No. 16-916

In the Supreme Court of the United States

MALCOLM A. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
KENNETH A. BLANCO
Acting Assistant Attorney General
FRANCESCO VALENTINI
Attorney

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

QUESTIONS PRESENTED

1. Whether petitioner committed honest services fraud, 18 U.S.C. 1343 and 1346, where petitioner knowingly participated in a scheme to bribe several political officials—including by approving the transfer of funds to those officials—in order to induce them to violate their fiduciary duty to their party and its members.

2. Whether petitioner unlawfully "obtain[ed] * * * property from another," in violation of the Hobbs Act, 18 U.S.C. 1951(b)(2), where petitioner took official action in exchange for the payment on his behalf of bribes to third parties.

3. Whether petitioner's conviction for violating the Travel Act, 18 U.S.C. 1952, is invalid on the ground that the predicate New York bribery statutes are unconstitutionally vague or overbroad.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

In the Supreme Court of the United States

No. 16-916

MALCOLM A. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the Federal Reporter but is reprinted at 664 Fed. Appx. 23. The opinion and order of the district court (Pet. App. 14a-149a) is reported at 985 F. Supp. 2d 547.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 2016. The petition for a writ of certiorari was filed on January 18, 2017. 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 New York, petitioner was convicted of honest services wire fraud, in violation of 18 U.S.C. 1343, 1346, 1349, and 2; Hobbs Act extortion, in violation of 18 U.S.C. 1951; traveling

and using a facility in interstate commerce to carry on an unlawful activity (bribery), in violation of the Travel Act, 18 U.S.C. 1952 and 2; and conspiracy to commit wire fraud and to violate the Travel Act, in violation of 18 U.S.C. 371. He was sentenced to concurrent terms of 84 months in prison on the wire fraud and Hobbs Act counts and 60 months in prison on the Travel Act and conspiracy counts, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 1a-13a.

1. In 2012 and 2013, petitioner was a New York State Senator considering a run for mayor of New York City. Gov't C.A. App. 662. At that time, many candidates were seeking the Democratic nomination; petitioner, himself a registered Democrat, hoped to avoid the crowded field by running on the Republican ticket. *Id.* at 47. Because petitioner was not a Republican, state law required him to obtain, as a prerequisite for seeking the Republican nomination, the approval of at least three of the five New York City Republican County Committees—commonly known as "Wilson-Pakula certificates." See N.Y. Elec. Law § 6-120(3) (McKinney 2007); see also *Master* v. *Pohanka*, 891 N.E.2d 285, 289 (N.Y. 2008) (identifying the "purpose" of the Wilson-Pakula law as "prevent[ing] the invasion or takeover of the party by outsiders"). This case arises from petitioner's attempt to obtain Wilson-Pakula certificates through a bribery scheme.

a. In April 2012, petitioner met with Mark Stern, who presented himself as a politically active member of the community with significant real estate interests. Unbeknownst to petitioner, Stern was an informant for the FBI. Gov't C.A. App. 154, 321. Stern later introduced petitioner to "Raj," who purported to

be a wealthy real estate developer attempting to enter the New York market but who was in fact an undercover FBI agent. *Id.* at 217.

In November 2012, petitioner met with Stern and Raj at a hotel in White Plains. Gov't C.A. App. 85. At the end of that meeting, petitioner mentioned his "mayoral ambition" and explained his need to obtain Wilson-Pakula certificates. *Id.* at 747. Stern told petitioner that he might be able to secure the support of Craig Eaton, Chairman of the Brooklyn County Republican Party. *Id.* at 748. Petitioner replied that it would be "huge" if Stern could obtain Eaton's support. *Id.* at 749; see *ibid.* ("[I]f you can switch him that would be a game changer."); *id.* at 751 ("I'm already indebted to you for life but I would really be like you can move in with me. I'm serious, that's how serious.").

To further petitioner's plan, Stern and Raj involved Daniel Halloran, a New York City Councilman to whom Stern and Raj had been paying bribes in return for city contracts. Gov't C.A. App. 92-93, 662-667. Petitioner directed Raj to work with Halloran, not only to secure Eaton's support, but also to recruit Joseph Savino, then the Chairman of the Bronx County Republican Party. *Id.* at 93-94, 97. Petitioner told Raj that this objective was a "big thing" worth "going to the bank" to achieve. *Id.* at 937; see *id.* at 939-941 ("You pull this off, you can have the house. * * * I'll be a tenant.").

Over the next two months, Halloran, Raj, and Stern worked to secure commitments for enough Wilson-Pakula certificates to enable petitioner to seek the Republican nomination. Halloran identified Vincent Tabone as key to that effort, because Tabone con-

trolled the Queens County Republican Party and could readily be bribed. See Gov't C.A. App. 916 ("Vince Tabone * * * he's a [expletive] whore, there's no nice way to say it, alright, it's all about the bottom line for him."); *ibid.* ("[Y]ou can buy him off tomorrow."). Ultimately the scheme included attempts to bribe Tabone, Savino, and Daniel Isaacs, the Chairman of the New York City (Manhattan) Republican Party.[1]

In February 2013, Raj and Stern briefed petitioner on the status of the scheme. They told him that they had "negotiated" down the required price and estimated "[i]t'll be in the range of, say, two hundred grand" to have "[a]ll five [county chairs] signing a Wilson-Pakula [certificate]." Gov't C.A. App. 1076; *id.* at 1077 ("They all have financial needs and want to be taken care of."). Raj explained that he was "happy" to contribute the money but that he was "not giving any of them fifty up front." *Id.* at 1076-1077. Petitioner, Raj, and Stern all agreed that, before the party officials would receive full payment, the officials should be required to follow through on their promise and sign the certificates. *Id.* at 1077-1079; see *id.* at 1108 ("[Petitioner:] I wouldn't give them more than like ten * * * just to start out.").

