly expressed its intention to reach bribery schemes involving state and local officials. In *McNally*, this Court reversed decades of lower-court decisions approving honest-services prosecutions involving the "bribery of public officials" based in part on the very federalism concerns petitioner raises here. *Skilling*, 561 U.S. at 401 (citation omitted). The Court advised Congress that if

---

[8] *McGregor* Instructions 22-23.

it desired to reach such conduct, it must "speak more clearly than it has." *McNally*, 483 U.S. at 360. Congress promptly did so by enacting the honest-services statute. *Skilling*, 561 U.S. at 402, 408-409.

b. Petitioner asserts (Br. 26-29) that the pre-*McNally* honest-services cases involved only "[s]teering public contracts," "[v]oting for, signing, or urging passage of legislation," "[r]esolving criminal or civil cases," or rendering "tax or zoning" decisions. That characterization would not support petitioner's position even if it were correct. As *Skilling* instructed, the honest-services statute is not limited to the particular facts of pre-*McNally* cases, but also "draws content" from federal bribery statutes, including 18 U.S.C. 201(b). 561 U.S. at 412. Here, petitioner has agreed that this case is governed by Section 201's definition of "official act," which has long been interpreted to cover a broader range of official acts. See pp. 20-26, *supra*.

In any event, the pre-*McNally* decisions petitioner cites refute his assertion (Br. 29) that "the *quo* in a bribery case must involve directing a particular resolution of a specific governmental decision." Several involved bribes paid to officials who lacked authority to "direct" the result sought and who instead merely exercised *influence* over others. Indeed, the seminal honest-services case involved officials bribed "to corruptly influence" other officials in connection with a public contract, and the court held that a violation occurs even if "the official who is bribed is only one of several and could not award the contract by himself." *Shushan* v. *United States*, 117 F.2d 110, 114-115 (5th Cir. 1941); see *Skilling*, 561 U.S. at 400 (describing

Shushan).[9] The Hobbs Act, too, has long been interpreted to prohibit officials from accepting bribes to exercise informal influence—including, as particularly relevant here, a governor's "attempt[] to use his office to influence" the decision of a state board. *United States* v. *Hall*, 536 F.2d 313, 320-321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); see *United States* v. *Bencivengo*, 749 F.3d 205, 211-212 (3d Cir.) (collecting cases holding that "the mere agreement to exercise influence is sufficient to sustain a conviction for extortion under the Hobbs Act"), cert. denied, 135 S. Ct. 236 (2014).

c. Petitioner asserts (Br. 30-31) that his narrow reading of "official act" is "compelled by the basic purpose of bribery laws," which petitioner characterizes as "ensur[ing] that sovereign decisions are based on independent judgment, not corrupt self-interest." But that purpose of the bribery laws applies equally to all those who influence government matters—not just the ultimate decisionmakers. As *Birdsall* illustrates, "[h]onesty at the top is not enough; it must begin at the bottom and run through the whole service." *Sears*, 264 F. at 261.

In addition, the laws against bribery and extortion also serve to "prevent[] the evil of allowing citizens with money to buy better public service than those without," *United States* v. *Biaggi*, 853 F.2d 89, 101 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989), and to

---

[9] See also, *e.g.*, *United States* v. *Mandel*, 591 F.2d 1347, 1367 (4th Cir. 1979) (governor bribed to exercise informal influence on legislative votes, including a vote to "override his veto of a bill"); *United States* v. *Lovett*, 811 F.2d 979, 985-986 (7th Cir. 1987) (mayor bribed to "exert special influence" over the votes of other board members) (citation omitted).

bar public servants from extracting payments "for services which should be rendered gratuitously," *Evans*, 504 U.S. at 269-270 (citation omitted). That is why an official "is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid." *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 378 (1991). Those interests apply as much to workaday matters of government service as to what petitioner labels "sovereign decisions." Pet. Br. 30.

D. Sufficient Evidence Supported The Jury's Finding That Petitioner Agreed To Perform Official Acts In Exchange For Bribes

Petitioner contends (Br. 43-50) that the evidence was insufficient to support the jury's verdict. In considering such a challenge, "[t]he reviewing court considers only the 'legal' question 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Musacchio* v. *United States*, 136 S. Ct. 709, 715 (2016) (citation omitted).

