No. 13-327

In the Supreme Court of the United States

TONY DEVAUGHN NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the prohibitions against honest-services mail fraud (18 U.S.C. 1341, 1346) and bribery involving an entity that receives federal funds (18 U.S.C. 666(a)(1)(B)) are unconstitutionally vague as applied to petitioner's conduct, which involved his breach of fiduciary duty as a state official by engaging in a "'classic' bribery and kickback scenario" involving a "*quid pro quo* exchange" of money for influence and access at a state agency.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-41) is published at 712 F.3d 498.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2013. A petition for rehearing was denied on June 13, 2013 (Pet. App. 42-43). The petition for a writ of certiorari was filed on September 11, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to commit honest-services mail fraud, bribery, and money laundering, in violation of 18 U.S.C. 371; 11 counts of hon-

est-services mail fraud, in violation of 18 U.S.C. 1341, 1346, and 2; 11 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); 12 counts of federal-funds bribery, in violation of 18 U.S.C. 666(a)(1)(B); and one count of making a false statement to a federal investigator, in violation of 18 U.S.C. 1001. 3:10-cr-23 Docket entry No. 408, at 1 (M.D. Fla. Feb. 21, 2012) (Judgment). He was sentenced to 40 months of imprisonment, to be followed by one year of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1-41.

1. In 2001, petitioner was appointed to the seven-member volunteer board of the Jacksonville Port Authority (JaxPort), an independent state agency responsible for the maintenance and development of the public seaport terminals in Jacksonville, Florida. Pet. App. 3. In 2005, another JaxPort board member, Marty Fiorentino, introduced petitioner to Lance Young, the owner of one of JaxPort's private dredging contractors, Subaqueous Services, Inc. (SSI). *Id.* at 3-4. At the time, Fiorentino was a paid lobbyist for SSI. *Id.* at 4. Petitioner became friendly with Young, frequently talking to him on the phone, socializing with him, and attending Jacksonville Jaguars football games in Young's private suite. *Ibid.* As the relationship matured, petitioner offered advice to Young about submitting bids for JaxPort projects and took credit when SSI's bids were successful. *Id.* at 4-5.

Petitioner also attempted to influence JaxPort staff to hire SSI for dredging work. Pet. App. 5. In a meeting with JaxPort's director of procurement and its chief financial officer, petitioner complained about the performance of JaxPort's current dredging contractor, urged cancellation of the current contract,

and advocated retaining SSI instead. *Ibid.* The procurement director told petitioner that he saw no reason to cancel the current contract and lacked authority to do so. *Ibid.* Petitioner responded that if the procurement director could not cancel the contract, petitioner would find someone who could. *Ibid.*

Meanwhile, Young was becoming frustrated that Fiorentino was not doing enough to help SSI at JaxPort, and he ultimately declined to renew Fiorentino's contracts. Pet. App. 6. When Young expressed his frustrations with Fiorentino to petitioner, petitioner said that he was already doing "twice as much" for SSI as Fiorentino had ever done and added that he "wanted to be on the payroll" of SSI. *Ibid.* Young interpreted petitioner's comment as a solicitation for a bribe. *Ibid.* Young accordingly arranged for his state-wide lobbyist to retain petitioner as a "consultant" for the lobbyist's company. *Ibid.* Petitioner's own company received regular payments of $8500 per month from August 2006 through the summer of 2007. *Ibid.* Those payments stopped temporarily in anticipation of the sale of SSI, but Young assured petitioner that he would be paid in full when the sale had been completed. *Id.* at 6-7. In March 2008, after the sale went through, Young gave petitioner a check for $50,000. *Id.* at 7.