At the same meeting, petitioner, Stern, and Raj discussed how to create a cover story for the bribes. Gov't C.A. App. 1100-1109. Raj and Stern told petitioner that they would pay out the bribes in cash. See *id.* at 1105 ("It's an envelope, to put it to you very bluntly."); *id.* at 1104 ("A couple thousand here, a

---

[1] Isaacs refused a bribe offer from Raj, contacted law enforcement, and began cooperating with the investigation. Gov't C.A. App. 272-273.

couple thousand there. There's no deposits."); see also *id.* at 1112 (explaining Raj's "invest[ment]"). Petitioner agreed. *Id.* at 1111-1116. He also recommended that, to create the appearance of legitimacy, Raj or Stern should enter into sham retainer agreements with the party officials to make it appear as if the money was being paid as part of a bona fide "business relationship." *Id.* at 1106; see *id.* at 1105-1109.

Four days later, Raj and Stern met with Tabone and Savino at a restaurant in Manhattan. Tabone gave Raj a "commitment" to "work to get * * * three or four" Republican county chairmen to sign Wilson-Pakula certificates for petitioner. Gov't C.A. App. 1031. In exchange, Raj suggested a payment of "[t]wenty now, twenty later"; Tabone responded, "I was thinking twenty-five now, twenty-five later." *Id.* at 1039. Tabone, who was a lawyer, also told Raj that he would send Raj a retainer agreement. *Id.* at 1040. Tabone and Raj then went to Raj's car. Before entering the car, Tabone patted Raj down to ensure that he was not wearing a recording device. *Id.* at 140. Inside the car, Raj handed Tabone two envelopes containing a total of $25,000 in cash. *Id.* at 141. That same day, Savino also visited Raj's car, where he accepted $15,000 in cash, with another $15,000 to be paid after petitioner appeared on the Republican ballot. *Id.* at 126-127. Like Tabone, Savino agreed to conceal the bribe as a retainer agreement. *Id.* at 219-221.

In March 2013, petitioner met with Raj and Stern at his New York State Senate office. Raj told petitioner that the committee leaders would meet in April to "do their little kabuki dance," and "discuss it," but that "they got a 100,000 dollar reason[]" to issue the Wilson-Pakula certificates. Gov't C.A. App. 982.

Petitioner asked Raj if he had "[given] it to them already," to which Raj responded, "I gave them, like we discussed, half." *Ibid.* By then, petitioner had approved bribes "in the range" of $200,000. *Id.* at 1076; see *id.* at 126, 146.

b. In exchange for Raj and Stern's payment of the Wilson-Pakula bribes, petitioner agreed to act on their behalf in his capacity as a New York State Senator: Petitioner would help them obtain $500,000 in state funds for road improvements near a real estate project in Spring Valley, which was supposedly being developed by Raj and Stern. Gov't C.A. App. 143. As early as October 2012, petitioner had sent an official letter of reference to the Spring Valley mayor on behalf of Stern and Raj's company. *Id.* at 965-966. Funding for the Spring Valley road project had also been a topic of discussion at the November 2012 meeting, where petitioner, Raj, and Stern conceived the bribery scheme. *Id.* at 669-746.

During meetings in February and March 2013—the same meetings at which the Wilson-Pakula bribery scheme was discussed, see pp. 4-6, *supra*—petitioner, Stern, and Raj again discussed obtaining state funding in support of the Spring Valley project. Gov't C.A. App. 970-971, 1128-1131. Although Spring Valley was not in petitioner's district, petitioner was able to help fund a project there, not just as a voting senator, but also as a member of the legislature's transportation and finance committees. *Id.* at 21. Petitioner told Stern and Raj that he would "work with" the State Senator from the Spring Valley district, David Carlucci, to "show him where in the budget, how to get it and all that kind of stuff." *Id.* at 1128-1129. Petitioner also promised to call Carlucci and suggested that if

Carlucci could not find the funds himself, "then we go to the agency, but * * * it's very doable." *Id.* at 1131; see *id.* at 1129-1131. Petitioner later told Carlucci that he wanted "500,000" in government funds for the project and arranged a meeting between Stern and Carlucci. *Id.* at 193-194. Petitioner also told Stern and Raj that he had located "multi-modal money" for use on the project. *Id.* at 970; see *id.* at 971 ("We'll get it done.").

2. In April 2013, a grand jury charged petitioner with four crimes related to the Wilson-Pakula scheme: (i) honest services wire fraud; (ii) traveling and using a facility in interstate commerce to carry out a bribery scheme, in violation of the Travel Act; (iii) conspiracy to commit honest services wire fraud and to violate the Travel Act; and (iv) Hobbs Act extortion, in connection with his agreement to secure state funding in support of the Spring Valley project in exchange for paying the Wilson-Pakula bribes. Indictment 21-24 (Doc. 42). Halloran, Tabone, and Savino were also indicted.[2]

a. Petitioner moved to dismiss all counts. With respect to the honest services fraud and conspiracy counts, petitioner contended that the indictment alleged a "legally invalid theory" because "a scheme to

---

[2] Halloran faced trial separately and was convicted of participating in the Wilson-Pakula scheme, among other crimes. The court of appeals affirmed Halloran's convictions and sentence in a separate order and opinion. See *United States* v. *Halloran*, 821 F.3d 321 (2d Cir. 2016) (reprinted at Pet. App. 150a-191a). This Court denied Halloran's petition for a writ of certiorari, 137 S. Ct. 1118 (2017) (No. 16-872), and Halloran filed a petition for rehearing on March 20, 2017.

bribe an officer of a political party—as opposed to a public official—does not constitute honest services fraud." Doc. 93, at 2 (emphasis omitted); see *id.* at 15. In the alternative, petitioner argued that the honest services statute was void for vagueness "as applied" to the context of political party officials. *Id.* at 17.