Petitioner's sufficiency challenge rests on the premise (Br. 43-44) that the government was required to prove that he actually performed an official action. That is incorrect. As the court of appeals explained, the performance of an official act is *not* an element of any of the charged offenses, and it was thus "not necessary for the Government to prove that [petitioner] actually took [an] official action." Pet. App. 71a. Instead, the evidence only had to show that petitioner understood that his receipt of personal benefits from Williams carried "an expectation that some type of official action would be taken." *Ibid.*; see Supp. J.A.

68, 78 (instructions). Honest-services fraud and Hobbs Act extortion, like bribery, are "completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense." *Evans*, 504 U.S. at 268 (Hobbs Act); see *United States* v. *Brewster*, 408 U.S. 501, 526 (1972) (bribery); *Ring*, 706 F.3d at 467 (honest-services fraud).

Here, a jury could readily have found that Williams secretly lavished thousands of dollars of gifts and undocumented loans on petitioner with the expectation that petitioner would, in exchange, advance Williams's interests through the power, prestige, and influence of petitioner's position as Governor—indeed, Williams testified to exactly that. J.A. 2355, 2441-2442. And the jury also had ample basis to conclude that petitioner, when soliciting and accepting the gifts, loans, and other benefits, well understood the nature of the quid pro quo agreement.

In any event, the court of appeals correctly held that the evidence established not only that petitioner accepted bribes from Williams on the understanding that he would take official action in return, but also that he followed through on the quid pro quo. Pet. App. 69a-74a. Petitioner's contrary arguments rest on a distorted and incomplete portrayal of the trial record that flouts the standards governing sufficiency review by ignoring unfavorable evidence while relying on self-serving testimony that the jury was free to disbelieve. See *Musacchio*, 136 S. Ct. at 715.[10]

---

[10] The petition asserted (Pet. 8) that the jury's general verdict can be sustained only if sufficient evidence established that "all five" of the acts alleged in the indictment qualified as "official."

1. Sufficient evidence established that petitioner agreed to, and then did, take official action to encourage Virginia's state universities to study Anatabloc

The government's principal theory at trial was that petitioner solicited and accepted payoffs from Williams in return for influencing Virginia's state medical schools to study Anatabloc.[11] Petitioner concedes (Br. 44-45) that whether the schools would conduct studies qualifies as a government "matter" under Section 201(a)(3). The only question is thus whether the jury could have found that petitioner agreed to take action on that matter by using his position to influence the schools. Overwhelming evidence showed that he did.

a. Williams made clear to petitioner in October 2010 that "what [he] needed from [petitioner] was that [he] needed testing" at state medical schools. J.A. 2211. That need was a constant refrain in Williams's interactions with petitioner over the next two years. *E.g.*, Pet. App. 8a; J.A. 2259-2260, 2338-2339. And in

---

Petitioner correctly abandons that argument in his merits brief. Because *taking* an official action was not an element of the charged offenses, the jury was not required to find that *any* of those acts satisfied Section 201's standard. And in any event, "[w]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Griffin* v. *United States*, 502 U.S. 46, 56-57 (1991) (citation omitted).

[11] Petitioner is wrong to assert (Br. 44-45) that this theory was somehow developed after trial. The indictment alleged that petitioner agreed to help Williams "obtain research studies for Star Scientific's products." Supp. J.A. 46. The government's opening and closing statements likewise focused on petitioner's efforts to influence the universities to conduct the studies. See, *e.g.*, J.A. 1754-1755, 7412-7413, 7613.

June 2011, at Mrs. McDonnell's request, Williams spelled it out in writing, asking petitioner to "initiate the 'Virginia Study' of Anatabloc at [VCU and UVA]." Gov't Supp. App. 29.

With full knowledge of what Williams wanted from him, petitioner solicited and secretly accepted tens of thousands of dollars in personal benefits from Williams. "[T]he jury was free to infer that [petitioner] was not requesting" those benefits from a man he barely knew "without offering something more than his friendship in return." *Biaggi*, 853 F.2d at 100. Here, moreover, Williams confirmed that he provided petitioner with loans and gifts because "[petitioner] control[led] the medical schools" and he "needed [petitioner's] help with the testing." J.A. 2234; see, *e.g.*, J.A. 2360. Williams explained that in return for his continued payoffs, he "expected" petitioner to continue "assisting with the universities" J.A. 2355. During the scheme, Williams told a Star lobbyist that petitioner wanted to have studies performed by UVA and VCU and funded by the Tobacco Commission. J.A. 4373; see J.A. 3912-3919. And when the universities got cold feet, Williams told colleagues that he "c[ould]n't understand it" because "[petitioner] and his wife [we]re so supportive." J.A. 3934.