While on the payroll, petitioner "never voted on an SSI contract" as a JaxPort board member, but "he was frequently called upon by Young to help SSI with various other matters before JaxPort." Pet. App. 7. For example, petitioner made several phone calls to JaxPort staff members in order to persuade them to approve a change order for one of SSI's dredging contracts. *Ibid.* The change order added almost

$150,000 of work to SSI's contract. *Ibid.* Petitioner also helped SSI obtain the "unprecedented" early release of a $585,000 "retainage" fee that JaxPort would normally have held until the successful completion of the contract. *Id.* at 7-8. Similarly, petitioner intervened on SSI's behalf on other contractual matters, including a request (which was ultimately denied) that JaxPort pay more to SSI to account for increased fuel costs and requests that SSI be paid on particular claims. *Id.* at 8.

In February 2007, after other JaxPort vendors complained about the relationship between petitioner and SSI, JaxPort's chief financial officer directed the organization's ethics officer to conduct an investigation. Pet. App. 8. That same day, petitioner met with the City of Jacksonville's general counsel to discuss the accusations. *Ibid.* Petitioner gave a misleading description of his relationship with SSI and did not disclose that he was receiving payments from the company. *Ibid.* Based on petitioner's representations, the general counsel sent petitioner an e-mail informing him that his relationship with SSI did not pose a conflict of interest. *Ibid.* Petitioner forwarded that email to JaxPort's chief financial officer. *Ibid.* Petitioner also met with JaxPort's ethics officer and denied ever receiving "a dollar, a penny, or a nickel" from SSI. *Id.* at 8-9.

In February 2008, the FBI began intercepting calls between petitioner and Young, in which they were discussing the forthcoming sale of SSI, how it would affect SSI's "level of access" to JaxPort, and potential modifications to their scheme in light of the sale. Pet. App. 9. As part of the FBI investigation, an agent asked Young about the recent $50,000 payment to

petitioner, and Young claimed that it was a "consulting fee." *Id.* at 10. Petitioner, in contrast, said that the $50,000 was a loan. *Ibid.* Petitioner also denied having any business relationship with SSI. *Ibid.* Subsequently, however, petitioner acknowledged that the payment was to provide SSI with "access" at JaxPort and that he would not have helped the company to the extent he did if he had not been paid. *Id.* at 10. Petitioner also "admitted to knowing that the payments were illegal" (although notes from one of the interviews emphasized his statement that he "now" knew the payments to be wrongful). *Id.* at 10 & n.5.

2. A federal grand jury indicted petitioner on one count of conspiracy to commit honest-services mail fraud, bribery, and money laundering, in violation of 18 U.S.C. 371; 12 counts of honest-services mail fraud (based on the checks petitioner's company received), in violation of 18 U.S.C. 1341 and 1346; 11 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); 12 counts of federal-funds bribery, in violation of 18 U.S.C. 666(a)(1)(B); and one count of making a false statement to an FBI agent, in violation of 18 U.S.C. 1001. Pet. App. 10-11. Seven other counts, which charged petitioner with a separate fraud scheme, were subsequently severed and dismissed. *Id.* at 11 n.6.

The honest-services mail-fraud statute forbids the use of the mail in furtherance of "any scheme or artifice to defraud," 18 U.S.C. 1341, where the scheme or artifice aims to "deprive another of the intangible right of honest services," 18 U.S.C. 1346. In *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), this Court interpreted the phrase "scheme or artifice to deprive another of the intangible right of honest services" to

refer to bribery and kickback schemes. *Id.* at 2931. The district court in this case accordingly instructed the jury that, in order to convict petitioner on the honest-services mail-fraud counts, it had to find the following elements (among others) beyond a reasonable doubt: (1) that petitioner "knowingly devised or participated in a scheme to fraudulently deprive the public of the right of honest services"; (2) that "the scheme or plan consisted of a bribe, such that [petitioner] solicited, demanded, accepted, or agreed to accept payment from someone other than [JaxPort], and that, in return for the payment, [petitioner] intended to be corruptly influenced or rewarded for a transaction or series of transactions of [JaxPort]"; and (3) petitioner "did so with an intent to defraud." Pet. App. 51; see *id.* at 50. The instructions emphasized that petitioner could not be found guilty merely for "fail[ing] to disclose or conceal[ing] a financial interest," but that the government instead had to "prove beyond a reasonable doubt that the scheme or plan * * * consisted of bribery." *Id.* at 52; see *id.* at 51.