On the Travel Act and related conspiracy counts, petitioner argued that the indictment's allegations were defective because the underlying state bribery statutes, N.Y. Penal Law §§ 200.45, 200.50 (McKinney 2010), did not criminalize the payment of bribes in connection with Wilson-Pakula certificates. Doc. 93, at 19-28. Petitioner conceded, however, that New York bribery law "covers both: (a) situations where a bribe is given in exchange for a definite agreement that a person 'will be' designated or nominated; and (b) situations where a bribe is given in exchange for an agreement that a person 'might be' designated or nominated, *without a guarantee that the designation or nomination will occur*." Doc. 142, at 8 (emphasis added). "[F]or example," petitioner explained, the statutes cover "situations where * * * a party officer agrees to 'put a good word in for' or 'support' or 'campaign for' a person, without an 'agreement or understanding' that the person 'will' be designated or nominated." *Ibid.*

Finally, petitioner argued that the government's Hobbs Act extortion theory was invalid "because there is no allegation that [he] 'induced' anyone to confer a benefit on his behalf." Doc. 93, at 33. Petitioner conceded that this Court's decision in *Evans* v. *United States*, 504 U.S. 255, 268 (1992), foreclosed his claim, but he raised it "to preserve the issue for potential review" by this Court. Doc. 93, at 33.

b. The district court denied petitioner's motion. Pet. App. 14a-149a. With respect to the honest services fraud counts, the court found that the party leaders (including Tabone) owed a fiduciary duty under state, federal, or common law to their county committees and to the members of the Republican Party. *Id.* at 112a-132a. The court also held that "a person of ordinary intelligence would have had a reasonable opportunity to be on notice" of that responsibility, such that the honest services statute was not unconstitutionally vague as applied to the indictment's allegations. *Id.* at 132a; see *id.* at 137a-140a (rejecting other arguments against application of the honest services statute).

As for the Travel Act, the district court "essentially agree[d]" with petitioner's interpretation of the New York bribery provisions—namely, that they cover "'situations where a bribe is given in exchange for an agreement that a person 'might be' designated or nominated.'" Pet. App. 52a (quoting petitioner's brief). The "problem" for petitioner, the court explained, was that his interpretation was "even *more* expansive" than the government's and thus "would encompass the conduct described in the indictment." *Id.* at 52a-53a. The court therefore concluded that the indictment's allegations, under petitioner's own reading of the law, would fall "well within" the scope of prohibited conduct. *Id.* at 52a.

Finally, the district court rejected, as foreclosed by *Evans*, petitioner's challenge to the Hobbs Act count. Pet. App. 143a-144a.

c. After a four-week trial, the jury found petitioner guilty on all counts. Pet. C.A. App. 237; Gov't C.A. App. 654-656. The district court sentenced petitioner

to concurrent terms of 84 months in prison on the wire fraud and extortion counts and 60 months on the conspiracy and Travel Act counts. Pet. C.A. App. 238.

3. The court of appeals affirmed in a summary order. Pet. App. 1a-13a.

a. Petitioner's main argument on appeal was that his "prosecution offend[ed] principles of federalism and violate[d] the Tenth Amendment." Pet. C.A. Br. 10 (capitalization altered); see *id.* at 10-42 (Point I). The court of appeals rejected that argument as contrary to Supreme Court precedent and lacking in "legal support." Pet. App. 6a-7a.

b. Petitioner challenged his honest services fraud conviction primarily on the ground that the honest services statute is "impermissibly vague and unenforceable on its face" because it "fails to identify the legal source and scope of the fiduciary duty one must breach." Pet. C.A. Br. 2; see *id.* at 42-47. Petitioner did not argue that his conviction was invalid because he had paid—rather than accepted—the Wilson-Pakula bribes. Nor did petitioner contend that applying the statute to a bribe payer (as opposed to recipient) would render the statute unconstitutionally vague.

The court of appeals rejected petitioner's vagueness challenge. Pet. App. 5a-6a. The court explained that petitioner's facial challenge failed because "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Id.* at 6a n.2 (citation omitted). To the extent that petitioner also raised an as-applied vagueness challenge, the court held, the Wilson-Pakula bribery scheme "clearly falls" within the statute's "'bribe-and-kickback core,'" which was upheld in *Skilling* v. *United States*, 561 U.S. 358 (2010). Pet. App. 5a (quoting *Skilling*, 561 U.S. at

409). In addition, the court noted, the Second Circuit had already rejected petitioner's theory that the statute "fails to specify the source of the fiduciary duty a defendant must breach." *Id.* at 5a-6a (citing *United States* v. *Halloran*, 821 F.3d 321, 337-340 (2016), cert. denied, 137 S. Ct. 1118 (2017) (pet. for reh'g filed Mar. 20, 2017)).

c. Petitioner also challenged his Hobbs Act conviction. Petitioner did not dispute that he had "obtain[ed]" the "property" of another, within the meaning of the statute, when he secured Raj and Stern's payment of bribes on his behalf to the Republican Party leaders. 18 U.S.C. 1951(b)(2) (defining "extortion" as the "obtaining of property from another * * * under color of official right"). Instead, petitioner argued that his support for Raj and Stern's Spring Valley project did not constitute an "official act," as required under the statute. Pet. C.A. Br. 70-80; see *Ocasio* v. *United States*, 136 S. Ct. 1423, 1428 (2016) (Hobbs Act extortion requires proof that a public official has obtained property "in return for official acts") (citation omitted). In the alternative, petitioner argued that his actions had not been taken "*in exchange for* [the] bribes paid to Republican Party officers on his behalf." Pet. C.A. Br. 70 (capitalization altered; emphasis added).

