Nos. 11-955 and 11-972

In the Supreme Court of the United States

DON EUGENE SIEGELMAN, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD M. SCRUSHY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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

QUESTIONS PRESENTED

1. Whether a conviction for bribery based on campaign contributions requires proof of an express agreement to exchange campaign contributions for specific official action.

2. Whether a campaign contribution can ever be prosecuted as a bribe under 18 U.S.C. 666 or 18 U.S.C. 1346.

3. Whether the jury could rationally conclude from the evidence that petitioner Siegelman obstructed justice.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 640 F.3d 1159.[1]

[1] Unless otherwise noted, all references to "Pet." and "Pet. App." are to the petition and appendix in No. 11-955.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2011. A petition for rehearing was denied on November 9, 2011 (Pet. App. 61a). The petition for a writ of certiorari in No. 11-955 was filed on February 1, 2012, and the petition in No. 11-972 was filed on February 6, 2012. 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 Middle District of Alabama, petitioners were convicted on one count of federal-funds bribery, in violation of 18 U.S.C. 666; one count of conspiring to commit honest-services mail fraud, in violation of 18 U.S.C. 371; and four counts of honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346. Petitioner Siegelman was also convicted on one count of obstructing justice, in violation of 18 U.S.C. 1512(b)(3). Pet. App. 2a. Siegelman was sentenced to 88 months of imprisonment, to be followed by three years of supervised release. Siegelman J. 2-3. Petitioner Scrushy was sentenced to 82 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay a $150,000 fine and $267,000 in restitution. Scrushy J. 2-3, 5. The court of appeals affirmed Scrushy's convictions and affirmed Siegelman's convictions except with respect to two mail fraud counts. *United States* v. *Siegelman*, 561 F.3d 1215 (11th Cir. 2009). This Court granted certiorari, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Skilling* v. *United States*, 130 S. Ct. 2896 (2010). *Scrushy* v. *United States*, 130 S. Ct. 3541 (2010) (No. 09-167); *Siegelman* v. *United States*, 130 S. Ct. 3542

(2010) (No. 09-182). On remand, the court of appeals issued an amended opinion reversing Scrushy's and Siegelman's convictions on two mail fraud counts, affirming their remaining convictions, vacating their sentences, and remanding for resentencing. Pet. App. 1a-57a. The district court resentenced Scrushy to 70 months of imprisonment and reimposed the same term of supervised release, fine, and restitution amount. Scrushy Amended J. 2-3, 5. Siegelman has not yet been resentenced.

1. a. In 1998, Siegelman was elected Governor of Alabama. He had campaigned in favor of establishing a state lottery to help fund education, and after his election, he established the Alabama Education Lottery Foundation (AELF) to raise money to campaign for approval of the lottery by ballot initiative. The initiative appeared on the October 1999 ballot and was defeated. Pet. App. 4a.

Scrushy is the founder and former Chief Executive Officer of HealthSouth Corporation, a major hospital corporation with operations throughout Alabama. Under previous governors, Scrushy had served on a state healthcare board—the Certificate of Need Review Board (CON Board)—that determines the number of healthcare facilities in the State and therefore was important to Scrushy and HealthSouth. The governor has the sole discretion to appoint and remove members of the CON Board. Pet. App. 2a, 5a; Gov't C.A. Br. 4, 6-7.

Nick Bailey was Siegelman's closest confidential assistant. After the 1998 election, Bailey was present when Siegelman met with Eric Hanson, a lobbyist for HealthSouth. Siegelman told Hanson that because Scrushy had contributed at least $350,000 to Siegelman's opponent in the election, Scrushy needed to "do"

at least $500,000 in order to "make it right" with the Siegelman campaign. Pet. App. 5a-6a. Bailey testified that Siegelman was referring to the lottery campaign and that Hanson was to relay the conversation to Scrushy. *Id.* at 6a; Gov't C.A. Br. 8. Bailey also testified that Hanson subsequently told Bailey that Scrushy wanted control of the CON Board and "made it clear to him that if Mr. Scrushy gave the $500,000 to the lottery campaign that [they] could not let him down" with respect to the CON Board seat. Pet. App. 6a. Bailey periodically reminded Siegelman of their conversations "with Eric Hanson about what Mr. Scrushy wanted for his contributions, and that was the CON Board." *Ibid.*

Scrushy told Mike Martin, then Chief Financial Officer of HealthSouth, that to "have some influence or a spot on the CON Board," they would have to help Siegelman raise money for the lottery campaign. Pet. App. 6a. If they did so, Scrushy said, they "would be assured a seat on the CON Board." *Ibid.* Martin testified that they "were making a contribution . . . in exchange for a spot on the CON Board." *Ibid.*

Scrushy did not want the contribution to come directly from himself or HealthSouth, so he instructed Martin to ask HealthSouth's investment banker, Bill McGahan of UBS, to make the contribution. Pet. App. 6a-7a. McGahan arranged for one of UBS's clients—Integrated Health Services (IHS) of Maryland—to pay $250,000 to the AELF in exchange for a reduction of $267,000 in the fee that IHS owed UBS. IHS then issued a check payable to the AELF. Scrushy told Martin that it was important that he, Scrushy, hand-deliver the check to Siegelman, so Martin gave the IHS check to Scrushy. *Id.* at 7a.

Siegelman and Scrushy subsequently met in Siegelman's office. Bailey testified that, at some point after the meeting, Siegelman showed Bailey the IHS check and said that Scrushy was "halfway there." Pet. App. 8a. Bailey asked, "what in the world is he [Scrushy] going to want for that?" *Ibid.* (brackets in original). Siegelman replied, "[T]he CON Board." *Ibid.* Bailey responded, "I wouldn't think that would be a problem, would it?" *Ibid.* Siegelman replied, "I wouldn't think so." *Ibid.*; see also Gov't C.A. Br. 12-13, 70 n.18.