The federal-funds bribery statute prohibits "corruptly solicit[ing] or demand[ing] * * * or accept[ing] or agree[ing] to accept, anything of value from any person, intending to be influenced or rewarded in connecting with any business, transaction, or series of transactions" of a state or local agency "involving any thing of value of $5,000 or more." 18 U.S.C. 666(a)(1)(B). The district court instructed the jury that to find petitioner guilty of the federal-funds-bribery offenses, the government was required to prove beyond a reasonable doubt that, *inter alia*, petitioner "solicited or demanded, accepted or agreed to accept anything of value from someone other than

[JaxPort]"; intended "in return * * * to be influenced or rewarded for a transaction or series of transactions"; and did so "corruptly," *i.e.*, "voluntarily, deliberately and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result." Pet. App. 53-55. Petitioner did not preserve any objections to the jury instructions. See Pet. C.A. Br. 13-14 (acknowledging that petitioner's appellate challenges to the jury instructions were subject to plain-error review).

3. After a three-week trial, the jury convicted petitioner on all counts except one count of mail fraud. Pet. App. 11. In denying various post-verdict motions filed by petitioner, the district court rejected petitioner's contention that his honest-services mail fraud convictions did not comport with this Court's opinion in *Skilling*. The district court explained that it "was well aware that the honest services mail fraud counts * * * had to meet the standards announced by the Supreme Court in *Skilling* and [had] fashioned jury instructions designed to accomplish that result." 3:10-cr-23 Docket entry No. 364, at 4 (M.D. Fla. Sept. 6, 2011) (Dkt.). The court added that the jury's finding of guilt on "twelve counts of federal funds bribery" helped to "convince[]" it that, "in convicting [petitioner] of honest services mail fraud, the jury was making a finding that [petitioner] had 'solicited, demanded, accepted, or agreed to accept' a bribe." *Id.* at 4-5. The district court sentenced petitioner to 40 months of imprisonment on each count, to run concurrently, and to be followed by one year of supervised release. Judgment 2-3.

4. a. The court of appeals affirmed. Pet. App. 1-41. The court first rejected petitioner's contention that the honest-services mail-fraud and federal-funds-bribery statutes were unconstitutionally vague as applied to petitioner's conduct. *Id.* at 12-26. The court of appeals observed that this Court's decision in *Skilling* had "held that any vagueness concerns regarding [the honest-services statute] could be obviated through a limiting construction of the statute" to cover only bribery and kickback schemes. *Id.* at 17 (citing *Skilling*, 130 S. Ct. at 2929-2931). The court of appeals quoted *Skilling*'s statements that "a criminal defendant who participated in a bribery or kickback scheme * * * cannot tenably complain about prosecution under [the honest-services-statute] on vagueness grounds"; that "it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud"; and that "the statute's *mens rea* requirement further blunts any notice concern." *Id.* at 17-19 (quoting *Skilling*, 130 S. Ct. at 2933-2934) (internal quotation marks and brackets omitted).

The court of appeals accepted that "*Skilling* does not foreclose an as-applied challenge" to an honest-services-fraud conviction, Pet. App. 21, but it found "nothing in the nature of [petitioner]'s conduct or his role on the JaxPort board, in particular, that separates him from those similarly charged with bribery who, according to the Supreme Court, 'cannot tenably complain about . . . vagueness,'" *id.* at 22. The court of appeals observed that its case law recognized a fiduciary duty of public officials to make decisions in the best interest of the public, *ibid.*, and it rejected petitioner's argument that this duty was implicated only when petitioner exercised his voting powers, *id.*

at 24. The court explained that "a board member who uses his position of authority to direct or influence someone else in his organization to do something that he could not do himself is * * * acting in his official capacity"; that it was "the authority inherent in [petitioner's] position as a board member that has enabled him to exercise his influence in the first place"; and that petitioner had "a duty to exercise those powers honestly and in the organization's interests, rather than his own." *Id.* at 24-25. The court additionally reasoned that the existence of a "*quid pro quo* exchange" here made this a "'classic' bribery and kickback scenario" and "undoubtedly blunts any argument that [petitioner] lacked notice that his conduct was unlawful." *Id.* at 23. The court also concluded that "any potential vagueness in these provisions is mitigated by their *scienter* requirements." *Id.* at 25.