At trial, petitioner disputed Williams' version of their arrangement, insisting that he never promised Williams anything. J.A. 6421-6422. But the jury was not required to credit petitioner's self-serving testimony, which the evidence contradicted in numerous respects. And petitioner's contemporaneous statements confirmed that he shared Williams's understanding of their bargain: After Williams reported that the universities were moving slowly on the stud-

ies, petitioner assured him "that he was following up with UVA" about the delay and then requested "more money." J.A. 2697; see J.A. 2325-2326.

b. The evidence also showed that petitioner followed through on the quid pro quo by taking official actions that "exploited the power of his office" in an "ongoing effort to influence the work of state university researchers." Pet. App. 73a.

First, in July 2011, petitioner directed Secretary Hazel to send a deputy to the Governor's Mansion to meet with Williams and Mrs. McDonnell about the proposed Anatabloc studies. J.A. 3055. Petitioner notes (Br. 45-46) that the deputy—who had a dim view of Williams, J.A. 3042-3043—later sent him a dismissive email. But the jury was entitled to infer that the highly irregular circumstances of petitioner's directive conveyed his support for Williams's request: The meeting was the only one the deputy ever attended at the Mansion; she was summoned on less than 12 hours' notice; and Williams made his pitch for state testing of Anatabloc with Mrs. McDonnell at his side. Pet. App. 71a; J.A. 3055. The meeting was not a "routine courtes[y]" (Pet. Br. 25, 54, 60); it was, rather, one manifestation of what Secretary Hazel characterized as petitioner's "unique" level of support for Williams and his product. J.A. 3766-3767.

Second, in August 2011, petitioner and Mrs. McDonnell hosted a launch event at the Mansion that—in Mrs. McDonnell's words—was designed to "encourag[e] [the] universities to do research on [Anatabloc]." J.A. 3608. Williams and other Star officials likewise recognized that petitioner's presence at the event "sen[t] a signal to [the state] medical schools that this [wa]s important." J.A. 2280; see J.A. 3930.

And as a UVA official who attended the event testified, "[petitioner] and Mrs. McDonnell both were extolling" successful testing on Anatabloc "as something that would be a good thing for the Commonwealth." J.A. 3355.

Petitioner protests (Br. 46-47) that he never expressly ordered anyone to study Anatabloc. But a corrupt official can exercise influence (or seek to) without telling subordinates, in so many words, "I am directing you to give my benefactor what he wants." An official need not use magic words to exert influence, particularly when he is the chief executive of a State. "The criminal law * * * 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." *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment).

Here, the jury was free to infer that petitioner—like his wife and Williams—understood that the Mansion event placed his official imprimatur on Williams's effort to have the universities' study Anatabloc. The relevant university officials saw it exactly that way. The UVA researcher highlighted petitioner's presence in his report to his colleagues. J.A. 3355; see J.A. 3348-3351. In subsequent emails, UVA officials who heard about the event noted petitioner's support for the studies and found it "odd" that it appeared that "the Governor is influencing UVA to a potential action." J.A. 4312; see J.A. 4310-4314. When one of those officials later wrote a pro/con list about possible studies of Anatabloc, the first "pro" was "[p]erception to Governor" and the first "con" was "[p]olitical pressure from Governor." Gov't Supp. App. 109. UVA

officials also speculated that if they went ahead with the proposed studies, petitioner might "look favorab[ly]" on UVA funding requests. J.A. 4317-4320; Gov't Supp. App. 110-112.

Third, after the universities got cold feet, petitioner followed through on his assurance to Williams "that he was following up with UVA" about the delay. J.A. 2697. Mrs. McDonnell wrote to Eige, petitioner's chief counsel, that petitioner "want[ed] to get this going w[ith] VCU." Gov't Supp. App. 154. Eige then told Star's lobbyist that he had "been asked by the Governor to call [the universities]" to "show support for this research," but that Eige himself "d[id]n't think [the Governor's office] should be pressuring UVA and VCU." J.A. 4374. Eige ultimately shut down petitioner's efforts, telling the lobbyist that Star should not expect help from the governor's office. And when petitioner followed up a few days later by directing Eige to "see [him]" about the studies, Eige responded that "[w]e need to be careful with this issue." Gov't Supp. App. 158.