On July 26, 1999—one week after the date on the IHS check—Siegelman appointed Scrushy to the CON Board. Through Bailey, Siegelman informed the chair-designate of the CON Board that he wanted Scrushy appointed vice-chair, and the CON Board complied. Pet. App. 8a. Bailey testified that Siegelman made Scrushy vice-chair "[b]ecause [Scrushy] asked for it." *Ibid.* (brackets in original).

Siegelman gave the IHS check to Darren Cline, the AELF's fundraising director, and said that it was from Scrushy. Cline expressed concern about the size of the donation; Siegelman, who "called the shots" on the lottery campaign, told Cline to hold the check. Gov't C.A. Br. 15-16; Pet. App. 4a, 8a. After the election, however, at Siegelman's direction, Bailey retrieved the check and, without telling Cline, deposited it in a newly opened checking account in the name of the Alabama Education Foundation (AEF), the AELF's successor. Pet. App. 8a-9a; see also Gov't C.A. Br. 16.

On March 9, 2000, the AEF took out a loan from the same bank that provided the checking account, in order to pay off debt incurred by the Alabama Democratic Party for get-out-the-vote expenses in connection with the lottery referendum; Siegelman and another individ-

ual unconditionally guaranteed the loan to the AEF. The AEF then had over $447,000 in its account, $250,000 of which came from the IHS check. On March 13, 2000, the AEF withdrew $440,000 from the account to pay down its loan. Pet. App. 9a; Gov't C.A. Br. 17-18.

In May 2000, Siegelman and Bailey met privately with Scrushy in Scrushy's office. Scrushy gave Siegelman a HealthSouth check for $250,000 payable to the AEF. On May 23, 2000, the HealthSouth check was applied directly against the balance on the AEF's loan. Pet. App. 9a.

In January 2001, Scrushy resigned from the CON Board. Siegelman immediately appointed HealthSouth Vice-President Thom Carman to serve the remainder of Scrushy's term. He subsequently reappointed Carman to a full term. While Carman was serving on the Board, HealthSouth applied for and obtained certificates of need for two projects. Pet. App. 8a.

The AEF did not timely disclose receipt of either the IHS or the HealthSouth check. The AEF's disclosure statements for 1999 did not disclose the IHS check, and the AEF filed no disclosure statements for 2000 at all. Thereafter, an Alabama newspaper questioned whether the AEF had properly reported its financial dealings with the state Democratic Party, and the Secretary of State's Office contacted the state Attorney General's Office about the AEF's failure to disclose the payoff of the state party's loan. Eventually, in July 2002, the AEF filed an amended annual report for 1999 and an annual report for 2000, disclosing the IHS and HealthSouth checks (and other previously undisclosed contributions). Pet. App. 9a-10a; Gov't C.A. 18-20.

b. Lanny Young was a long-time friend of Siegelman's. For many years, Young, Bailey, and Siegelman

had an agreement whereby Young would provide the others with money, campaign contributions, and other benefits in return for official action to benefit Young's business interests. Pet. App. 10a; Gov't C.A. Br. 24-25.

In January 2000, Siegelman asked Young to give him $9200 to buy a motorcycle; Siegelman, in fact, had already purchased the motorcycle for $12,173.35. Siegelman told Young to work out the details of the $9200 payment with Bailey. Young obtained a cashier's check for $9200 made payable to Bailey and gave it to him. Bailey, in turn, gave Siegelman's secretary a $9200 check payable to Siegelman's wife, which was deposited into Siegelman's bank account that day. Pet. App. 10a; Gov't C.A. Br. 26-27.

In June 2001, Siegelman was aware that federal and state authorities were investigating his dealings with Young. On June 5, 2001, Bailey wrote Young a check for $10,503.39 bearing the notation "repayment of loan plus interest." Gov't C.A. Br. 28; see Pet. App. 10a. Young and Bailey each testified that the purpose of that check was "to cover * * * up" the $9200 payment by making it appear that Bailey had borrowed the money from Young. Gov't C.A. Br. 28. Bailey testified that he had no intention of buying the motorcycle when he wrote the $10,503.39 check to Young, of which Siegelman knew and approved. *Ibid*. Bailey also wrote a check for $2973.35 to Siegelman bearing the notation "balance due on m/c" to provide a reason for Bailey's having borrowed money from Young—to purchase a motorcycle from Siegelman. Pet. App. 10a-11a; see Gov't C.A. Br. 28-29.

Bailey gave Siegelman the $2973.35 check in the presence of his and Siegelman's attorneys. Siegelman accepted Bailey's check and gave Bailey a bill of sale for the motorcycle, which the attorneys helped finalize.

Neither lawyer was told that the purpose of the transaction was to help cover up the $9200 payment from Young to Siegelman. Bailey testified that he lied about the transaction to the attorneys, that he and Siegelman were aware of the investigation at the time, and that he later lied about the transaction to federal investigators to protect himself and Siegelman. Pet. App. 11a.

