No. 11-67

In the Supreme Court of the United States

RALPH INZUNZA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court plainly erred by failing to instruct the jury that a "corrupt intent" was an element of honest-services wire fraud and color-of-official-right extortion under 18 U.S.C. 1346 and 18 U.S.C. 1951(a) and (b)(2).

2. Whether the district court abused its discretion in rejecting petitioner's proposed instruction on good faith, where the court correctly instructed the jury on the intent required for the charged crimes.

3. Whether the court of appeals correctly concluded that petitioner was guilty of bribery-based honest-services fraud and extortion, in violation of Sections 1346 and 1951, and whether that conclusion is inconsistent with the First Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-46) is reported at 638 F.3d 1006.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2009. A petition for rehearing en banc was denied on April 12, 2011 (Pet. App. 1-2). The petition for a writ of certiorari was filed on July 11, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on three counts of extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951; nine counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; and conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. 371. He was sentenced to 21 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 3-46.

1. Petitioner is a former member of the San Diego City Council. In 2000, the Council enacted an ordinance prohibiting exotic dancers from touching their customers. Previously, local law had prohibited only "lewd and lascivious" conduct—a standard that was more difficult to enforce. While the police preferred the new rule, strip-club owners opposed it. Pet. App. 4-5.

Michael Galardi owned a strip club in San Diego. Displeased with the "no-touch" law, he enlisted his friend Lance Malone, a former Las Vegas county commissioner, to bribe San Diego politicians in order to get the law changed. Pet. App. 5; Gov't C.A. Br. 5-6.

In June 2001, Malone gave petitioner $8650 in campaign checks, and petitioner promised to help repeal no-touch. Petitioner also told Malone that he needed allies on the Council to get the law changed, and that if Malone supported candidate Michael Zucchet, "we'll get [no-touch] off." On three subsequent occasions, petitioner solicited money from Malone for Zucchet (stressing that the contributions should not be traceable to Galardi), with the understanding that, in exchange, Zucchet would also help repeal no-touch. Pet. App. 5-7; Gov't C.A. Br. 7-8.

In March 2002, petitioner and Malone began to put their plan into action. Petitioner said that he would introduce a set of legislative proposals that would appear to place restrictions on strip clubs, but would at the same time remove the no-touch restriction. Petitioner asked Malone if he knew a police officer who could provide "cover" for the plan and represent that the police supported a change in the law. Malone placed petitioner in contact with an officer with whom Malone had an ostensibly corrupt relationship, but who was in fact an undercover FBI informant. In an effort to create a further pretext for his actions on Malone's behalf, petitioner had Malone send emails from fictitious citizens to all the council members raising adult-entertainment issues. Pet. App. 7.

In November 2002, Zucchet was elected, and soon thereafter, petitioner, Malone, and Zucchet met to discuss the repeal of no-touch. Petitioner and Malone outlined their plan and discussed the various "cover" issues they would raise to distract attention from their true goal. When Malone later became worried about Zucchet's commitment, he told Galardi he would follow up with petitioner to ensure that Zucchet would "come through." Malone then tried to arrange a meeting for Zucchet with Malone's police officer to discuss no-touch. When Zucchet instead arranged to meet with a police lieutenant, Malone complained to petitioner that Zucchet was meeting with the "wrong guy." Although the lieutenant made clear that the police supported, rather than opposed, no-touch, petitioner's staff assured Malone that they were still working to repeal the provision. Galardi testified that at around the same time, he gave Malone $6000 in cash to split among petitioner, Zucchet, and another councilman. Pet. App. 7-9; Gov't C.A. Br. 23.