The court of appeals separately rejected petitioner's arguments that the jury instructions provided a "hopelessly circular" definition of bribery. Pet. App. 26-30. The court observed that plain error review applied because petitioner had forfeited his objections to the instructions, *id.* at 27; that petitioner had in fact specifically requested one of the instructions he now challenged, *id.* at 27-28; that the pattern instruction on bribery had correctly required the jury to find that petitioner "voluntarily and deliberately engaged in unlawful conduct," *id.* at 29; and that the instructions, on the whole, "accurately express[ed] the law applicable to the case," *id.* at 30 (citation omitted).

b. Judge Wilson filed a concurring opinion. Pet. App. 34-36. He emphasized, among other things, that the evidence in this case had shown a *quid pro quo* in which petitioner had accepted money in return for

using his official position to exert influence on SSI's behalf. *Id.* at 35. Judge Wilson reasoned that "it cannot be seriously contended that [petitioner's] influence on the board was limited to voting." *Ibid.* He rejected the view that petitioner was free to "accept any payment that came his way" merely because he had refrained from voting on SSI matters or because he had gotten a "rubber stamp" ethics opinion after disclosing "a mere fraction of the truth" of his relationship with SSI. *Id.* at 34-35.

c. Judge Hill dissented. Pet. App. 36-41. In Judge Hill's view, the government had not proved that petitioner "had a corrupt intent to be bribed," but merely that he had engaged in lobbying he could have believed to be lawful and had concealed his financial relationship with SSI. *Id.* at 39-40. Judge Hill also took the view that the jury instructions had not adequately instructed the jury "on the scope of [petitioner's] duty to JaxPort—an essential element of the crime of honest services fraud"—and that "the necessity to find a violation of that duty is fatal to the verdict." *Id.* at 41.

ARGUMENT

Petitioner contends (Pet. 13-31) that the honest-services-fraud statute and the federal funds bribery statute are unconstitutionally vague, because those statutes failed to provide him with notice that his conduct in this case would be a breach of his fiduciary duty to JaxPort. That contention lacks merit; the decision below does not conflict with any decision of this Court or any other court of appeals; and no further review is warranted.

1. a. In *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), this Court held that the honest-services statute

"presents no vagueness problem" when construed to apply only to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party." *Id.* at 2928; see *id.* at 2927-2934. The Court explained that the statute, so construed, does not raise either of the concerns that the void-for-vagueness doctrine addresses, namely, providing "fair notice" and preventing "arbitrary and discriminatory prosecutions." *Id.* at 2933.

"As to fair notice," the Court reasoned that "it has always been 'as plain as a pikestaff that' bribes and kickbacks constitute honest-services fraud," and "the statute's *mens rea* requirement further blunts any notice concern." *Skilling*, 130 S. Ct. at 2933 (citation omitted). The Court observed, *inter alia*, that "the honest-services doctrine had its genesis in prosecutions involving bribery allegations"; that the "'vast majority' of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes"; and that courts of appeals had long "described schemes involving bribes or kickbacks as 'core . . . honest services fraud precedents.'" *Id.* at 2930-2931 (citations omitted); see *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute."). "As to arbitrary prosecutions," the Court "perceive[d] no significant risk that the honest-services statute," construed to cover only bribes and kickbacks, "will be stretched out of shape." *Skilling*, 130 S. Ct. at 2933. The Court explained that the statute's "prohibition on bribes and kickbacks draws content not only from * * * case law, but also from federal statutes proscribing—and defining—similar crimes," including the

federal-funds bribery statute. *Ibid.* (citing 18 U.S.C. 666(a)(2), which prohibits bribing the agent of an organization that receives federal funds).