The court of appeals rejected both contentions. The court recognized that, under *McDonnell* v. *United States*, 136 S. Ct. 2355, 2375 (2016), "merely setting up a meeting—without more—does not qualify as an official act." Pet. App. 10a. The court noted, however, that *McDonnell* also made clear that setting up a meeting can "serve as *evidence* of an agreement to take an official act." *Ibid.* (emphasis added) (quot-

ing *McDonnell*, 136 S. Ct. at 2371). In this case, the court held, petitioner's agreement to set up a meeting with a key legislator, in conjunction with other evidence presented at trial, supported the jury's finding that petitioner had agreed to steer funds to the Spring Valley project by means of legislative action and that he had done so "in exchange for" Raj and Stern's payment of the Wilson-Pakula bribes. *Id.* at 10a-11a.

d. Finally, petitioner challenged his Travel Act and related conspiracy convictions, arguing that the district court had misconstrued the state bribery statutes, N.Y. Penal Law §§ 200.45, 200.50 (McKinney 2010), and that, so construed, the statutes were "unconstitutionally vague." Pet. C.A. Br. 48 (capitalization altered); see *id.* at 48-70.

The court of appeals rejected petitioner's arguments, relying on its previous decision in *Halloran*. Pet. App. 4a-5a. There, the Second Circuit had interpreted the requirement, under Sections 200.45 and 200.50, that money or property be conferred on a public official based "upon an agreement or understanding that some person will *or may be* appointed to a public office or designated or nominated as a candidate for public office." *Id.* at 4a (citation omitted; emphasis added). The court in *Halloran* explained that the word "'may' is naturally read to connote either possibility (as in: 'Sea levels may rise by several feet in the next hundred years.') or permission (as in: 'You may leave the table only after you have finished your vegetables.')." *Id.* at 168a. An agreement to exchange Wilson-Pakula certificates for bribes fits both definitions: "[T]he Wilson-Pakula not only makes it *possible* that the person will be designated or nominated as the candidate of a party, but it does so by *permit-*

ting the person to compete for the nomination." *Id.* at 169a. *Halloran*'s holding, the court explained, controlled petitioner's statutory claim. *Id.* at 4a-5a.

Finally, the court of appeals held, based on its decision in *Halloran*, that its construction did not render the New York bribery statutes unconstitutionally vague. Pet. App. 4a-5a. Where, as in the Wilson-Pakula context, a party official "accept[s] bribes in exchange for an exercise of statutory authority that renders the bribe payer eligible to be nominated," *Halloran* explained, the official's conduct does not merely "increase the possibility that a candidate will be nominated." *Id.* at 176a-177a. Rather, the exchange "directly affect[s] the course of governmental action" by fulfilling a prerequisite that only the party committee can fulfill. *Id.* at 177a. From a notice perspective, therefore, a Wilson-Pakula bribery scheme is different in kind from "commonly compensated" political activities that "anyone" can carry on, such as circulating "a petition, solicit[ing] votes, appear[ing] in an advertisement, or offer[ing] an endorsement." *Id.* at 176a-177a (footnote omitted). Here, the court held, *Halloran* disposed of petitioner's identical claim. *Id.* at 4a-5a.

ARGUMENT

Petitioner contends (Pet. 11-17) that his conviction for honest services fraud is invalid under *Skilling* v. *United States*, 561 U.S. 358 (2010), because he merely paid—but did not receive—the Wilson-Pakula bribes. He also claims (Pet. 18-20) that his extortion conviction is invalid because he did not "obtain[] * * * property" within the meaning of the Hobbs Act, 18 U.S.C. 1951(b)(2), when he secured Raj and Stern's payment of cash bribes on his behalf. Petitioner has

failed to preserve either of those claims, which were neither pressed nor passed upon in the lower courts. In any event, petitioner's claims lack merit, and no conflict on those issues exists in the courts of appeals.

Petitioner also argues (Pet. 20-26) that, as interpreted by the Second Circuit in *United States* v. *Halloran*, 821 F.3d 321 (2016), the New York bribery statutes referenced in his Travel Act counts, N.Y. Penal Law §§ 200.45, 200.50 (McKinney 2010), are unconstitutionally vague and overbroad. Petitioner waived that claim, however, by urging the district court to adopt an "even *more* expansive" interpretation of the New York statutes. Pet. App. 53a. In any event, the court of appeals correctly rejected petitioner's argument, and its decision does not conflict with any decision of this Court or another court of appeals. The Court recently denied petitions for writs of certiorari raising that issue. *Tabone* v. *United States*, 137 S. Ct. 1361 (2017) (No. 16-1014) (pet. for reh'g filed Apr. 14, 2017); *Halloran* v. *United States*, 137 S. Ct. 1118 (2017) (No. 16-872) (pet. for reh'g filed Mar. 20, 2017). The Court should follow the same course here.

1. Petitioner's challenge to his conviction for honest services fraud does not warrant further review.

a. The mail and wire fraud statutes prohibit use of the mails or wires to further a "scheme or artifice to defraud." 18 U.S.C. 1341, 1343. The term "scheme or artifice to defraud" reaches any scheme to deprive others of money or property, including a scheme "to deprive another of the intangible right of honest services." 18 U.S.C. 1346. Section 1346 was designed to reinstate the concept of "honest services" fraud developed by the courts of appeals before this Court rejected a prosecution under that theory in *McNally* v.

United States, 483 U.S. 350 (1987). See *Skilling*, 561 U.S. at 402.

Before *McNally*, courts of appeals had found that officials and employees committed schemes to defraud when they violated their fiduciary duties in a manner that deprived employers of their "honest services," even where "a third party, who had not been deceived, provided the enrichment" that was received by the corrupt employee. *Skilling*, 561 U.S. at 400. For example, courts concluded that it would constitute fraud for a city official to "accept[] a bribe from a third party in exchange for awarding that party a city contract," even if "the contract terms were the same as any that could have been negotiated at arm's length." *Ibid.* Under such a scheme, the courts held, the official's employer (the city) was deprived of the "honest services" of the official—even though the bribe did not come from the employer's funds. *Ibid.* *McNally* held that the existing mail fraud statute did not prohibit the deprivation of honest services, but Congress "responded swiftly" to "reinstate the body of pre-*McNally* honest-services law." *Id.* at 402, 405 (citation omitted).

