No. 17-448

In the Supreme Court of the United States

THOMAS S. JACKSON, 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 evidence that petitioner accepted money in exchange for appointing an unqualified person as a police officer is sufficient to support his conviction for bribery under 18 U.S.C. 666(a)(1)(B).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is not published in the Federal Reporter but is reprinted at 688 Fed. Appx. 685. The order of the district court (Pet. App. 39-41) is not published in the Federal Supplement but is available at 2015 WL 13540985.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30) was entered on May 12, 2017. A petition for rehearing was denied on June 22, 2017 (Pet. App. 42-43). The petition for a writ of certiorari was filed on September 20, 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 Middle District of Florida, petitioner was

convicted on one count of conspiracy to solicit and accept bribes, in violation of 18 U.S.C. 371, and three counts of bribery of an agent of a local government receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(B). Pet. App. 32. Petitioner was sentenced to 48 months of imprisonment, to be followed by one year of supervised release. *Id.* at 33-34. The court of appeals affirmed. *Id.* at 1-29.

1. From 1997 to 2010, petitioner was chief of the Longwood Police Department (LPD) in Longwood, Florida. Pet. App. 1-2. As chief, petitioner was responsible for appointing police officers. *Id.* at 2. Under Florida law, a person may not be appointed a police officer unless he meets certain statutory requirements and obtains the certification of the Criminal Justice Standards and Training Commission (Commission) of the Florida Department of Law Enforcement (FDLE). *Id.* at 3-4.

Samer Majzoub wanted to be a police officer in Longwood. Although Majzoub lacked the necessary certification and had a prior federal conviction for mail fraud, petitioner gave Majzoub a badge and photo identification indicating that he was an "officer" and a "duly appointed member of the Longwood Police Department." Pet. App. 2. Petitioner also brought Majzoub to meet the director of a local police academy, who agreed to let Majzoub take courses. *Id.* at 3-4. Soon after, Majzoub wrote petitioner a check for $3700. *Id.* at 4.

Months later, petitioner wrote to the Florida Attorney General about a counterterrorism training program for police officers. Pet. App. 3-4. Petitioner told the Attorney General that he would be implementing the program in coordination with Majzoub. *Id.* at 4. The next day, Majzoub wrote petitioner a check for $6200. *Ibid.*

Petitioner subsequently ordered a subordinate, Commander Troy Hickson, to take Majzoub to the firing range and put him through the firearms-qualification protocol for officer candidates. Pet. App. 4-5; Gov't C.A. Br. 11. That same day, petitioner swore in Majzoub as a police officer, even though Majzoub still lacked the necessary certification of the Commission. Pet. App. 4-5. Petitioner and Majzoub executed an "Oath of Office" form, which stated that Majzoub was "being employed by," or was an "officer of," the LPD. *Id.* at 5.

Later that month, an FDLE agent informed petitioner that Majzoub was not eligible for certification as a police officer because of his prior conviction. Pet. App. 5; Gov't C.A. Br. 12. Petitioner sent the agent a letter on LPD letterhead, written by Majzoub's attorney, asking the Commission to consider Majzoub's eligibility. Pet. App. 5-6. In that letter, petitioner argued that Majzoub's prior conviction was not disqualifying because Majzoub had received a pardon from the governor. Gov't C.A. Br. 14. Several weeks later, Majzoub wrote petitioner a check for $5500. Pet. App. 6. After the Commission announced that it would consider Majzoub's eligibility at an upcoming meeting, petitioner accepted another $5500 check from Majzoub. *Ibid.*

A week before the meeting, however, petitioner sent another letter to the Commission, written by Majzoub's attorney, withdrawing Majzoub from consideration for certification. Pet. App. 6. Majzoub then applied to be a police officer with the District of Columbia Protective Services Police. *Id.* at 7; Gov't C.A. Br. 16. Majzoub emailed petitioner a draft letter of recommendation, and petitioner put it on LPD letterhead and sent it to the police chief in D.C. *Ibid.* The letter referred to Majzoub as "Commander Sam Majzoub," and petitioner

included along with the letter a forged "firearms qualification" signed by "Commander T. Hixon." Pet. App. 7. Petitioner then ordered his assistant to submit a rush order for business cards identifying Majzoub as a "Commander" of the LPD. *Id.* at 8. Soon after, Majzoub gave petitioner a $5000 check that petitioner used to pay for a deposit on a property in North Carolina. *Id.* at 7-8; Gov't C.A. Br. 17-18. When petitioner retired as police chief a few months later, Majzoub gave petitioner an additional $6200. Pet. App. 8.