Petitioner asserts (Br. 47-48) that his only role in these events was to ask Eige to "see him" about the issue and stresses that Eige successfully headed off the effort to pressure the universities. But a subordinate's exercise of sound judgment to thwart an improper attempt to influence the universities hardly exonerates petitioner. And petitioner's "see me" email must be understood in light of his wife's email to Eige days earlier that "Gov wants to get this going" with the universities. Gov't Supp. App. 154. The jury could readily infer that Mrs. McDonnell's email reflected petitioner's desires: petitioner had assured Williams that he would "follow up" with the universi-

ties, J.A. 2697; his wife sent that email while sitting next to petitioner, Pet. App. 17a; and petitioner himself raised the issue with Eige just a few days later (and just minutes after emailing Williams about his pending request for a $50,000 loan), Gov't Supp. App. 157.

2. Sufficient evidence established that petitioner agreed to, and then did, take official action to encourage state officials to include Anatabloc in the state employee health plan

The evidence also established that petitioner agreed to, and then did, use his position to influence the coverage of the state employee health plan. Pet. App. 73a-74a. Here, too, petitioner concedes (Br. 45) that the scope of the plan's coverage qualifies as a government "matter" under Section 201(a)(3); the only question is whether petitioner used his position to influence that matter. The evidence established that he did.

One of Williams's desires was to encourage state employees to use Anatabloc as a means of gathering data on its supposed beneficial effects. J.A. 2271. Petitioner had ultimate authority over the state employee health plan, including the scope of its coverage. Pet. App. 70a. In March 2012, during a meeting about the health plan, petitioner produced a bottle of Anatabloc, consumed one of the pills, and told the senior officials with immediate authority over the plan that he thought Anatabloc "would be good for * * * state employees." J.A. 4227. He then asked those officials to meet with Star. *Ibid.* In so doing, petitioner "used his position as Governor to influence" the health plan's coverage. Pet. App. 74a.

Petitioner's only response (Br. 50) is that he did not "direct[]" his subordinates to include Anatabloc in the state health plan. But a directive is not required; under Section 201 and *Birdsall*, the question is whether petitioner took action on—that is, sought to *influence*—the relevant matter. The jury was entitled to infer that a governor's statement to the responsible official that a health product "would be good for * * * state employees," J.A. 4227, was an attempt to exert such influence—particularly when it was followed by a request that the official meet with Star on the subject.

3. Sufficient evidence established that petitioner agreed to, and then did, take official action to promote Star's business

At trial, the government argued that petitioner took official action by using the power of his office to promote Star and Anatabloc to the public and to doctors outside the Virginia government. Although the court of appeals did not rely on that ground, it provides a further basis for affirmance.[12]

The indictment alleged and the evidence established that a customary part of the job of the Virginia Governor was promoting Virginia business development and that petitioner "made economic development and the promotion of Virginia businesses priorities of his administration." Pet. App. 5a; Supp. J.A. 8; see, *e.g.*, J.A. 3785-3786, 4487-4489. Among other things,

---

[12] Petitioner errs in asserting (Br. 44-45) that the government's brief in opposition abandoned this theory. That brief defended the grounds relied upon by the court of appeals, but did not suggest that they were the only evidentiary basis for upholding the jury's verdict.

petitioner routinely hosted events promoting Virginia business at the Governor's Mansion. J.A. 3588-3589. And in exchange for payments from Williams, petitioner approved and participated in two Mansion events designed to promote Star and Anatabloc. Petitioner hosted the launch of Anatabloc at the Governor's Mansion, and later included dozens of Star-affiliated doctors and guests in a Mansion reception for leaders in the Virginia health care industry. Pet. App. 12a-14a, 16a-18a.

Petitioner had final authority to approve both events, J.A. 4095; both events involved the expenditure of state resources, including state employees' time, J.A. 3592, 3638-3641, 3669; and petitioner has not disputed that his approval of and participation in the events was a part of his official duties and consistent with his customary practice of promoting Virginia businesses. Both events therefore involved "decisions" or "actions" within the scope of petitioner's official duties.

Petitioner asserts (Br. 44-45) that "Virginia business development"—or, more specifically, the promotion of a particular business like Star—cannot qualify as a "question" or "matter" within the meaning of Section 201(a)(3) because it is not "a decision the government *qua* government makes." Petitioner is mistaken. The promotion of Virginia businesses was unquestionably an important part of his job. When he made decisions about which businesses to promote and what official events to hold to promote them, he was acting on the government's behalf and in the execution of his official duties; he could not, for example, demand a personal payment of $10,000 from any company or industry seeking an official event at the

Governor's Mansion. The promotion of business interests forms a part or all of the official duties of many federal, state, and local officials.[13] The federal bribery laws do not allow those officials to sell their official efforts for personal gain on the theory that the promotion of businesses by government officials is not "a decision the government *qua* government makes."