2. A federal grand jury returned a 34-count indictment against Siegelman, Scrushy, and others. In connection with the CON Board scheme, Siegelman and Scrushy were charged with federal-funds bribery, in violation of 18 U.S.C. 666(a), conspiracy to commit honest-services mail fraud, in violation of 18 U.S.C. 371, and honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346. Siegelman was also charged with obstructing justice, in violation of 18 U.S.C. 1512(b)(3), for his role in covering up the $9200 payment from Young. Pet. App. 11a-12a; Second Superseding Indictment 29-36, 39-40. The remaining counts against Siegelman charged him and others with RICO offenses and with various other offenses arising from conduct unrelated to the CON Board scheme or the cover-up of the payment. Second Superseding Indictment 2-29, 36-39, 41-43.

3. In instructing the jury on the bribery counts, the district court stated: "A defendant does not commit a crime by giving something of value to a governmental official unless the defendant and the official agree that the official will take specific action in exchange for the thing of value." Pet. App. 63a. With respect to the honest-services fraud counts, the court instructed the jury that to find the defendants guilty, it "must find not only that the defendants intended to deprive the public of their honest services, but also that they intended to deceive the public and that they intended to alter their

official actions as a result of the receipt of campaign contributions." *Id.* at 62a.

The jury found both petitioners guilty on the bribery, fraud, and conspiracy counts related to the CON Board scheme, and it found Siegelman guilty on the obstruction count relating to the $2973.35 check. The jury acquitted Siegelman on the remaining counts and acquitted the other two defendants on all counts. Pet. App. 12a. The district court denied petitioners' post-verdict motions for judgment of acquittal. *Id.* at 64a-71a.

4. a. On appeal, petitioners relied on *McCormick* v. *United States*, 500 U.S. 257 (1991), in which this Court held that a public official's receipt of campaign contributions is subject to prosecution under the Hobbs Act, 18 U.S.C. 1951, as extortion "under color of official right," 18 U.S.C. 1951(b)(2), "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273. They argued that the holding of *McCormick* interpreting the Hobbs Act to require proof of a *quid pro quo* was equally applicable to their prosecution for bribery, conspiracy, and honest-services mail fraud; that the district court failed to give an adequate *quid pro quo* instruction; and that the evidence was insufficient to prove a *quid pro quo*. Siegelman separately challenged the sufficiency of the evidence supporting his conviction for obstructing justice. The court of appeals affirmed Scrushy's convictions, reversed Siegelman's convictions on two fraud counts, and affirmed his remaining convictions. *Siegelman*, 561 F.3d at 1245.

b. Petitioners filed petitions for a writ of certiorari in which they renewed their arguments based on *McCormick*; Siegelman also renewed his challenge to the sufficiency of the evidence supporting his obstruc-

tion conviction. See 09-167 Pet. 10-17; 09-182 Pet. 11-29. This Court granted the petitions, vacated the judgment of the court of appeals, and remanded for further consideration in light of *Skilling*, in which it held that the honest-services fraud statute, 18 U.S.C. 1346, reaches only fraudulent schemes involving bribes or kickbacks, 130 S. Ct. at 2928-2931. *Scrushy*, 130 S. Ct. at 3541; *Siegelman*, 130 S. Ct. at 3542.

5. On remand, the court of appeals reversed Scrushy's and Siegelman's convictions on two mail fraud counts, affirmed their remaining convictions, vacated their sentences, and remanded for resentencing. Pet. App. 1a-57a.

The court of appeals found it unnecessary to determine whether *McCormick* applies to prosecutions for federal-funds bribery and honest-services mail fraud, because "even if a *quid pro quo* instruction was required, such an instruction was given" in this case. Pet. App. 16a; see *id*. at 21a-22a. The court noted that the bribery instruction had required the jury to find that petitioners had "*agree[d]*" to exchange "specific action" (the CON Board appointment) for a "thing of value" ($500,000 to the lottery campaign). *Id*. at 16a. In concluding that the instruction was adequate, the court rejected petitioners' contention that the "agreement had to be *express*." *Ibid*. The court relied on *Evans* v. *United States*, 504 U.S. 255 (1992), in which this Court held that a jury instruction that did not require an "express" *quid pro quo*, but did require that acceptance of the campaign contribution be in return for specific official action, satisfied *McCormick*. Pet. App. 17a. Here, the instruction that required an agreement covering specific action, the court of appeals explained, prevented prosecution of a campaign contribution based on only a

"generalized expectation of some future favorable action." *Ibid.* The court rejected a requirement that the agreement be memorialized in writing or, as petitioners had suggested, "overheard by a third party"; "[s]ince the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*." *Id.* at 17a-18a. The court also stated that "an explicit agreement may be 'implied from [the official's] words and actions.'" *Id.* at 18a (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment)) (brackets in original).

As to the conspiracy count (Count 5) and two substantive honest-services counts (Counts 6 and 7), the court concluded that any failure to adequately instruct the jury on a *quid pro quo* requirement was harmless in light of the *quid pro quo* instruction on the bribery counts (Counts 3 and 4), as all of those counts were based on the appointment of Scrushy to the CON Board in exchange for $500,000. Pet. App. 20a-22a. The court also held that "the evidence of a corrupt agreement between Siegelman and Scrushy to exchange the CON Board seat for a campaign donation was sufficient to permit a reasonable juror to find * * * a *quid pro quo*," as instructed. *Id.* at 19a.[2]

The court of appeals then held that the evidence was sufficient to support Siegelman's conviction for obstruction of justice. Count 17 alleged two separate bases for Siegelman's violation of 18 U.S.C. 1512(b)(3): that, with intent to hinder, delay, or prevent the communication of

[2] The court of appeals also concluded that *Skilling* did not affect petitioners' honest-services fraud convictions on Counts 6 and 7 because those counts alleged a bribery scheme, Pet. App. 20a, but it vacated petitioners' remaining honest-services fraud convictions, concluding that the evidence was insufficient to support them, *id.* at 23a-29a.

information to the FBI about offenses related to the $9200 payment, Siegelman (1) corruptly persuaded Bailey to write and give him a check for $2973.35 with the false notation "balance due on m/c," and (2) engaged in misleading conduct toward another person. The court found the evidence sufficient to support conviction on either ground. Pet. App. 30a-37a.