Malone then came up with a new idea: a "concerned citizen" would appear before the legislative committee on which Zucchet sat and would ask that the committee increase the required distances between adult businesses and other establishments. Once that issue was voted upon by the committee and referred to the full council, Malone's police officer would criticize the no-touch ordinance, and petitioner would move to repeal it. Petitioner and Zucchet agreed to the plan. After the "concerned citizen" chosen and scripted by Malone appeared before the committee, petitioner altered the plan somewhat and worked to place the entire package of issues, including the repeal of no-touch, on the committee's docket. His staff worked on a memo with Malone, and petitioner lobbied the committee chairman on behalf of repeal. In May 2003, the effort was aborted when the government executed a series of search warrants at city hall. Pet. App. 9-10; Gov't C.A. Br. 26-31.

2. A grand jury charged petitioner and others with conspiring to deprive the citizens of San Diego of their right to the honest services of their public officials. The indictment also contained substantive honest-services wire-fraud counts against petitioner, as well as three Hobbs Act charges. Galardi and another conspirator pleaded guilty to the honest-services conspiracy charge. Another councilman charged in the indictment died before trial, and petitioner was tried with Malone and Zucchet. C.A. E.R. 484-512; Gov't C.A. Br. 3.

a. The Hobbs Act provides criminal penalties for any person who "obstructs, delays, or affects commerce * * * by * * * extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). "Extortion" includes "the obtaining of property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2). The district court instructed the jury that to find petitioner guilty under the Hobbs Act, it had to find "an explicit agreement between a donor and [petitioner] by which the acceptance of a campaign contribution was a quid pro quo or given in exchange for a promise or undertaking to perform a specific official act." Pet. App. 64.

The federal wire-fraud statute prohibits using the wires to execute "any scheme or artifice to defraud," 18 U.S.C. 1343, including "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. The district court instructed the jury that to find petitioner guilty of honest-services fraud, it had to find that he "explicitly agreed to accept a campaign contribution as a quid pro quo, that is, in exchange for or in return for his promise or undertaking to perform a specific official act." Pet. App. 57; see *ibid.* ("[T]he quid pro quo must be clear and unambiguous, leaving no uncertainty about the terms of the bargain."). The instructions also emphasized that, without a quid pro quo, it is not a crime for a politician to accept campaign money and then take official action on behalf of a contributor: "Whatever ethical considerations and appearances may indicate, elected officials do not" violate the wire-fraud statute "when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents shortly before or after campaign contributions are solicited and received from those beneficiaries." *Id.* at 58.

The district court additionally instructed that to find petitioner guilty on the honest-services counts, the jury had to find that he "made up a scheme or plan" or "knowingly participated" in a plan to deprive San Diegans of his honest services; that he acted with the "intent to defraud"; and, for purposes of the honest-services conspiracy, that he knowingly and willfully "participat[ed] in the unlawful plan with the intent to advance" its purposes. Pet. App. 56, 61; C.A. E.R. 630-633. The court instructed that an "intent to defraud" means an "intent to deprive [San Diegans] of the right to honest services," as well as an "intent to deceive or cheat." Pet. App. 61, 65.

b. Petitioner did not object to any of those instructions. He requested an additional instruction that provided:

> A person who acts * * * on a belief or an opinion honestly held is not punishable [under] these statutes. An honest mistake in judgment or an error in management does not rise to the level of intent to defraud. However, a defendant does not act in 'good faith' if, even though he honestly holds a certain opinion or belief, that defendant acts for illegal purposes or under knowingly and materially false or fraudulent pretenses. While the term 'good faith' has no precise definition, it means, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.

C.A. E.R. 605; see Pet. App. 48-51.

The district court refused to give the instruction. It stated that the quid pro quo standard as encompassed in the jury instructions "cover[ed] the mens rea requirements of these charges." Pet. App. 53. In the court's view, a "subjective good-faith requirement" should not be "superimpose[d] on the objective standard" of a quid pro quo. *Ibid.*; see *ibid.* ("If a public official accepts a campaign contribution as a quid pro quo, that is, in exchange for, or in return for an official act, then there simply isn't any good-faith defense that would bar liability.").