The bribery convictions affirmed in *United States* v. *Jefferson*, 674 F.3d 332 (4th Cir.), cert. denied, 133 S. Ct. 648 (2012), confirm that point. There, a Member of Congress "solicited bribes from several American businesses * * * that aspired to do business in West Africa" and then "spoke favorably to his African government contacts on behalf of such businesses" as part of his customary practice of promoting his constituents' business interests with African governments. *Id.* at 346. Petitioner's view would mean that Jefferson's actions did not violate the bribery laws because they did not involve any "decision the government *qua* government makes."

E. Petitioner's Challenges To The Jury Instructions Lack Merit

Petitioner alternatively asserts (Br. 53-55) that the district court's "official action" instruction was flawed and that the court abused its discretion in declining to include his proposed instructions. Those objections lack merit.

---

[13] See, *e.g.*, *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 560-562 (2005) (describing government-run promotion of agricultural commodities); Dep't of Commerce, *The Advocacy Center*, http://www.export.gov/advocacy/ (last visited Mar. 29, 2016) (describing "interagency advocacy efforts on behalf of U.S. exporters").

1. The district court's instruction began with "a near-verbatim recitation" of Section 201's definition. Pet. App. 46a; see Supp. J.A. 69-70. As the court of appeals held, that instruction accurately conveyed to the jury the meaning of "official action." Pet. App. 48a-49a. Petitioner asserts (Br. 56-57) that this is "obviously incorrect" because courts should not "give lay juries copies of the U.S. Code and leave them to figure it out." But the definition in Section 201(a)(3) is neither technical nor complex, and the pattern jury instructions in several circuits thus define "official act" by quoting or paraphrasing it.[14] The D.C. Circuit's decision in *Valdes*—which petitioner embraces (Br. 34-35)—likewise indicated that an instruction that includes this "statutory language" is sufficient to convey the limits of "official act." 475 F.3d at 1325.

2. The district court provided additional instructions clarifying the statutory definition in three respects. Each of those instructions was correct; this is not a case in which a court provided an "expansive gloss" that contradicted the statutory text. *Sun-Diamond*, 526 U.S. at 403.

First, the district court instructed the jury on "settled practices":

> Official action as I just defined it includes those actions that have been clearly established by settled practice as part of a public official's position, even if the action was not taken pursuant to responsibilities explicitly assigned by law. In other words, of-

[14] See, *e.g.*, *Fifth Circuit Pattern Jury Instructions (Criminal Cases)* 2.09A (2015); *Ninth Circuit Model Criminal Jury Instructions* 8.12 cmt. (2010); *Tenth Circuit Criminal Pattern Jury Instructions* 2.11 (2011); see also Leonard B. Sand et al., *Modern Federal Jury Instructions—Criminal* ¶ 16.02, at 16-25 (2015).

> ficial actions may include acts that a public official customarily performs, even if those actions are not described in any law, rule, or job description.

Supp. J.A. 69-70. Petitioner asserts (Br. 53) that "whether actions are 'customary' has nothing to do with whether they are 'official.'" But *Birdsall* instructs otherwise. The instruction closely parallels this Court's opinion, which explained that an "official action" need not be "prescribed by statute" or "by a written rule or regulation," but may instead be taken pursuant to a duty "found in an established usage" or "clearly established by settled practice." 233 U.S. at 231.[15]

Second, the district court instructed that an exercise of influence may constitute an official act:

> [A] public official need not have actual or final authority over the end result sought by a bribe payor so long as the alleged bribe payor reasonably believes that the public official had influence, power or authority over a means to the end sought by the bribe payor.