The court of appeals explained that the evidence showed that "Siegelman knew and agreed that Bailey would disguise Young's payment to Siegelman as a loan to Bailey to buy the motorcycle by 'paying back' Young with his own check," and that Siegelman had accepted and cashed the $2973.35 check with the notation that it was the final payment on the motorcycle. Pet. App. 35a. It also noted that the jury heard testimony that "Bailey always did what Siegelman asked him to do." *Ibid.* And the court found "the evidence * * * more than sufficient to support the jury's finding that the delivery of the final check in the presence of the two lawyers and the use of the lawyers to 'finalize' the sale of the motorcycle to Bailey was an attempt to 'create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth.'" *Id.* at 36a (quoting *United States* v. *Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999)). The jury reasonably could infer, the court explained, that Siegelman "intended to mislead the lawyer into believing that the transaction was legitimate," *i.e.*, that Bailey had, all along, been purchasing the motorcycle from Siegelman. *Id.* at 36a-37a. "As the 'unwitting third party,'" the court concluded, "the lawyer would be in a position factually to support the coverup since Siegelman clearly knew that there was

a 'possibility' that the federal investigators would come asking." *Id*. at 37a.

ARGUMENT

Petitioners renew their claim (Pet. 12-24; 11-972 Pet. 10-20) that *McCormick* v. *United States*, 500 U.S. 257 (1991), requires that a bribery prosecution based on campaign contributions to a public official be supported by proof of an "express" *quid pro quo*, which may not be inferred from circumstantial evidence. Siegelman also contends (Pet. 24) that campaign contributions can never be prosecuted as bribes under 18 U.S.C. 666 or 18 U.S.C. 1346, and (Pet. 27-32) that the evidence in this case was insufficient to show that he obstructed justice. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioners argue that the district court was required to instruct the jury that it could find petitioners guilty only if the government proved an "express" quid pro quo, by which petitioners mean "an overtly spoken *quid pro quo* communication between the contributor and the official," Pet. 4, or "articulated commitments, not inferences or implications," 11-972 Pet. 12-13. That argument lacks merit.

Petitioners rely heavily on *McCormick*, in which this Court held that a Hobbs Act prosecution based on campaign contributions to a public official requires proof of a *quid pro quo*. They place great weight on the *McCormick* Court's reference to a political contribution "made in return for an *explicit* promise or undertaking by the official to perform or not to perform an official act," and its statement that, "[i]n such situations the official *asserts* that his official conduct will be controlled

by the *terms* of the promise or undertaking." 500 U.S. at 273 (emphasis added); see Pet. 4; 11-972 Pet. 12-13. But those sentences do not address the manner in which an agreement must be proved at trial. Indeed, in *McCormick* the jury had not been instructed to find a *quid pro quo* at all, explicit or otherwise. 500 U.S. at 274. *McCormick*, therefore, does not impose petitioners' desired requirement.

In any event, petitioners' argument is foreclosed by *Evans* v. *United States*, 504 U.S. 255 (1992), which was decided just one year after *McCormick*. Evans, a county commissioner, accepted $8000, purportedly as a contribution to his reelection campaign, "knowing that it was intended to ensure that he would vote in favor of the [donor's] rezoning application and that he would try to persuade his fellow commissioners to do likewise." *Id.* at 257. The Court held that Evans's violation of the Hobbs Act was complete when Evans "receive[d] a payment in return for his agreement to perform specific official acts." *Id.* at 268.

Evans had challenged a jury instruction on the ground that it failed to "properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution." 504 U.S. at 268. The Court held that the instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Ibid.* 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 instruction given in this case covered the essential aspects of the instruction approved in *Evans* because it required the jury to find that "the defendant and the official agree[d] that the official [would] take specific action in exchange for the thing of value." Pet. App. 63a. As the court of appeals correctly explained, "[s]ince the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*." *Id.* at 17a-18a; accord, *e.g.*, *United States* v. *Blandford*, 33 F.3d 685, 696 (6th Cir. 1994), cert. denied, 514 U.S. 1095 (1995). The court of appeals was likewise correct that "an explicit agreement may be 'implied from [the official's] words and actions." Pet. App. 18a (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment)) (brackets in original). As Justice Kennedy observed in *Evans*:

> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment). Indeed, "matters of intent are for the jury to consider." *McCormick*, 500 U.S. at 270; see *United States* v. *Williams*, 553 U.S. 285, 306-307 (2008).

Scrushy attempts (11-972 Pet. 14) to distinguish *Evans* by arguing that it "was not a campaign contribution case," but that is incorrect. In fact, Evans contended that all of the payments were contributions; the instruc-

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

Similarly unavailing is petitioners' effort to distinguish *Evans* on the theory that the question presented was whether an affirmative act of inducement (such as a demand) by a public official is an element of extortion under color of official right. See Pet. 14-15; 11-972 Pet. 14-15. Evans directly challenged the adequacy of the jury instructions under *McCormick* on the ground that passive acceptance of a campaign contribution based on a specific requested exercise of official power is not a *quid pro quo* unless the official complies or attempts to comply with the request. Pet. Br. at 23, 46-47, *Evans*, *supra* (No. 90-6105). Rejecting that challenge, the Court concluded that the instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Evans*, 504 U.S. at 268. By clarifying that "knowing the payment was made in return for official acts is enough," *Evans* "gave content to what the *McCormick quid pro quo* entails." *Blandford*, 33 F.3d at 696.