In *Skilling*, this Court sustained the honest services statute against a constitutional vagueness challenge. Consistent with the core conduct addressed by pre-*McNally* cases, the Court construed the honest services provision to reach only "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." 561 U.S. at 407. The Court found "no doubt that Congress intended § 1346 to reach at least bribes and kickbacks." *Id.* at 408 (emphasis omitted). And the Court concluded that construing the honest services provision "to encompass only

bribery and kickback schemes" ensures that the statute "is not unconstitutionally vague." *Id.* at 412. "As to fair notice," the Court explained, "whatever the school of thought concerning the scope and meaning of § 1346, it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud." *Ibid.* (citation and internal quotation marks omitted). The Court also observed that "the statute's mens rea requirement further blunts any notice concern." *Ibid.* (emphasis omitted). Finally, the Court found no significant risk of arbitrary prosecution under a statute limited to bribery and kickback schemes, because a "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." *Ibid.*

b. Petitioner contends (Pet. 13) that his conviction is invalid under *Skilling* because he "could not and did not breach the only honest-services duty at issue in this case"—namely, "the duty owed to the Republican Party committees or party members" by Tabone and Savino. Petitioner has failed to preserve that claim, however. Petitioner did not argue in the district court that the honest services statute applies only to the public official who breaches a duty by accepting a bribe, but not to a person who induces the breach by paying or directing a bribe to the public official; nor did he request a jury instruction to that effect. And while petitioner challenged his honest services conviction in the court of appeals, he did so on the ground that the statute is "unconstitutionally vague on its face" because it "fails to specify the legal source and scope of the fiduciary duty one must breach." Pet. C.A. Br. 42-43 (capitalization altered); see *id.* at 42-48.

At no point below did petitioner contend, as he does in the petition (Pet. 12-14), that his fraud conviction was invalid because *Skilling* limits the statute's reach to defendants who breach *their own* fiduciary duty. Nor did petitioner argue below, as he does here (Pet. 15-17), that applying the statute to the payer of a bribe (as opposed to the recipient) would render the statute unconstitutionally vague. The court of appeals did not consider either issue *sua sponte*, and this Court should not resolve it in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

c. In any event, petitioner is wrong in arguing (Pet. 12-14) that, after *Skilling*, the honest services fraud statute does not reach offenders who induce others to breach their fiduciary duty by paying bribes.

First, nothing in the statutory text supports petitioner's argument. To the contrary, the statute reaches any defendant who uses the mails or wires "having devised or intending to devise any scheme or artifice to defraud," 18 U.S.C. 1343, which includes "a scheme or artifice to deprive another of the intangible right of honest services," 18 U.S.C. 1346. A bribe payer, like a bribe recipient, unquestionably may "devise[] or intend[] to devise" such a scheme. And while *Skilling* construed the statute to cover "only bribery and kickback schemes," 561 U.S. at 368, it did not further limit the statute's application to fiduciaries who *receive* bribes or kickbacks in violation of their *own* fiduciary duties.

Petitioner principally grounds his proposed limitation (Pet. 13) on a passage in *Skilling* that described the "'vast majority' of the honest-services cases" as "involv[ing] offenders who, in violation of a fiduciary

duty, participated in bribery or kickback schemes." 561 U.S. at 407 (citation omitted). That statement does not support petitioner's theory. It broadly references all offenders who have "*participated* in" bribery and kickback schemes—not just those who have *accepted* bribes and kickbacks. The passage also adds that the scheme must be "in violation of *a* fiduciary duty"—but not necessarily the defendant's *own* fiduciary duty. As the First Circuit has explained, the Court's statement "merely identif[ied] bribe and kickback cases as core honest services violations, distinguishing some less established scenarios to which some lower courts had extended the concept." *United States* v. *Urciuoli*, 613 F.3d 11, 17, cert. denied, 562 U.S. 1045 (2010). The statement did not "suggest[] that the Court was distinguishing between the fiduciary who received the bribe and the non-fiduciary who gave it." *Id.* at 17-18; cf. *United States* v. *Bryant*, 655 F.3d 232, 245 (3d Cir. 2011) ("*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.").

Other passages in *Skilling* confirm that the Court saw no vagueness problem once the honest services statute was limited to participants in "bribery and kickback" schemes—without further distinguishing between bribe payers and recipients or between inducers of a fiduciary breach and fiduciaries who engage in the breach. See 561 U.S. at 368 ("We * * * hold that § 1346 covers only bribery and kickback schemes."); *ibid.* ("Congress intended at least to reach schemes to defraud involving bribes and kickbacks."); *id.* at 412 ("Interpreted to encompass only bribery

and kickback schemes, § 1346 is not unconstitutionally vague."); *id.* at 408 n.42 (The Court "draw[s] the honest-services line * * * at bribery and kickback schemes."). Indeed, several of the decisions that *Skilling* cited as "exemplars of 'core' honest service fraud cases * * * involve[d] convictions of individuals who bribed another to violate his fiduciary duties." *Urciuoli*, 613 F.3d at 18 & n.6 (citing *United States* v. *Mandel*, 591 F.2d 1347, 1359 n.7 (4th Cir. 1979); *Shushan* v. *United States*, 117 F.2d 110, 115 (5th Cir. 1941); *United States* v. *Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942)); see *Skilling*, 561 U.S. at 408 (citing *Mandel*, *Shushan*, and *Procter & Gamble*).