Supp. J.A. 70. Petitioner does not challenge the statement that the official "need not have actual or final authority" over the end sought; under *Birdsall*, that is "indisputably correct." Pet. App. 59a. Instead,

---

[15] Petitioner suggests (Br. 53) that the district court's instruction conveyed that *every* act that a public official customarily performs "categorically" qualifies as an official action. That is wrong. The instruction, which identifies what "[o]fficial actions *may* include," Supp. J.A. 70 (emphasis added), "did not in any way supplant the statutory definition"; instead, "it simply explained to the jury that an official act need not be prescribed by statute." *Jefferson*, 674 F.3d at 357.

he asserts (Br. 54) that the court erred in instructing that it was sufficient if Williams "reasonably believe[d]" that petitioner had the ability to bring about the results promised in their quid pro quo exchange. But that is settled law under the Hobbs Act.[16] And the court of appeals held that any error was harmless because petitioner, as Governor, "most certainly had power and influence over the results Williams was seeking." Pet. App. 62a. Petitioner does not acknowledge—let alone challenge—that harmless-error holding.

Third, the district court instructed that "official action can include actions taken in furtherance of longer-term goals, and an official action is no less official because it is one in a series of steps to exercise influence or achieve an end." Supp. J.A. 70. Petitioner asserts (Br. 54) that this instruction allowed the jury to conclude that any "'step' towards some 'end'" is an "official act." But that ignores the rest of the instruction, which makes clear that an act qualifies only if it is an effort to "exercise influence or achieve an end" on a government matter. And it has been settled since *Birdsall* that preliminary steps to influence government matters qualify as official acts.

3. Petitioner also contends (Br. 54-55) that the district court should have given fragments of two of his requested instructions. The court's "refusal to give a specific jury instruction" is reviewed "for abuse of discretion" and constitutes an abuse of discretion

---

[16] An official who exploits a bribe payor's "reasonable belief" in his authority or influence is guilty of Hobbs Act extortion even if the official had "no actual *de jure* or *de facto* power" over the decision in question. *Bencivengo*, 749 F.3d at 212-213 (3d Cir.); see Pet. App. 60a-61a (collecting cases).

"only when the rejected instruction (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." Pet. App. 62a (citation, ellipsis, and internal quotation marks omitted). Petitioner cannot satisfy that standard.

a. Petitioner asserts (Br. 54-55) that the district court should have instructed the jury that "mere ingratiation and access are not corruption." But that language was part of a much longer proposal that was "not a statement of law," but rather "a thinly veiled attempt to argue the defense's case." Pet. App. 63a; see *id.* at 146a. It was also covered by the court's other instructions, which emphasized that the jury was required to find that petitioner engaged in a "quid pro quo" exchange of bribes for official action. Supp. J.A. 67-68, 78. "[T]he district court was well within its discretion in declining to give an instruction on what does *not* constitute official action when it correctly instructed on what *does*." *United States* v. *Frega*, 179 F.3d 793, 807 (9th Cir. 1999), cert. denied, 528 U.S. 1191 and 529 U.S. 1029 (2000). And in this case, the court further excluded anything that could be characterized as legitimate "ingratiation and access" by instructing that "there would be no crime" if petitioner "believed in good faith that he * * * was acting properly." J.A. 7692; see Pet. App. 64a-65a.

b. Petitioner also asserts (Br. 55) that the district court erred by failing to instruct the jury, as he proposed at the charge conference, that an official action must be "intended to * * * influence a specific official decision the government actually makes." Pet.

App. 254a. That argument is unsound for at least three reasons.

First, petitioner's brief in the court of appeals *did not even cite* the "modest fall-back" instruction (Br. 13) that he offered at the charge conference and on which he now places critical reliance. See Pet. C.A. Br. 53 (not citing J.A. 7340-7341, the source for Pet. App. 254a). His brief instead cited only a single sentence from a much longer, and seriously flawed, proposed instruction (J.A. 753, the source for Pet. App. 147a). Understandably, therefore, the court did not address the issue. See *Eriline Co.* v. *Johnson*, 440 F.3d 648, 653 n.7 (4th Cir. 2006) (argument raised in a "single sentence" is forfeited); see also *United States* v. *Palacios*, 677 F.3d 234, 244 n.5 (4th Cir.), cert. denied, 133 S. Ct. 124 (2012). And because the issue was not "pressed or passed upon below," this Court should decline to consider it in the first instance. *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see Gov't Br. in Opp. 21.[17]

Second, petitioner's proposed instruction was legally incorrect because it would have required the jury to find that he accepted bribes in exchange "for performing or promising to perform some *specific* official act" and defined an official act as an attempt to "influence a *specific* official decision the government actually makes." Pet. App. 254a (emphases added). As the government explained at the charging conference,

---

[17] Petitioner has asserted that he did not forfeit this argument because he "spent 35 pages in his appellate brief arguing 'official action,' including eight dissecting the flawed instructions." Cert. Reply Br. 9. But those pages focused on other asserted errors, and the length at which petitioner developed his other arguments only underscores his failure to develop this one.