3. The jury found petitioner guilty on three Hobbs Act counts, nine substantive wire-fraud counts, and con-

spiracy to commit wire fraud. C.A. E.R. 872.[1] In a post-verdict motion for a judgment of acquittal, petitioner challenged the sufficiency of the evidence (for both the honest-services and Hobbs Act counts) on the quid pro quo element. The district court denied the motion, finding that the evidence showed that, in exchange for money for both himself and Zucchet, petitioner promised and took official action to repeal the no-touch ordinance. See *id.* at 859 ("[S]ufficient evidence * * * establish[es] that sums exchanged hands * * * [and] that in exchange for these sums [petitioner] promised and did in fact take official action to benefit Galardi"); *id.* at 860 ("In an attempt to create an aura of legitimacy to the transaction, [petitioner] and Malone engaged in deceitful conduct to conceal and disguise the corrupt relationship"). The court sentenced petitioner to 21 months of imprisonment, to be followed by three years of supervised release. *Id.* at 872-874.

4. The court of appeals affirmed. Pet. App. 3-46. In rejecting petitioner's challenge to the sufficiency of the evidence, the court first held that, in a case involving political campaign contributions, proof of a quid pro quo is required to prove both extortion and honest-services fraud. *Id.* at 12. Even so, the court noted its "uneasiness" with application of criminal sanctions to the "nearly universal system of private campaign financing,"

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[1] Malone was found guilty on three Hobbs Act counts, honest-services wire-fraud conspiracy, and various substantive honest-services wire fraud counts. Zucchet was found guilty on Hobbs Act, conspiracy, and honest-services wire fraud counts. The district court granted Zucchet's post-verdict motion for acquittal on the Hobbs Act and several honest-services counts, and it ordered new trials on the conspiracy count and one substantive honest-services charge. The court of appeals affirmed those rulings. Pet. App. 40-45.

where "large contributions are commonly given in expectation of favorable official action." *Id.* at 13. The court explained that its unease was resolved by the rule this Court set out in *McCormick* v. *United States*, 500 U.S. 257 (1991), which held that the "receipt of [campaign] contributions is * * * vulnerable under the [Hobbs] Act * * * only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." Pet. App. 14 (quoting *McCormick*, 500 U.S. at 273) (first brackets in original).

The court of appeals observed that, even as so stated, the "test may still leave grey areas" allowing a jury to "speculate on the requisite connection" between an official's promise and a contribution, and thus "stretch the Act beyond its intended application." Pet. App. 14-15. It went on to explain, however, that petitioner's conviction "raises no such concerns":

> There was no absence of very explicit promises, made directly to the person delivering the contributions, regarding actions [petitioner] would take toward repealing the No-Touch ordinance. The circumstances of the promises, including their covert nature, their detail, and the deception in carrying them out, were such that the jury could connect them casually to campaign contributions privately made at or near the same time.

Id. at 15. Based on that evidence, the court concluded, the jury "could fairly conclude beyond a reasonable doubt that throughout" the relationship between petitioner and Malone, "reciprocity was understood and often stated." *Id.* at 18.

The court of appeals also determined that the district court did not err in failing to give petitioner's requested good-faith instruction. Pet. App. 28-29. The court held that, under both the Hobbs Act and the honest-services statute—where "a knowing *quid pro quo* is the nub" of the crime—the adequacy of the instructions on specific intent "eliminate[d] the need for an additional defense instruction on good faith." *Ibid.*

ARGUMENT

Petitioner claims that a jury must be instructed that a "corrupt intent" is an element of honest-services wire fraud and color-of-official right extortion. He also renews his contentions that the district court erred in failing to give an instruction on "good faith" and that his convictions for bribery-based fraud and extortion offenses violate the First Amendment. The court of appeals correctly rejected those arguments, and further review is not warranted.