Petitioners' proposed requirement of an "express" promise or undertaking between the payor and the official would allow the evasion of criminal liability through "knowing winks and nods," *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judg-

ment), even where (as the jury found here) the parties had a meeting of the minds and agreed to exchange money for official action. See, *e.g.*, *United States* v. *Carpenter*, 961 F.2d 824, 827 (9th Cir.) ("When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond 'anticipation' and into an arrangement that the Hobbs Act forbids."), cert. denied, 506 U.S. 919 (1992). Under a standard that requires not just a *quid pro quo*, but one that is verbally spelled out with all "i"s dotted and "t"s crossed, all but the most careless public officials will be able to avoid criminal liability for exchanging official action for campaign contributions.

b. Petitioners argue (Pet. 15-18; 11-972 Pet. 15-20) that the decision below conflicts with various decisions of other courts of appeals, but none of the cited cases supports the proposition that an "express" *quid pro quo* is required in campaign-contribution cases.

The Ninth Circuit has long rejected the requirement of an "overtly spoken" *quid pro quo* (Pet. 4) that petitioners urge here. In *Carpenter*, the Ninth Circuit upheld a state legislator's bribery conviction for accepting and soliciting campaign contributions, explaining that "what *McCormick* requires is that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain." 961 F.2d at 827. The court emphasized "[t]he jury may consider both direct and circumstantial evidence, including the context in which a conversation took place, to determine if there was a meeting of the minds on a quid pro quo." *Ibid*. *Carpenter* makes clear that in the Ninth Circuit, the understanding between official and contributor "need not be verbally explicit." *Ibid*.

The Ninth Circuit recently confirmed its adherence to *Carpenter*, stating that "[a]n official may be convicted without evidence equivalent to a statement such as: 'Thank you for the $10,000 campaign contribution. *In return for it*, I promise to introduce your bill tomorrow.'" *United States* v. *Inzunza*, 638 F.3d 1006, 1014 (2011), cert. denied, 132 S. Ct. 997 (2012). Instead, "the proof may be circumstantial." *Ibid*. Siegelman erroneously contends (Pet. 18) that, under *Inzunza*, the official must "say[] out loud what action he is going to take." In fact, nothing in *Inzunza* undermines *Carpenter*'s conclusion that the *quid pro quo* "need not be verbally explicit." 961 F.2d at 827.[3] The decision below is therefore fully consistent with the Ninth Circuit's description of the requirements for an explicit *quid pro quo*.

The Second and Sixth Circuit decisions that petitioners cite also do not establish any conflict because those cases did not involve campaign contributions. See *United States* v. *Abbey*, 560 F.3d 513, 515, 518 (6th Cir.), cert. denied, 130 S. Ct. 739 (2009); *United States* v. *Ganim*, 510 F.3d 134, 137-140 (2d Cir. 2007) (Sotomayor, J.), cert. denied, 552 U.S. 1313 (2008). Although each case made passing mention of the campaign-contribution context, those references were dicta, and neither case establishes a heightened "express" standard in that context. Moreover, both cases based the contrast between campaign-contribution cases and cases involving other

[3] Petitioners (Pet. 18; 11-972 Pet. 18-19) cite *United States* v. *Kincaid-Chauncey*, 556 F.3d 923 (9th Cir.), cert. denied, 130 S. Ct. 795 (2009), but that decision does not announce a different rule for campaign-contribution cases, and in fact it did not involve campaign contributions at all. See *id*. at 927-929. Kincaid-Chauncey challenged only the district court's treatment of payments that were *not* contributions. See *id*. at 928, 938, 944 n.16.

types of payments on whether there must be an explicit promise to perform a "particular act" (*Ganim*, 510 F.3d at 144 (quoting *United States* v. *Coyne*, 4 F.3d 100, 114 (2d Cir. 1993), cert. denied, 510 U.S. 1095 (1994)) or "particular, identifiable act" (*Abbey*, 560 F.3d at 518) at the time of payment in a campaign-contribution context, as opposed to the official's understanding that he was expected to benefit the payor "as specific opportunities arose" (*Ganim*, 510 F.3d at 144 (quoting *Coyne*, 4 F.3d at 114); see *Abbey*, 560 F.3d at 518) in cases involving other types of gifts or payments. In this case, the instructions made clear that petitioners had to "agree that the official will take specific action in exchange for the thing of value," Pet. App. 63a; see *id.* at 18a-19a, thus satisfying any specificity requirement that *Ganim* or *Abbey* might impose.

c. Contrary to Siegelman's contention (Pet. 21-23), "due process concerns" do not require a heightened standard of a verbally explicit *quid pro quo* in campaign-contribution cases. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling*, 130 S. Ct. at 2927-2928 (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)) (brackets in original). A defendant convicted under a *quid pro quo* standard requiring the jury to find an exchange of specific official action for a contribution cannot complain that he lacked notice that his conduct was illegal, particularly since the applicable *mens rea* requirement "further blunts any notice concern." *Id.* at 2933.