b. Petitioner's conduct in this case falls squarely within the construction of the honest-services statute that the Court adopted in *Skilling* to alleviate any vagueness concerns. The court of appeals found that this case presented a "'classic' bribery and kickback scenario" involving "a *quid pro quo* exchange" of money for official influence. Pet. App. 23; see *id.* at 35 (Wilson, J., concurring) (stating that this case "obviously" involved a *quid pro quo*).[1] As the court explained, "the evidence presented at trial reflects that [petitioner] agreed to represents SSI's interests before JaxPort in exchange for monthly payments routed through a middleman." *Id.* at 23. Petitioner accepted over $100,000 in payments in return for using his position to obtain advantages for SSI, including a $150,000 expansion of SSI's contract and the "unprecedented" early release of a $585,000 retainage fee under a contract. *Id.* at 6-8.

The jury necessarily determined, in light of its instructions, that the "scheme or plan" giving rise to honest-services-fraud liability "consisted of a bribe." Pet. App. 51. More specifically, the jury necessarily found that petitioner "solicited, demanded, accepted, or agreed to accept payment" from someone other than JaxPort and that "in return for the payment," he "intended to be corruptly influenced or rewarded for a

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[1] Petitioner briefly asserts (Pet. 9) that the government waived any reliance on a *quid pro quo* theory at oral argument in the court of appeals. As the citations in the text reflect, however, the court of appeals apparently did not perceive the government as having made such a concession.

transaction or series of transactions of" JaxPort. *Ibid.* The jury also determined, in specifically finding petitioner guilty of federal-funds bribery, that petitioner acted "voluntarily, deliberately and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result." *Id.* at 55. Petitioner, in other words, wrongfully accepted bribes and knew that he wrongfully accepted bribes. And under *Skilling*, "[a] criminal defendant who participated in a bribery or kickback scheme * * * cannot tenably complain about prosecution [for honest-services fraud] on vagueness grounds." 130 S. Ct. at 2934.[2]

c. Petitioner nevertheless cites (Pet. 15) a concurring opinion in *Skilling* for the proposition that the Court's limiting construction of the honest-services statute contains a "fundamental indeterminacy" about "the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies." 130 S. Ct. at 2938 (Scalia, J., concurring in part and concurring in the judgment). The Court, however, did not share the concurrence's view that this made the statute vague. Compare *id.* at 2933 ("Interpreted to encompass only bribery and kickback schemes, [the honest-services statute] is not unconstitutionally vague."), with *id.* at 2935 (Scalia, J., concurring in part and concurring in the judgment) ("In my view [the honest-services statute] is vague."). The Court directly responded to the concurrence's criticism about a fiduci-

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[2] Petitioner contends that not only the honest-services statute, but also the federal-funds bribery statute, is unconstitutionally vague. See Pet. i. Because his argument about the bribery statute is entirely derivative of his argument about the honest-services statute, see Pet. 16 n.4, it fails for the same reasons.

ary-duty indeterminacy by observing that "debates" about "the source and scope of fiduciary duties" were "rare in bribe and kickback cases" and that the "existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute." *Id.* at 2930 n.41.

Although the Court closed the door to bribery defendants' claims that the honest-services statute is vague because the covered fiduciary duties are not clear, *Skilling*, 130 S. Ct. at 2934, petitioner suggests (Pet. 16) that this is the rare case in which the scope of the fiduciary duty is unclear and thus warrants revisiting the issue resolved in *Skilling*. That contention is incorrect. The Court in *Skilling* specifically listed "public official-public" as an example of a fiduciary relationship that is "beyond dispute." 130 S. Ct. at 2930 n.41. Here, the court of appeals observed that petitioner "does not dispute that he was a public official"; that the court itself had previously held that "'public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest'"; and that petitioner's case "is not exceptional" as compared to other bribery cases. Pet. App. 22 (quoting *United States* v. *de Vegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (brackets omitted), cert. denied, 530 U.S. 1264 (2000)).