1. Petitioner's principal contention (Pet. 21-28) is that the district court erred in failing to include a "corrupt intent" requirement in the jury instructions with respect to both honest-services wire fraud and the Hobbs Act. Petitioner did not request a "corrupt intent" instruction in the district court, however, nor did he argue on appeal that the court plainly erred in failing to give one. Petitioner advanced a plain-error argument for the first time in his petition for rehearing en banc. Pet. C.A. Reh'g Pet. 9-10. The court of appeals denied rehearing without addressing that contention. Pet. App. 1-2; see *Gorman* v. *Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1173 n.35 (9th Cir. 2009) (argument raised for the first time in petition for rehearing is deemed waived), cert. denied, 131 S. Ct. 71 (2010). "It has been the tradi-

tional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below," *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari), and petitioner offers no reason why this Court should depart from that practice in this case. In any event, "corrupt intent" is not an element of either honest-services wire fraud or the Hobbs Act.

a. The wire-fraud statute punishes "scheme[s] or artifice[s] to defraud," 18 U.S.C. 1343, and Section 1346 defines that phrase to include a "scheme or artifice to deprive another of the intangible right of honest services." To be guilty under the fraud statutes, a defendant must have an intent to defraud, but the statute contains no separate requirement that the defendant act "corruptly."

Petitioner observes (Pet. 19) that this Court stated in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), that Section 1346's prohibition against bribery "draws content" from other federal bribery statutes and that the Court cited 18 U.S.C. 201(b) and 666(a)(2), which do contain the word "corruptly." 130 S. Ct. at 2933. As the Court has elsewhere explained, however, a knowing quid pro quo itself serves to make a bribe "corrupt." In *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999), for example, the Court noted that the bribery provision in 18 U.S.C. 201(b) requires "corruptly" giving or demanding something of value. 526 U.S. at 404. The Court explained that "[t]he distinguishing feature" of bribery is "its intent element," and it went on to equate that element with a "quid pro quo—a specific intent to give or receive something of value *in exchange* for an official act." *Id.* at 404-405; see *United States* v. *Strand*, 574 F.2d 993, 995 (9th Cir. 1978) ("It is [the] element of quid pro quo that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple mens rea required for violation of the gratuity sections.").

Other courts interpreting Sections 201(b) and 666 (including in several cases cited by petitioner, see Pet. 22-23) have also found that a "corrupt intent" is synonymous with an intent to engage in a quid pro quo—thus making a separate instruction on "corrupt intent" unnecessary. As the Seventh Circuit observed in a Section 666 bribery case, when the jury has been directed to find a quid pro quo, "corruptly" is "self-defining." *United States* v. *Medley*, 913 F.2d 1248, 1260-1261 (1990), cert. denied, 510 U.S. 1013 (1993). Accord, *e.g.*, *United States* v. *Bryant*, No. 09-3243, 2011 WL 3715811, at *7-*10 (3d Cir. Aug. 25, 2011) (mens rea for bribery under Sections 1346 and 666 is an intent to engage in a quid pro quo); *United States* v. *Harvey*, 532 F.3d 326, 334 (4th Cir. 2008) ("The requirement of 'corrupt intent' [under Section 201(b)] simply means the intent to receive a specific benefit in return for the payment.") (citations and internal quotation marks omitted); *United States* v. *Ganim*, 510 F.3d 134, 151-152 (2d Cir. 2007) (equating "corrupt intent" under Section 666 with the intent to engage in a quid pro quo), cert. denied, 552 U.S. 1313 (2008); *United States* v. *Alfisi*, 308 F.3d 144, 149 (2d Cir. 2002) ("The 'corrupt' intent necessary to a bribery conviction is in the nature of a *quid pro quo* requirement."); *United States* v. *Jennings*, 160 F.3d 1006, 1013 (4th Cir. 1998) (Under Section 201(b), "corrupt intent" is an "inten[t] to engage in [a] quid pro quo."); *United States* v. *Gatling*, 96 F.3d 1511, 1522 (D.C. Cir. 1996) ("Given the equation of bribery with a *quid pro quo*, 'corruptly' in the context of [Section 201(b)] would appear to mean that the defendant accepts money with the specific intent of performing an official act in return.").