The limitation that petitioner urges also is not necessary to ensure "fair notice" or to avoid "arbitrary and discriminatory prosecutions," the twin considerations underpinning the vagueness doctrine and the Court's construction of the honest services statute in *Skilling*. 561 U.S. at 412. Because it has long been "plain as a pikestaff" that bribery and kickback schemes are unlawful, *ibid.* (citation omitted), and because bribery and kickbacks are well-defined concepts that draw meaning from numerous provisions of federal law, *ibid.*, defendants have fair notice and can avoid arbitrary prosecution even if the statute is construed to cover those who, by paying bribes and kickbacks, induce others to breach the duty they owe to their principals.[3] Nor does anything in *Skilling* war-

[3] Petitioner notes (Pet. 15) that, when a fiduciary accepts a bribe or kickback, he "elevates his own pecuniary interest above his principals' interests." That observation, while true, has relevance to the Court's discussion in *Skilling* only insofar as it might mitigate potential notice—and thus vagueness—concerns. From a

rant creating an honest-services-fraud-specific exception to the "centuries-old" criminal law principle that "a person may be responsible for a crime he has not personally carried out if he [knowingly] helps another to complete its commission." *Rosemond* v. *United States*, 134 S. Ct. 1240, 1245 (2014) (construing 18 U.S.C. 2).

d. Contrary to petitioner's contention (Pet. 14), the unpublished decision below does not create or implicate any disagreement among the courts of appeals. To begin with, the court of appeals had no reason to address—and did not address—petitioner's argument; its silence on that issue cannot "[e]xacerbate[]" (*ibid.*) any purported circuit conflict.

In any event, no conflict exists. As petitioner correctly recognizes (Pet. 15), his conviction is consistent with the Ninth Circuit's conclusion, in an unpublished decision, that *Skilling* does not "draw a distinction between a fiduciary who deprives a victim of the right of honest services by receiving a bribe or kickback and a fiduciary who does the same by paying a bribe or kickback." *United States* v. *Johnson*, 588 Fed. Appx. 743, 744 (2014), cert. denied, 136 S. Ct. 318 (2015). That ruling is consistent as well with a decision of the First Circuit. In *Urciuoli*, *supra*, the court rejected as "hopeless" the argument, which petitioner advances here, that a payer of bribes "cannot violate the mail fraud statute" because he "owes no fiduciary duty to the public." 613 F.3d at 17.

Petitioner relies (Pet. 14-15) on decisions of the Sixth and Eleventh Circuits, but neither decision

---

notice standpoint, however, no reason exists to believe that those who induce fiduciaries to take bribes or kickbacks have any less notice of the resulting breach than do the fiduciaries themselves.

presented, discussed, or decided the question whether an honest services conviction may be based on the payment (as opposed to receipt) of a bribe or kickback. See *United States* v. *Terry*, 707 F.3d 607, 612-614 (6th Cir. 2013) (rejecting challenge to jury instructions that properly advised jurors they could convict if they found the defendant took a campaign contribution as a quid pro quo for official acts), cert. denied, 134 S. Ct. 1490 (2014); *United States* v. *Langford*, 647 F.3d 1309, 1321-1322 (11th Cir. 2011) (similar), cert. denied, 565 U.S. 1169 (2012). Petitioner correctly notes (Pet. 14-15) that those decisions refer to the defendants' "accept[ance]" of bribes as satisfying an element of honest services fraud. But they did so in the context of prosecutions in which the defendants were officials who took bribes. See *Terry*, 707 F.3d at 610, 614-615; *Langford*, 647 F.3d at 1315-1319, 1322. Neither decision had occasion to address the viability of a prosecution based on the theory at issue here: that the defendant induced public officials to accept bribes.

e. In the alternative, petitioner argues (Pet. 17) that the Court should overrule *Skilling* and declare the statute unconstitutional. This Court, however, rejected a similar invitation to invalidate Section 1346 just last Term. See *McDonnell* v. *United States*, 136 S. Ct. 2355, 2375 (2016). And petitioner rests his constitutional challenge (Pet. 17) on the premise that the Ninth Circuit's unpublished order in *Johnson* and the decision below illustrate the statute's irresolvable vagueness. Because that premise is baseless, see pp. 17-20, *supra*, so is petitioner's constitutional claim. And because petitioner's own conduct is clearly prohibited by Section 1346, see Pet. App. 5a-6a, he

cannot complain about purported ambiguities that had no effect on his conduct and conviction. See *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 18 (2010) ("We consider whether a statute is vague as applied to the particular facts at issue.").

2. Petitioner argues (Pet. 18-20) that the court of appeals erred in affirming his conviction for extortion, in violation of the Hobbs Act, but his contention does not warrant this Court's review.

a. The Hobbs Act imposes criminal penalties on any person who "obstructs, delays, or affects commerce * * * by * * * extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). "[E]xtortion" includes "the obtaining of property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2). To establish extortion under color of official right, 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." *Ocasio* v. *United States*, 136 S. Ct. 1423, 1428 (2016) (quoting *Evans* v. *United States*, 504 U.S. 255, 268 (1992)); see *ibid.* ("[O]btaining property from another with his consent and under color of official right * * * is the 'rough equivalent of what we would now describe as "taking a bribe."'") (quoting *Evans*, 504 U.S. at 260). This Court has found that "the extortion provision of the Hobbs Act * * * require[s] not only the deprivation but also the acquisition of property." *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 404 (2003). In addition, "the property extorted must * * * be transferable—that is, capable of passing from one person to another." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2725 (2013) (emphasis omitted). Peti-

tioner contends (Pet. 18-20) that he cannot be convicted of extortion under the Hobbs Act because he did not "obtain[]" any "property."