Petitioner's fact-bound disagreement with how the court of appeals viewed the circumstances of this particular case does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). It also lacks merit. Petitioner's primary contention (Pet. 16-17, 24-28) is

that his conduct is indistinguishable from the conduct of his colleague Fiorentino, a registered lobbyist who openly received consulting fees from Young, but was not charged with a crime. Dkt. No. 227, at 6-7 (Mar. 16, 2011). But as the government explained to the district court in responding to petitioner's motion alleging selective prosecution, the government has no evidence that Fiorentino actually used his influence on SSI's behalf at Jaxport like petitioner did. See *id.* at 13-18. Young in fact testified at trial that he was motivated to replace Fiorentino precisely because Fiorentino "wasn't doing anything for [Young]." Pet. App. 6. Young had no such problems with petitioner, who repeatedly exerted his influence at JaxPort on Young's behalf. See *id.* at 7-8.[3]

To the extent that petitioner suggests that he believed his actions were permissible, or that what he did was generally acceptable around JaxPort, those arguments are inconsistent with the record. The evidence showed that JaxPort vendors and employees found petitioner's behavior sufficiently unusual to launch an investigation, Pet. App. 8, and the ethics opinion petitioner obtained to squelch that investigation was based on his incomplete and misleading rep-

[3] Petitioner suggests (*e.g.*, Pet. 27) that the jury may impermissibly have convicted him simply because he, unlike Fiorentino, concealed his relationship with SSI. See *Skilling*, 130 S. Ct. at 2932-2933 (concluding that "undisclosed self-dealing by a public official" is not covered by the honest-services statute). That contention cannot be squared with the jury instructions, which repeatedly informed the jury that concealment of a financial relationship is not itself a crime. Pet. App. 51-52. Petitioner's concealment was, however, highly relevant to proving his "inten[t] to be corruptly influenced or rewarded" and his "inten[t] to defraud," which were elements of the offenses. *Id.* at 51; see *id.* at 54-55.

resentations about his relationship with Young, *id.* at 8-9. The jury, moreover, convicted petitioner of not only honest-services fraud, but also actual bribery, in violation of the federal-funds bribery statute. *Id.* at 2. In light of the jury instructions on federal-funds bribery, the jury necessarily found that petitioner "kn[ew] that accepting payments from SSI in exchange for representing the company's interests at JaxPort is something that the law forbids," *id.* at 29; see *id.* at 26, 55; see also pp. 18-19, *infra* (discussing state law).[4]

2. Petitioner identifies no conflict of authority that is implicated by this case. Petitioner's assertion (Pet. 18-20) of pre-*Skilling* disagreement about the source and scope of a fiduciary duty as a precondition for an honest-services-fraud conviction simply repeats an argument that was before the Court in *Skilling*. See 130 S. Ct. at 2930 n.41. The Court expressly rejected the view that any such disagreement rendered the statute unconstitutionally vague. *Ibid.*

Petitioner's claim of a post-*Skilling* circuit conflict that would warrant certiorari in this case is misplaced. Petitioner does not identify any decision of any court of appeals holding that the honest-services-fraud statute or the federal-funds-bribery statute is vague as applied to any set of facts, let alone as applied to the sort of *quid pro quo* bribery at issue here. Nor does petitioner identify any decision of any court of appeals that would find his particular conduct to be

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[4] Petitioner contends (Pet. 26) that the jury instructions were flawed, but that contention is not fairly encompassed within the question presented (which is about vagueness), see Pet. i; would be reviewable only for plain error, Pet. App. 27; is substantively incorrect for the reasons explained by the court of appeals, *id.* at 29; and is entirely case-specific.

outside the scope of the honest-services or federal-funds-bribery statutes. To the contrary, he appears to recognize that the courts of appeals would uniformly sustain a conviction where the facts show *quid pro quo* bribery. See Pet. 21-22 & n.6.