In a recent post-*Skilling* decision, the Second Circuit rejected the defendant's argument that honest-services bribery instructions were flawed because of their failure to refer to "corrupt intent." *United States* v. *Bahel*, No. 08-3327-cr, 2011 WL 5067095, at *18-*19 (Oct. 26, 2011). After reviewing *Skilling*'s description of "classic kickbacks as involving the receipt of something of value from a third party '*in exchange for*' official action," *id.* at *19 (quoting *Skilling*, 130 S. Ct. at 2926), the court concluded that "it is not necessary, though it may be advisable, for the district judge to use the magic words 'corrupt intent' or 'quid pro quo' to effectively charge a jury on bribery," *ibid.* Rather, "'in return for' language in the district court's instruction rests comfortably within the statutory requirement." *Ibid.* Under that analysis, which correctly interprets *Skilling*, the instructions here were plainly adequate. See p. 5, *supra.*

Petitioner relies (Pet. 22) on *United States* v. *Abbey*, 560 F.3d 513 (6th Cir.), cert. denied, 130 S. Ct. 739 (2009), and *United States* v. *Gee*, 432 F.3d 713 (7th Cir. 2005), cert. denied, 547 U.S. 1113 (2006), but those cases further undermine his claim that Section 1346 requires a separate "corrupt intent" instruction. In those cases, the courts held that proof of a quid pro quo, while not necessary under Section 666, nevertheless satisfies the "corrupt" intent requirement of that statute. *Abbey*, 560 F.3d at 520-521; *Gee*, 432 F.3d at 714-715. Indeed, the Sixth Circuit suggested that the "corruptly" standard can be satisfied by something less than a quid pro quo. See *Abbey*, 560 F.3d at 520 & n.7 ("[T]he term 'corruptly' in criminal laws * * * denotes 'an act done with an intent to give some advantage inconsistent with official duty and the rights of others.'") (quoting *United States* v. *Aguilar*, 515 U.S. 593, 616 (1995) (Scalia, J., concurring in part and dissenting in part)).[2]

b. The Hobbs Act prohibits extortion affecting interstate commerce, which is defined to include "the obtaining of property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2). That statute also does not contain a separate requirement that the defendant act "corruptly."

Contrary to petitioner's claim (Pet. 19-22), neither *McCormick* v. *United States*, 500 U.S. 257 (1991), nor *Evans* v. *United States*, 504 U.S. 255 (1992), read a "corruptly" standard into the Hobbs Act. In *McCormick*, this Court stated that a public official's receipt of campaign contributions may be prosecuted under the Hobbs Act "if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273. The Court elaborated on the quid pro quo requirement in *Evans*, another campaign-contribution case, holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 504 U.S. at 268. The defendant in *Evans* had also challenged a jury instruction on the ground that it did

[2] Petitioner elsewhere appears to contend (Pet. 24-27) that a defendant acts "corruptly" only if he has an "inten[t] to violate the law" or knowledge of illegality. But where Congress intends to require knowledge of illegality, it typically uses the term "willfully." *Bryan* v. *United States*, 524 U.S. 184, 191-192 (1998); see *Dixon* v. *United States*, 548 U.S. 1, 5 (2006) ("[T]he term 'willfully' in [a statute] requires a defendant to have acted with knowledge that his conduct was unlawful.") (citation and internal quotation marks omitted). Neither the honest-services statute nor the Hobbs Act contains a "willfulness" requirement. See 18 U.S.C. 1346 and 1951(a).

not correctly describe the quid pro quo requirement for a campaign contribution. The instruction provided:

> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 258 (second brackets in original). The Court upheld that instruction as "satisf[ying] the *quid pro quo* requirement of *McCormick*," even though it did not require the jury to make any specific finding with respect to the defendant's corrupt intent. *Id.* at 268.

c. In this case, for both the honest-services wire fraud and Hobbs Act counts, the jury was given far more comprehensive instructions than those approved in *Evans*. It was instructed that it had to find that petitioner "explicitly agreed" to accept a campaign contribution in exchange for a promise or undertaking to perform an official act and that the "quid pro quo must be clear and unambiguous, leaving no uncertainty about the terms of the bargain." Pet. App. 57-58. The jury was also instructed that without such a quid pro quo, it is not a crime to take campaign money and then take official action on behalf of a contributor. *Id.* at 63-65. And for the honest-services fraud counts, the jury was further instructed that petitioner had to act with an intent to defraud—which the court defined as an "intent to deprive [San Diegans] of the right to honest services" as well as an "intent to deceive or cheat." *Id.* at 61, 65. Under those instructions, petitioner was not in danger of being convicted simply of receiving a "gratuity" (Pet. 22-23, 26-27), or of otherwise engaging in unintentional or innocent conduct. See, *e.g.*, *Sun-Diamond*, 526 U.S. at 404-406 (the "distinguishing feature" of bribery is its requirement of a quid pro quo; "[a]n illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken"); *Ganim*, 510 F.3d at 151-152 (because the jury was required to find a quid pro quo, it necessarily convicted the defendant of bribery, rather than the lesser included offense of receiving illegal gratuities).

2. In light of the district court's extensive instructions on criminal intent, petitioner's related claim—that the district court erred in failing to give his requested "good faith" instruction (Pet. 20, 24-25)—lacks merit. As the court of appeals recognized, a separate instruction on good faith is not required when the trial court correctly instructs on the intent required for the charged offense. Pet. App. 28-29; see *Cheek* v. *United States*, 498 U.S. 192, 201 (2001); *United States* v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam). That view is shared by the overwhelming majority of the courts of appeals. See *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990); *United States* v. *Evangelista*, 122 F.3d 112, 118-119 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); *United States* v. *Gross*, 961 F.2d 1097, 1103-1104 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982); *United States* v. *Rashid*, 383 F.3d 769, 778 (8th Cir. 2004), cert. denied,

543 U.S. 1080 (2005), and cert. granted and judgment vacated on other grounds, 546 U.S. 803 (2005); *United States* v. *Shipsey*, 363 F.3d 962, 967 (9th Cir. 2004); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).[3]

3. Petitioner contends (Pet. 20) that this Court should grant review in order to resolve what he describes as a "growing confusion" in the circuits over the meaning of "bribery." The confusion he apparently identifies involves the question whether the bribery provision of Section 666 requires proof of what petitioner refers to (Pet. 21) as a "specific *quid pro quo*." Section 666 does require a quid pro quo in the sense that, to violate the statute, the official receiving the payment must have the intent to be influenced in connection with an official act. Contrary to petitioner's suggestion, however, the statute does not require that a specific thing of value be given in exchange for a specific, identifiable official act. Rather, the courts of appeals have uniformly upheld convictions under Section 666 in cases involving an intent to exchange something of value for official acts, even where the official acts to be undertaken have not been determined with precision. See *United States* v. *McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010), cert.