The facts of this case do not bear out Siegelman's contention that he lacked notice of the illegality of his

conduct or petitioners' concerns that, without an express *quid pro quo* standard, First Amendment activity will be chilled, or arbitrary and unjust prosecutions will result. Pet. 20-23; 11-972 Pet. 19-20.[4] The evidence amply proved not only that petitioners negotiated an agreement to exchange $500,000 in contributions to the lottery campaign for membership on the CON Board, but also that they understood and faithfully executed the agreement's terms. See Pet. App. 4a-9a. Petitioners also concealed their corrupt agreement. For example, Scrushy structured the first $250,000 payment to come from a third party (ultimately, an out-of-state corporation) and hid both payments from the HealthSouth lawyer responsible for political donations, while Siegelman had Bailey deposit the first $250,000 check into a secretly opened bank account (unbeknownst to the lottery fundraising director), and failed to report either payment until the AEF's finances came under scrutiny. See *id.* at 6a-10a. Those acts of concealment corroborate the jury's finding that petitioners acted with corrupt intent and knowledge that their conduct was illegal. See, *e.g.*, *United States* v. *McDowell*, 250 F.3d 1354, 1366-1367 (11th Cir. 2001).[5]

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[4] Siegelman's claim of insufficient notice is also flawed. Even accepting his incorrect assertion that the court of appeals announced a new *quid pro quo* standard in this case, Pet. 22, the fact that a law was not previously interpreted a certain way does not violate due process or require application of the rule of lenity so long as the law's unambiguous meaning can be discerned. See *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2718-2722 (2010); *Moskal* v. *United States*, 498 U.S. 103, 107-108 (1990).

[5] Siegelman contends (Pet. 21) that, in view of what he describes as "the First Amendment aspect" of this case, this Court "should view the factual record with much closer scrutiny, to ensure that the application of the law to the facts is constitutionally sound." To the extent that Sie-

d. Even if the question presented otherwise warranted review, this case would be a poor vehicle for considering it because it would require the Court first to answer the threshold question, not resolved below, whether *McCormick*'s *quid pro quo* standard, developed in the context of the Hobbs Act's proscription of extortion under color of official right, 18 U.S.C. 1951(a) and (b)(2), even applies to prosecutions under the federal-funds bribery and honest-services fraud statutes. See Pet. App. 16a, 19a. Both of the substantive statutes at issue here contain a scienter element different from the Hobbs Act's: federal-funds bribery requires proof that petitioners acted corruptly, 18 U.S.C. 666(a)(1)(B) and (2), and honest-services fraud requires proof that petitioners acted with intent to defraud, *i.e.*, "knowingly and with the specific intent to deceive someone," Gov't C.A. Br. 62. No court of appeals has specifically addressed whether *McCormick* applies to those statutes. See, *e.g.*,

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gelman is challenging the sufficiency of the evidence, that claim does not warrant review. This Court ordinarily does not review the fact-bound question whether the evidence was sufficient in a given case, especially once the claim has been rejected by both the trial court and the court of appeals. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 124 (1974). There is no reason to depart from that practice here. Nor, contrary to the arguments of Siegelman and his *amici* (Law Professors' Br. 9-12), does the First Amendment require reviewing the evidence under a heightened sufficiency standard, rather than one asking "whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt." *United States* v. *Powell*, 469 U.S. 57, 67 (1984). Even in campaign-contribution cases, courts routinely review sufficiency claims by examining the evidence in the light most favorable to the guilty verdict. See, *e.g.*, *Inzunza*, 638 F.3d at 1014-1016; *United States* v. *D'Amico*, 496 F.3d 95, 101-102 (1st Cir. 2007), vacated on other grounds, 552 U.S. 1173 (2008); *Carpenter*, 961 F.2d at 826-828; see also *United States* v. *Cruzado-Laureano*, 404 F.3d 470, 482 (1st Cir.), cert. denied, 546 U.S. 1009 (2005).

United States v. *Beldini*, 443 Fed. Appx. 709, 717 (3d Cir. 2011) (so noting as to Section 666).[6] The Ninth Circuit has specifically held that *McCormick* does not apply to a state bribery statute, and it has rejected the contention that the First Amendment invariably requires an explicit *quid pro quo* instruction in campaign-contribution cases. *United States* v. *Jackson*, 72 F.3d 1370, 1374-1376 (1995), cert. denied, 517 U.S. 1157 (1996); see also, *e.g.*, *United States* v. *Ford*, 435 F.3d 204, 209, 212-213 & n.5 (2d Cir. 2006) (contrasting the *mens rea* requirements under the federal-funds bribery statute and the Hobbs Act).

At a minimum, *McCormick*'s application to the federal-funds bribery and honest-services fraud statutes presents a significant threshold question. The court of appeals had no need to address that question in affirming petitioner's convictions, but to win reversal based on the lack of an explicit *quid pro quo* jury instruction, petitioners would have to prevail both on the question presented and on the threshold question. In the absence of any conflict on either question, this Court's review is not warranted.

2. Siegelman contends (Pet. 24) that campaign contributions cannot be "prosecuted as bribes at all under § 666 and § 1346." That argument lacks merit.

According to Siegelman (Pet. 25), Congress did not intend Section 1346 to cover "campaign contributions as 'honest services' bribes, because that was not part of the

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[6] The Ninth Circuit's decision in *Inzunza* is not to the contrary. See 638 F.3d at 1013. *Inzunza* merely reaffirmed *Kincaid-Chauncey*, in which the Ninth Circuit had held that honest-services fraud in the form of bribery requires "at least an implicit *quid pro quo*." 556 F.3d at 943; see *id.* at 941 ("*McCormick* and *Evans*, while instructive, are clearly not controlling.").

doctrine's core" under case law predating *McNally* v. *United States*, 483 U.S. 350 (1987). Instead, he argues, that core was limited to self-enrichment schemes. That is incorrect.