Finally, petitioner's assertion (Pet. 20-21) of a post-*Skilling* conflict between the Fifth, Ninth, and Eleventh Circuits on the source of the fiduciary duty for honest-services convictions provides no basis for further review in this case. To the extent that petitioner suggests a conflict between the decision below and the Ninth Circuit's decision in *United States* v. *Milovanovic*, 678 F.3d 713 (2012) (en banc), cert denied, 133 S. Ct. 929 (2013), that suggestion is misplaced. The court of appeals' conclusion here that "public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest," Pet. App. 22 (citation and brackets omitted), is consistent with the Ninth Circuit's conclusion that the type of fiduciary duty that can support an honest-services-fraud prosecution "is not limited to a 'formal' fiduciary relationship well-known in the law," *Milovanovic*, 678 F.3d at 724. And *Milovanovic*'s holding that a person who held no state office, but was entrusted by the State with administering licensing tests, had a fiduciary duty, *ibid.*, is consistent with the holding of the court below that a person who *did* hold state office was a fiduciary. Indeed, the Ninth Circuit specifically endorsed the Eleventh Circuit's pattern civil jury instructions on the existence of a fiduciary duty as a useful "starting point." *Id.* at 723 n.9.

Petitioner also fails to establish that the outcome of this case would have been different in the Fifth Circuit. In a pre-*Skilling* case, *United States* v. *Brum-*

ley, 116 F.3d 728 (en banc), cert. denied, 522 U.S. 1028 (1997), the Fifth Circuit held that the government must "prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law" in order to convict a defendant of honest-services fraud. *Id.* at 734. In an unpublished opinion cited by petitioner, a panel of the Fifth Circuit concluded that *Brumley* remains good law after *Skilling*. See *United States* v. *Sanchez*, 502 Fed. Appx. 375, 381-382 (2012). But even assuming the Fifth Circuit would reach that same conclusion in a precedential decision,[5] *Brumley* specifically recognized that conduct constituting "something close to bribery" is sufficient to support an honest-services-fraud conviction. 116 F.3d at 734. The Fifth Circuit would accordingly affirm petitioner's convictions for *quid pro quo* bribery, just like the decision below did.

Furthermore, petitioner has not explained, either in his petition or in his briefing in the court of appeals, why or how his conduct would be lawful under state

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[5] The one published post-*Skilling* Fifth Circuit decision relied on by petitioner, *United States* v. *Teel*, 691 F.3d 578 (2012), cert. denied, 133 S. Ct. 1279 and 133 S. Ct. 1286 (2013), does not directly address whether a state-law violation is a necessary prerequisite to an honest-services-fraud conviction. The defendants in that case argued that their honest-services-fraud convictions were infirm because the court had instructed the jury on Mississippi, rather than federal, bribery law. *Id.* at 582. The Fifth Circuit rejected the argument that "after *Skilling*, [the honest-services statute] criminalizes *only* bribery and kickbacks under *federal law*," *id.* at 583 (first emphasis added), and concluded instead that honest-services "prosecutions *may* involve misconduct that is *also* a violation of state law," *id.* at 584 (emphasis added); see *Sanchez*, 502 Fed. Appx. at 381-382 (considering *Teel*, but applying *Brumley*).

law. Florida law broadly prohibits a "public servant" from "corruptly * * * accept[ing] * * * any pecuniary or other benefit not authorized by law with an intent or purpose to influence the performance of any act or omission * * * within the official discretion of a public servant * * * in performance of a public duty." Fla. Stat. Ann. § 838.015(1) (West 2006). Florida courts have concluded that this statute applies even to otherwise-lawful activities, when those activities are part of a *quid pro quo* bribery scheme. See *State* v. *Flansbaum-Talabisco*, 121 So.3d 568, 573-579 (Fla. Dist. Ct. App. 2013) (campaign contributions). It is unlikely that petitioner could escape liability on the ground that he did not vote on any of the matters for which he was paid, because the statute specifically states that "[p]rosecution under this section shall not require * * * proof that * * * the matter was properly pending before him or her or might by law properly be brought before him or her, that the public servant possessed jurisdiction over the matter, or that his or her official action was necessary to achieve the person's purpose." Fla. Stat. Ann. § 838.015(2) (West 2006). Further review of petitioner's vagueness claim is accordingly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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