J.A. 7375-7376, that specificity requirement is inconsistent with precedent establishing that "the government need not show that the defendant intended for his payments to be tied to specific official acts" so long as the payments "were made with the intent of securing a specific *type* of official action" in return. *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998).[18]

Third, any correct portions of petitioner's proposed language were captured more precisely by the instructions as given. Petitioner's language was drawn in part from *Valdes*, which described official action as including "inappropriate influence on decisions that the government actually makes." 475 F.3d at 1325; see Pet. App. 148a. But *Valdes* was not dictating a jury instruction. To the contrary, the next paragraph of the opinion indicated that the instructional error in that case would have been cured by including "the definition of 'official act'" or "anything comparable." *Ibid.* Here, the district court properly conveyed the relevant concept using the words of the statute itself rather than through an amorphous and argumentative reference to "decision[s] the government actually makes."

4. Finally, petitioner claims (Br. 55-56) that these asserted instructional errors were prejudicial. As explained, no error occurred. But if this Court concludes otherwise, it should remand to allow the court of appeals to determine whether petitioner preserved the relevant issue and whether any departure from

---

[18] See, *e.g.*, *Ganim*, 510 F.3d at 147; see also *Terry*, 707 F.3d at 612 (collecting cases).

the correct standard was prejudicial. See, *e.g.*, *Rosemond* v. *United States*, 134 S. Ct. 1240, 1252 (2014).[19]

F. Petitioner's Vagueness Challenges Lack Merit

Petitioner's assertion (Br. 57-61) that the honest-services statute and the Hobbs Act are unconstitutionally vague lacks merit.

1. Just five years ago, this Court held that the honest-services statute "is not unconstitutionally vague" so long as it is "[i]nterpreted to encompass only bribery and kickback schemes." *Skilling*, 561 U.S. at 412. The Court explained that "it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud." *Ibid.* (citation and internal quotation marks omitted). The Court added that Section 1346 "draws content" from federal bribery laws, including Section 201, and that "the statute's *mens rea* requirement further blunts any notice con-

[19] Petitioner attempts to establish prejudice by asserting (Pet. 14-15, 57) that the government's closing argument presented an overbroad understanding of official action. But he relies on fragments of the argument quoted out of order and without context. For example, the statement "[w]hatever it was, it's all official action" immediately followed and referred to a description of the specific official acts alleged in the indictment, including "the effort to pressure VCU and UVA on Star's behalf," "approving the Mansion event," and "directing conduct by [petitioner's] subordinate." J.A. 7438-7439 (reproduced at Pet. App. 263a). The instructions as given allowed petitioner to argue that those acts did not satisfy the statutory standard, and he did so. J.A. 7543-7551. The jury simply disagreed. In arguing otherwise, petitioner quotes (Br. 57) a newspaper article that (selectively) quotes another article in which one juror purported to describe the reasons for the verdict. Those articles are not in the record, and petitioner's reliance on them violates Federal Rule of Evidence 606(b)(1).

cern." *Ibid.* Petitioner identifies no sound reason to overrule or revisit *Skilling*.

2. Petitioner's as-applied vagueness challenge (Br. 60-62) similarly fails. He was convicted of violating the Hobbs Act and the honest-services statute because he solicited and secretly accepted personal benefits in exchange for agreeing to perform "official acts" that fall within the definition federal law has given that term for more than a century. One need not "consult Nostradamus" (Pet. Br. 60) to know that such conduct is illegal. See *Skilling*, 560 U.S. at 412; cf. *McCormick*, 500 U.S. at 273 (the requirement of a quid pro quo "defines the forbidden zone of conduct with sufficient clarity"). Petitioner's claimed lack of notice rings especially hollow because the jury found—and petitioner no longer disputes—that he acted corruptly, with intent to defraud, and without a good faith belief that his conduct was lawful. Pet. App. 74a-79a & n.23.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
BRIAN H. FLETCHER
Assistant to the Solicitor General
SONJA M. RALSTON
Attorney

MARCH 2016

APPENDIX

1. 18 U.S.C. 201 provides:

Bribery of public officials and witnesses

(a) For the purpose of this section—

(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term "person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give

anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

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

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of val-

ue to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;

(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;

shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former

public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;

shall be fined under this title or imprisoned for not more than two years, or both.