b. Petitioner failed to preserve his argument, which he did not raise below. In the court of appeals, petitioner argued that his agreement to secure state funding in support of Stern and Raj's Spring Valley project did not constitute "official action" within the meaning of *McDonnell*. Pet. C.A. Br. 78 ("Because [petitioner] plausibly agreed only to take nonofficial action, his conviction must be reversed.") (capitalization altered); see *id.* at 73-80; see also Pet. App. 11a-12a (rejecting petitioner's challenge to the district court's instruction on the definition of "official action"). Petitioner also argued that insufficient evidence supported the jury's finding that he took action in exchange for Raj and Stern's payment of the Wilson-Pakula bribes; in his view, the evidence at trial was "equally consistent" with other "potential schemes" that were not charged in the indictment. Pet. C.A. Br. 80 (capitalization altered); see *id.* at 80-82. At no point, however, did petitioner raise the claim he advances here: that his role in directing the bribes that Raj and Stern paid on his behalf did not constitute the "obtaining of * * * property" under the Hobbs Act. For that reason, this Court's intervention is unwarranted. See *Cutter*, 544 U.S. at 718 n.7.

c. In any event, petitioner's argument lacks merit. The indictment alleged that petitioner agreed "to take official action in exchange for payment of Wilson-Pakula bribes." Pet. App. 11a. Raj and Stern paid cash bribes of $25,000 to Tabone and $15,000 to Savino, with more to come after the Wilson-Pakula certificates were issued. See pp. 5-6, *supra*. Those

cash payments clearly constituted "property" for purposes of the Hobbs Act. In addition, this Court has held that property is "obtained" for purposes of the Hobbs Act whenever the defendant "received 'something of value from' [another] that [he] could exercise, transfer, or sell." *Scheidler*, 537 U.S. at 405 (citation omitted). Here, petitioner received substantial value from the money that Raj and Stern transferred to Tabone and Savino on petitioner's behalf, at his direction, and for his sole benefit. Indeed, had Raj and Stern handed petitioner the envelopes of cash to deliver to Tabone and Savino, the benefit to petitioner would have been no different. See *Salman* v. *United States*, 137 S. Ct. 420, 428 (2016) (where corporate insider conveys information that allows another to trade for a profit, "the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds"); see also Pet. C.A. Br. 70-71 ("Count Four * * * charged [petitioner] with * * * agree[ing] to use his official position * * * in exchange for bribes paid to New York City Republican party officers *on his behalf*.") (emphasis added). Neither the meaning of the word "obtain" nor this Court's precedents support a distinction between (on one hand) money that is physically given to a public official for use to bribe others and (on the other) money that is spent directly on bribes on behalf of—and as directed by—the public official. In both cases, the public official has "received something of value" that he has "transfer[red]" for his own benefit. *Scheidler*, 537 U.S. at 405 (citation and internal quotation marks omitted).[4]

---

[4] Because petitioner obtained money—in the form of bribes to third parties that he was able to direct as payments on his behalf—

3. Petitioner contends (Pet. 20-26) that his Travel Act and related conspiracy convictions are invalid because the underlying New York bribery provisions, as interpreted by the court of appeals, are unconstitutionally vague and overbroad. That argument lacks merit and further review is unwarranted.

a. The Travel Act imposes liability on "[w]hoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to * * * promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity." 18 U.S.C. 1952(a)(3). The term "unlawful activity" includes "bribery * * * in violation of the laws of the State in which [the bribery offense is] committed." 18 U.S.C. 1952(b).

Here, the indictment charged petitioner with violating the Travel Act based on predicate violations of Sections 200.45 and 200.50 of New York's Penal Law. See Pet. C.A. App. 138-139. Those provisions prohibit the giving (Section 200.45) and receiving (Section 200.50) of bribes in connection with the appointment, designation, or nomination of candidates for public office. They specify that money or property may not

---

in exchange for his official actions, it is unnecessary to consider petitioner's contention (Pet. 19) that the Wilson-Pakula certificates do not constitute "property" under this Court's decision in *Sekhar* or his claim (Pet. 19-20) that a contrary conclusion would conflict with the Seventh Circuit's decision in *United States* v. *Blagojevich*, 794 F.3d 729, 736 (2015), cert. denied, 136 S. Ct. 1491 (2016). Even assuming that such certificates are not property, it would have no impact on his conviction. And because he did not raise his current claim below, he of course cannot maintain that the court of appeals issued any holding that the certificates were (or were not) obtainable property.

be paid "upon an agreement or understanding that some person will or may be appointed to a public office or designated or nominated as a candidate for public office." N.Y. Penal Law §§ 200.45, 200.50 (McKinney 2010).

In *Halloran*, *supra*, the Second Circuit held that the Wilson-Pakula bribery scheme violated those prohibitions because petitioner directed the payment of money to Tabone and Savino based upon an agreement or understanding that, in return, petitioner "may" be nominated as the Republican candidate for mayor. The court explained that, "[i]n this context, 'may' is naturally read to connote either possibility (as in: 'Sea levels may rise by several feet in the next hundred years.') or permission (as in: 'You may leave the table only after you have finished your vegetables.')." Pet. App. 168a-169a. As the court correctly explained:

> An agreement or understanding that a Wilson-Pakula [certificate] will be issued to a person is an agreement or understanding that that person "may be . . . designated or nominated as a candidate for public office," under either of those meanings of "may": the Wilson-Pakula [certificate] not only makes it *possible* that the person will be designated or nominated as the candidate of a party, but it does so by *permitting* the person to compete for the nomination.