In *Skilling*, this Court observed that the "vast majority" of pre-*McNally* honest-services cases involved bribery or kickback schemes, and it went on to "hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." 130 S. Ct. at 2930-2931. In describing bribes and kickbacks as "core" honest-services cases, the Court was referring to the theory of the honest-services fraud in those cases, not to the type of corrupt payment. See *id.* at 2930-2931 & nn.42-43, 2933. As the Third Circuit recently explained, "*Skilling* did not eliminate from the definition of honest services fraud any particular type of bribery, but simply eliminated honest services fraud theories that go beyond bribery and kickbacks." *United States* v. *Bryant*, 655 F.3d 232, 245 (2011). Nor would there be any reason to criminalize, under Section 1346, only those bribes or kickbacks involving self-enrichment, as the public is deprived of an official's honest services whether or not the bribed official personally receives a benefit. See *United States* v. *Spano*, 421 F.3d 599, 603 (7th Cir. 2005), cert. denied, 546 U.S. 1122 (2006).

Siegelman cites the statement in the government's *Skilling* brief that "the vast majority (if not all) pre-*McNally* honest-services cases did involve self-enrichment schemes." Pet. 25 (quoting Gov't Br. at 51, *Skilling*, *supra* (No. 08-1394)). But *Skilling* did not involve campaign contributions or a third-party enrichment scheme, see 130 S. Ct. at 2934, so the government had no reason to address such schemes. In any event, Siegelman *was* enriched by Scrushy's donations to the lottery

campaign because the payments were used to pay down the AEF's loan, for which Siegelman was unconditionally liable as a guarantor. Pet. App. 9a; Gov't C.A. Supp. Br. 7-8.[7] Moreover, Section 1346'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 the federal-official (18 U.S.C. 201(b)) and federal-funds (18 U.S.C. 666(a)) bribery statutes. *Skilling*, 130 S. Ct. at 2933. Campaign contributions have been prosecuted as bribes under Section 201(b), see *United States* v. *Tomblin*, 46 F.3d 1369, 1374-1376, 1378-1381 (5th Cir. 1995); *United States* v. *Carson*, 464 F.2d 424, 435 (2d Cir.) (conspiracy), cert. denied, 409 U.S. 949 (1972), and Section 666, see *United States* v. *Caro-Muñiz*, 406 F.3d 22, 24-25 (1st Cir. 2005); *United States* v. *Moeller*, 80 F.3d 1053, 1056-1058 (5th Cir. 1996); *United States* v. *Grubb*, 11 F.3d 426, 433-434 (4th Cir. 1993); see also *Ford*, 435 F.3d at 206 (in-kind contribution to union reelection campaign).

Siegelman's argument (Pet. 26) under the federal-funds bribery statute fares no better. Section 666 criminalizes the corrupt payment or acceptance of "anything of value" to or from "any person" with the requisite intent to influence. 18 U.S.C. 666(a)(1)(B) and (a)(2). A monetary contribution to a political campaign certainly qualifies as a "[]thing of value" to "any person," even if not made (as it was here) to the public official. Siegelman cites the purported absence of legislative history indicating that Congress intended Section

[7] Siegelman received the second payment from Scrushy in May 2000, two months after he guaranteed the AEF loan and one month before all of the principal and interest on the loan became due. Gov't C.A. Supp. Resp. Br. 17.

666 to cover campaign contributions, but the plain language of the statute makes reference to legislative history unnecessary. See *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984).

3. Siegelman contends (Pet. 27-32) that the evidence was insufficient to support his conviction for obstruction of justice because, he says, it did not establish that he intended to "hinder, delay, or prevent the communication to * * * law enforcement * * * of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(b)(3). That contention is entirely factbound, and it lacks merit in any event.

a. As an initial matter, this Court's review of Siegelman's argument is unwarranted at this time because the court of appeals reversed Siegelman's conviction on two fraud counts, vacated his sentence, and remanded for resentencing, so the case is still in an interlocutory posture as to Siegelman. This Court routinely denies petitions by parties challenging interlocutory determinations that may be reviewed at the conclusion of the proceedings. See, *e.g.*, *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Here, the interests of judicial economy would be best served by denying review now and allowing Siegelman to reassert his claim at the conclusion of the proceedings.

b. In reviewing a jury's guilty verdict for sufficiency of the evidence, "the relevant question is 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." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). Here, the court of appeals correctly applied that stan-

dard and held that "[a] reasonable juror could have concluded that Siegelman persuaded Bailey (he asked and Bailey agreed) to take the final step in the coverup [of the $9200 payment from Young] by giving him a $2793.35 check with the notation that it was final payment for the motorcycle." Pet. App. 34a. The court also found sufficient evidence "to support the jury's finding that the delivery of the final check in the presence of two lawyers and the use of the lawyers to 'finalize' the sale of the motorcycle to Bailey" satisfied the misleading-conduct requirement of Section 1512(b)(3), because it proved "an attempt to 'create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement agents in discovering the truth.'" *Id.* at 36a (quoting *United States* v. *Veal*, 153 F.3d 1233, 1247 (11th Cir. 1998), cert. denied, 526 U.S. 1147 (1999)).[8]

The court's reference to the evidence that Siegelman and Bailey were engaged in a "coverup" and were using third parties "to deflect" the efforts of investigators reflects the court's conclusion that the evidence was sufficient to permit the jury to find that Siegelman intended to hinder, delay, or prevent the communication of information about the $9200 payment to law enforcement. The purpose of any cover-up is to frustrate discovery of the truth about a crime. And here, the jury heard testimony that Siegelman was aware of the criminal investigation into his dealings with Young when he persuaded Bailey to write the $2973.35 check and that the $2973.35 check was the final step in the plan to make the $9200

[8] Siegelman contends (Pet. 28) that the evidence was insufficient to prove that he "persuaded" Bailey to write the check or that he misled Bailey's lawyer, but he does not contend that the sufficiency of that evidence independently warrants review.

payment from Young appear legitimate. Pet. App. 32a-33a. As the court of appeals explained, "Siegelman clearly knew that there was a 'possibility' that the federal investigators would come asking." *Id.* at 37a. The jury reasonably could have found that, by creating false exculpatory evidence (the $2973.35 check with the notation "balance due on m/c") and an unwitting alibi witness (Bailey's lawyer), Siegelman intended (as was alleged in the indictment) to hinder, delay, or prevent the communication by Young, Bailey, or Bailey's lawyer of information related to the $9200 payment to investigators.