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

(e) The offenses and penalties prescribed in this section are separate from and in addition to those prescribed in sections 1503, 1504, and 1505 of this title.

2. 18 U.S.C. 1343 provides:

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster

Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

3. 18 U.S.C. 1346 provides:

Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

4. 18 U.S.C. 1349 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

5. 18 U.S.C. 1951 provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this

section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

6. 5 U.S.C. 7353 provides:

Gifts to Federal employees

(a) Except as permitted by subsection (b), no Member of Congress or officer or employee of the executive, legislative, or judicial branch shall solicit or accept anything of value from a person—

(1) seeking official action from, doing business with, or (in the case of executive branch officers and employees) conducting activities regulated by, the individual's employing entity; or

(2) whose interests may be substantially affected by the performance or nonperformance of the individual's official duties.

(b)(1) Each supervising ethics office is authorized to issue rules or regulations implementing the provisions of this section and providing for such reasonable exceptions as may be appropriate.

(2)(A) Subject to subparagraph (B), a Member, officer, or employee may accept a gift pursuant to rules or regulations established by such individual's supervising ethics office pursuant to paragraph (1).

(B) No gift may be accepted pursuant to subparagraph (A) in return for being influenced in the performance of any official act.

(3) Nothing in this section precludes a Member, officer, or employee from accepting gifts on behalf of the United States Government or any of its agencies in accordance with statutory authority.

(4) Nothing in this section precludes an employee of a private sector organization, while assigned to an agency under chapter 37, from continuing to receive pay and benefits from such organization in accordance with such chapter.

(c) A Member of Congress or an officer or employee who violates this section shall be subject to appropriate disciplinary and other remedial action in accordance with any applicable laws, Executive orders, and rules or regulations.

(d) For purposes of this section—

(1) the term "supervising ethics office" means—

(A) the Committee on Standards of Official Conduct of the House of Representatives or the House of Representatives as a whole, for Members, officers, and employees of the House of Representatives;

(B) the Select Committee on Ethics of the Senate, or the Senate as a whole, for Senators, officers, and employees of the Senate;

(C) the Judicial Conference of the United States for judges and judicial branch officers and employees;

(D) the Office of Government Ethics for all executive branch officers and employees; and

(E) in the case of legislative branch officers and employees other than those specified in subparagraphs (A) and (B), the committee referred to

in either such subparagraph to which reports filed by such officers and employees under title I of the Ethics in Government Act of 1978 are transmitted under such title, except that the authority of this section may be delegated by such committee with respect to such officers and employees; and

(2) the term "officer or employee" means an individual holding an appointive or elective position in the executive, legislative, or judicial branch of Government, other than a Member of Congress.

7. 5 C.F.R. 2635.202 provides:

General standards.

(a) *General prohibitions.* Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift:

(1) From a prohibited source; or

(2) Given because of the employee's official position.

(b) *Relationship to illegal gratuities statute.* Unless accepted in violation of paragraph (c)(1) of this section, a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B).

(c) *Limitations on use of exceptions.* Notwithstanding any exception provided in this subpart, other than § 2635.204(j), an employee shall not:

(1) Accept a gift in return for being influenced in the performance of an official act;

(2) Solicit or coerce the offering of a gift;

(3) Accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the employee is using his public office for private gain;

Example 1: A purchasing agent for a Veterans Administration hospital routinely deals with representatives of pharmaceutical manufacturers who provide information about new company products. Because of his crowded calendar, the purchasing agent has offered to meet with manufacturer representatives during his lunch hours Tuesdays through Thursdays and the representatives routinely arrive at the employee's office bringing a sandwich and a soft drink for the employee. Even though the market value of each of the lunches is less than $6 and the aggregate value from any one manufacturer does not exceed the $50 aggregate limitation in § 2635.204(a) on de minimis gifts of $20 or less, the practice of accepting even these modest gifts on a recurring basis is improper.

(4) Accept a gift in violation of any statute. Relevant statutes applicable to all employees include:

(i) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty. As used in 18 U.S.C. 201(b), the term "public official" is broadly construed and includes regular and special Gov-

ernment employees as well as all other Government officials; and

(ii) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several specific exceptions to this general prohibition, including an exception for contributions made from the treasury of a State, county, or municipality; or

(5) Accept vendor promotional training contrary to applicable regulations, policies or guidance relating to the procurement of supplies and services for the Government, except pursuant to § 2635.204(1).