[3] Although the Tenth Circuit has expressed a contrary view, see *United States* v. *Harting*, 879 F.2d 765, 769-770 (1989), petitioner does not ask this Court to resolve that conflict, and the Court has repeatedly denied review in cases presenting the issue. See *Green* v. *United States*, 549 U.S. 1055 (2006); *Simkanin* v. *United States*, 547 U.S. 1111 (2006); *Lewis* v. *United States*, 534 U.S. 814 (2001); *Bates* v. *United States*, 520 U.S. 1253 (1997); *Von Hoff* v. *United States*, 520 U.S. 1253 (1997); *Gross* v. *United States*, 506 U.S. 965 (1992); *Green* v. *United States*, 474 U.S. 925 (1985). There is no reason for a different result here.

denied, 131 S. Ct. 1599, and 131 S. Ct. 1600 (2011); *Abbey*, 560 F.3d at 519; *Ganim*, 510 F.3d at 141-142; *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 943 & n.15 (9th Cir.), cert. denied, 130 S. Ct. 795 (2009); *United States* v. *Kemp*, 500 F.3d 257, 282 (3d Cir. 2007), cert. denied, 552 U.S. 1223 (2008); *Gee*, 432 F.3d at 714-715; *Jennings*, 160 F.3d at 1014; *United States* v. *Sawyer,* 85 F.3d 713, 730 (1st Cir. 1996). As the Seventh Circuit has explained, "[a] *quid pro quo* of money for a specific legislative act is *sufficient* to violate [Section 666], but it is not *necessary.* It is enough if someone 'corruptly solicits * * * anything of value from any person, intending to be influenced or rewarded in connection with any business.'" *Gee*, 432 F.3d at 714-715 (quoting 18 U.S.C. 666(a)(1)(B)).

Even if there were a conflict on that issue, it would not warrant review in this case, for two reasons. First, petitioner was not charged under Section 666. Second, this case does not turn on the level of specificity at which a quid pro quo must be identified at the time of payment. The court of appeals held that a quid pro quo was required for both the honest-services fraud and the extortion charges, and it noted a direct and explicit link between Malone's money and the official action petitioner promised to take (and did take) in exchange for it. Pet. App. 15 ("There was no absence of very explicit promises, made directly to the person delivering the contributions, regarding actions [petitioner] would take toward repealing the No-Touch ordinance."); *id.* at 17 (petitioner "took official action, as he said he would, to achieve the repeal of the No-Touch ordinance"). Resolution of the conflict alleged by petitioner would therefore not affect the outcome of this case.

4. Finally, petitioner errs when he suggests (Pet. 28-31) that the decision below has "serious implications for campaign and other political activity" protected by the First Amendment. In *McCormick*, this Court held that the quid pro quo requirement ensures that officials cannot be prosecuted for legitimate fund-raising and that it also "defines the forbidden zone of conduct with sufficient clarity." 500 U.S. at 273; see *id.* at 272 (expressing concern that, without a quid pro quo requirement, ordinary campaign activity would be criminalized under the Hobbs Act). See also *United States* v. *Siegelman*, 640 F.3d 1159, 1174 n. 21 (11th Cir. 2011) ("[T]he Court [in *McCormick*] protected both the First and Fifth Amendments by reading the statute to require an agreement to swap money for office, thereby putting both government officials and potential contributors on notice that such an agreement would subject them to prosecution."). The court of appeals in this case also noted its concern with the application of criminal sanctions to the acceptance of campaign contributions. Pet. App. 13-15. But the court determined that petitioner's convictions "raise[d] no such concerns" in light of the evidence of his explicit quid pro quo with Malone. *Id.* at 15; see also *United States* v. *Jackson*, 72 F.3d 1370, 1376 (9th Cir. 1995) ("[T]he First Amendment does not protect political contributions made in return for an explicit promise by the official to perform an official act."), cert. denied, 517 U.S. 1157 (1996); *United States* v. *Freeman*, 6 F.3d 586, 595, 597-598 (9th Cir. 1993) (rejecting vagueness and First Amendment challenge to RICO prosecution based on solicitation of campaign contributions where the jury was instructed on a quid pro quo), cert. denied, 511 U.S. 1077 (1994). As the jury in this case found, and as both the district court and the court of appeals affirmed, peti-

tioner accepted money in exchange for his promise to take official action on behalf of his payor. That is a classic case of bribery and extortion under color of official right, and it raises no First Amendment concerns.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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