Siegelman contends that the intent prong of Section 1512(b)(3) is limited to a defendant's "efforts to stop or keep people * * * from providing information to law enforcement, or at least to slow them down," Pet. 28-29, and that the jury allegedly heard no evidence that Bailey or his lawyer would have been willing to provide inculpatory information to law enforcement, Pet. 31. Those arguments are misplaced. First, Siegelman effectively reads the term "hinder" out of Section 1512(b)(3). Whether or not Siegelman believed that Young, Bailey, or Bailey's lawyer would have communicated information about the $9200 payment on their own initiative, the jury reasonably could have found that, by engaging with Young and Bailey in a cover-up, Siegelman intended to hinder their communication of information to law enforcement, because the $2973.35 transaction locked in Siegelman's, Bailey's, and Young's cover story about the $9200 payment. Indeed, Siegelman even tried to use the cover-up to his advantage at trial by introducing the bill of sale for the motorcycle. Pet. App. 37a n.28. Second, even under Siegelman's view of the statute, the jury reasonably could have found that he was aware of the possibility that Young or Bailey might become cooperating

witnesses—as each one ultimately did—and might (with the support of a lawyer) provide inculpatory information to investigators. Third, the jury could also have found that Siegelman intended to "hinder, delay, or prevent" Bailey's unwitting lawyer from communicating information about the $9200 payment to law enforcement by giving the lawyer a false understanding of events so that he "would be in a position factually to support the coverup" when investigators came calling. *Id.* at 37a. See *United States* v. *Applewhaite*, 195 F.3d 679, 683, 686-688 (3d Cir. 1999) (upholding Section 1512(b)(3) conviction that was based on attempt to hinder communication to law enforcement by persuading third party who was not involved in underlying crime to provide false alibi); see also *Veal*, 153 F.3d at 1247 (holding that Section 1512(b)(3) covers "activities designed to create witnesses as part of a cover-up and to use unwitting third parties or entities to deflect the efforts of law enforcement").

c. Siegelman asserts (Pet. 30-31) that the decision below conflicts with *Fowler* v. *United States*, 131 S. Ct. 2045 (2011), with *Skilling*, and with a decision of the Second Circuit. That is incorrect.

In *Fowler*, this Court considered the application of 18 U.S.C. 1512(a)(1)(C) to a case in which "a defendant killed a person with an intent to prevent that person from communicating with law enforcement officers in general but where the defendant did not have federal law enforcement officers (or any specific individuals) particularly in mind." 131 S. Ct. at 2048. "[I]n such circumstances," the Court held, "the Government must show * * * a *reasonable likelihood* that a relevant communication would have been made to a federal officer." *Ibid.* Here, Siegelman was "well aware of the

federal-state investigation into * * * his dealings with Young," Pet. App. 10a, and that cognizance of specific federal involvement is enough to satisfy the statute. See *Fowler*, 131 S. Ct. at 2049 (statute "fits like a glove" when the defendant intends to prevent communication to a person "the defendant knows is a federal law enforcement officer"). And, in any event, Siegelman does not dispute that the evidence of a federal connection in his case satisfied the "reasonable likelihood" standard. Rather, he contends generally (Pet. 31) that, under *Fowler*, "prosecutors must prove the particular intent that the subsection [of Section 1512] requires" and that the court of appeals failed to "follow" "the [clear] words of § 1512(b)(3)." That argument simply repackages his challenge to the sufficiency of the evidence in this case. The decision of the court of appeals rejecting that challenge and finding the requisite intent, Pet. App. 36a-37a, is entirely consistent with *Fowler*.

Siegelman's claim of a conflict with *Skilling* similarly lacks merit. Siegelman suggests (Pet. 31) that the court of appeals' alleged failure "to follow the statutory language" means that he lacked "fair warning" that his obstructive conduct was illegal. But Siegelman did not raise a vagueness challenge to Section 1512(b)(3) in the district court or in his initial briefs on appeal. *Skilling*'s reliance, in part, on vagueness principles to narrow the scope of Section 1346, see 130 S. Ct. at 2931, does not cast doubt on the court of appeals' correct decision upholding the sufficiency of the evidence on an unrelated count.

Nor does the decision below conflict with *United States* v. *Hertular*, 562 F.3d 433 (2d Cir. 2009). The court in that case upheld the defendant's conviction under Section 1512(b)(3) because the evidence proved his

"specific intent * * * to hinder or prevent not simply the filing of an indictment but any communication to or among federal law enforcement officials that could lead to his indictment." *Id.* at 443. The same is true here. Siegelman's intent was not generally to avoid indictment for the $9200 payment from Young; the purpose of creating false evidence and an alibi witness was to hinder, delay, or prevent the communication of any incriminating information if "the federal investigators [came] asking." Pet. App. 37a.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOHN-ALEX ROMANO
Attorney

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