Id. at 169a. The court also held that, thus construed, New York's bribery statutes are not constitutionally infirm. *Id.* at 177a.

b. Petitioner contends (Pet. 20-26) that the court of appeals' interpretation renders the statute unconstitutionally vague and overbroad. But petitioner has

waived that argument by affirmatively advocating an "even *more* expansive" interpretation in the district court. Pet. App. 53a. Criticizing the government's argument that the phrase "may be" connotes "permission," petitioner argued that "[a] more logical (and simpler) reading of the statute is that 'may be' simply indicates 'possibility.'" Doc. 142, at 8. "In other words," petitioner argued, the "'may be' clause covers * * * situations where a bribe is given in exchange for a definite agreement that a person * * * 'might be' designated or nominated, without a guarantee that the designation or nomination will occur"—"for example," when "a party officer agrees to 'put a good word in for' or 'support' or 'campaign for' a person, without an 'agreement or understanding' that the person '*will*' be designated or nominated." *Ibid.* The district court "essentially agree[d]" with petitioner's interpretation. Pet. App. 52a. The court thus found that the Wilson-Pakula scheme fit "well within" the interpretation of Sections 200.45 and 200.50 that petitioner had advocated. *Ibid.* Having advanced below a broad statutory interpretation that squarely covered his conduct, petitioner cannot now challenge an interpretation that is narrower.

c. In any event, petitioner's argument lacks merit. Petitioner describes *Halloran* as holding that Sections 200.45 and 200.50 "appl[y] to payments involving *any* agreement that 'mathematically increases the possibility that the candidate will be appointed.'" Pet. 21-22 (emphasis added) (quoting Pet. App. 170a-171a). That assertion rests on a mischaracterization of the court of appeals' decision. The quoted portion of *Halloran* was part of the court's discussion of cases, like this one, in which "the appointment of a public official requires

the approval of a majority of a five-member board." Pet. App. 170a. The court concluded that, under those circumstances, paying one of the board members for her vote would fall within the statute's prohibition: The board member has agreed to take "an official act that mathematically increases the possibility that the candidate will be appointed." *Id.* at 171a.

Petitioner repeatedly cites the latter part of that statement. Pet. 21, 22, 23, 26 ("mathematically increases the possibility"). But each time, he fails to mention the type of action that was taken in return for the bribe ("an *official* act") and the context in which it was discussed ("appointment * * * *requires* the approval"). Those qualifications, however, are critical: They dispose of petitioner's argument (Pet. 22) that the court's interpretation would permit prosecution of *non*-official acts that might improve, however slightly, the odds of nomination, such as paid political endorsements or voter canvassing. See Pet. App. 176a ("Unlike Wilson-Pakulas, endorsements and advertisements are not statutory conditions of eligibility for nomination."); *ibid.* ("[N]one of Halloran's examples involve an exercise of statutory authority."). Petitioner is thus wrong to argue (Pet. 22) that *Halloran* would permit prosecution of "innocent, everyday political transactions."[5]

---

[5] Contrary to petitioner's contention, the government did not argue below that "soliciting general payments to a particular party," without more, "might lead to criminal penalties." Pet. 23 (citing Gov't C.A. Br. 23). The government made clear that, without more, "a party official asking a prospective nominee to offset the party's potential expenditures on his campaign would *not* amount to soliciting a bribe." Gov't C.A. Br. 23 (emphasis added). Nor did the government argue that gifts of "cigars or sports tickets" by a donor "could violate the statute" if "the donor hope[s]

Finally, petitioner argues (Pet. 25-26) that the New York bribery law, even if interpreted as applying only to official acts such as Wilson-Pakula certificates, gives prosecutors too much discretion: "A federal prosecutor could easily decide that a given official's donations suddenly constitute payments made in return for actions by his colleagues that mathematically increase the donor's likelihood of securing some desired nomination." But under New York bribery law, as construed by the court of appeals, the government must still prove an actual quid pro quo; it must prove that payments were made "upon an agreement or understanding" that the public official would take official action in return. N.Y. Penal Law §§ 200.45, 200.50 (McKinney 2010). This Court has made clear that such arrangements—that is, the exchange of money or property for official action—are "[t]he hallmark of corruption." *McCutcheon* v. *FEC*, 134 S. Ct. 1434, 1441 (2014) (opinion of Roberts, C.J.) (citation omitted); see *Citizens United* v. *FEC*, 558 U.S. 310, 356 (2010) ("[L]arge direct contributions * * * given to secure a political *quid pro quo* * * * would be covered by bribery laws, see, *e.g.*, 18 U.S.C. § 201, if a *quid pro quo* arrangement were proved.") (citation and internal quotation marks omitted). Indeed, the criminal nature of such arrangements is so clear that this Court, in *Skilling*, focused its statutory interpretation on quid pro quo corruption in order to *elimi-*

---

to increase the chance of obtaining a nomination." Pet. 23 (quoting Gov't C.A. Br. 28 n.8). The government made clear that, if a donation were accompanied only by the "mere hope of improving [the] odds" of favorable action, "the statutes would *not* apply." Gov't C.A. Br. 28 n.8 (emphasis added).

nate any potential vagueness problem. 561 U.S. at 412 ("Interpreted to encompass only bribery and kickback schemes, [the honest services statute] is not unconstitutionally vague."). In this context, the constitutional safeguard against potentially overzealous prosecution is the Sixth Amendment: "It is up to the jury, under the facts of the case, to determine whether the public official agreed to perform an 'official act' at the time of the alleged quid pro quo." *McDonnell*, 136 S. Ct. at 2371 (emphasis omitted); see *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment) (noting that "the trier of fact is quite capable" of determining intent and whether a quid pro quo existed).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
KENNETH A. BLANCO
Acting Assistant Attorney General
FRANCESCO VALENTINI
Attorney

MAY 2017

---

[6] Although petitioner discusses (Pet. 23-26) what he perceives to be flaws in *Halloran*'s interpretation of the New York bribery statutes, he does not seek plenary review of that state-law issue, which would be inconsistent with this Court's practice. Petitioner does briefly propose (Pet. 26 n.6) certifying a question to the New York Court of Appeals, purportedly to "avoid the constitutional question otherwise presented here." Because that constitutional question does not merit review, petitioner's suggestion of certification is baseless.