Federal agents subsequently searched Majzoub's home, finding three LPD star badges that read "Longwood Police" and eight LPD photo identification cards that read "Commander," "Lieutenant," "Police Officer," and "Officer." Pet. App. 9. The cards identified Majzoub as either "a duly appointed member of the Longwood Police Department" or "a duly appointed Police Officer * * * empowered to execute all duties of the office as prescribed by [Florida statute]." *Id.* at 10.

2. A grand jury in the Middle District of Florida returned an indictment charging petitioner with one count of conspiracy to solicit and obtain bribes, in violation of 18 U.S.C. 371, and three counts of bribery of an agent of a local government receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(B). Indictment 2-11. Section 666(a)(1)(B) prohibits, *inter alia*, an agent of a state or local government, or a private organization, that receives a certain amount of federal funding from "corruptly solicit[ing] or demand[ing] for the benefit of any person, or accept[ing] or agree[ing] to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000

or more." 18 U.S.C. 666(a)(1)(B); see 18 U.S.C. 666(b). The indictment alleged that petitioner had accepted payments from Majzoub, with the intent of being influenced and rewarded in the appointment of Majzoub as a police officer with the LPD. Indictment 10-11. Following a jury trial, petitioner was convicted on all counts, and the district court sentenced him to 48 months of imprisonment, to be followed by one year of supervised release. Pet. App. 31-34.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-29.

The court of appeals determined that sufficient evidence supported petitioner's convictions for bribery under 18 U.S.C. 666(a)(1)(B). Pet. App. 16. The court explained that petitioner was subject to Section 666(a)(1)(B) because he was an "agent" of a local government that "received the requisite amount of federal funds." *Id.* at 12 & n.6. The court further explained that petitioner violated Section 666(a)(1)(B) if "(1) he solicited or accepted anything of value; (2) with the corrupt intent to be influenced or rewarded; (3) in connection with any business, transaction, or series of transactions of the City of Longwood involving anything of value of $5,000 or more." *Id.* at 12 (brackets and citation omitted). Viewing the evidence in the light most favorable to the verdict, the court determined that the evidence showed that petitioner accepted "six separate payments from Majzoub"; that those "payments rewarded or influenced [petitioner] to use his authority as Chief to appoint Majzoub as a law enforcement officer, a 'transaction' of the LPD"; and that petitioner "appointed (and held out) Majzoub as a duly appointed LPD law enforcement officer even though the Commission had yet not certified Majzoub and Majzoub could not legally serve as a law

enforcement officer without that certification." *Id.* at 13-14.

The court of appeals declined to consider petitioner's contention that Section 666(a)(1)(B) required the government to show a *quid pro quo* involving an "official act," as construed in *McDonnell* v. *United States*, 136 S. Ct. 2355, 2367-2373 (2016). Pet. App. 19 n.8. The court observed that petitioner had failed to argue "either before the district court or in his opening brief on appeal" that the jury should have been required to find a *quid pro quo* involving an "official act." *Ibid.* The court of appeals thus determined that petitioner had "waived th[e] issue" by raising it for the first time in "his reply brief on appeal." *Ibid.*

"In any event," the court of appeals determined that "ample evidence" showed that petitioner had "committed a covered act in exchange for bribes." Pet. App. 20. The court observed that petitioner had "provided Majzoub with LPD badges credentials, performed a swearing-in ceremony," "administered the oath of office," and "even" ordered "his assistant [to] rush order LPD business cards for Majzoub." *Ibid.* The court thus determined that petitioner "did much more than set up meetings, make connections, or advocate for Majzoub: [petitioner] used his position as Chief to make Majzoub a police officer." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-15) that his bribery conviction under 18 U.S.C. 666(a)(1)(B) rests on insufficient proof of an unlawful exchange. Petitioner's contention lacks merit, and the court of appeals' decision does not conflict with any decisions of this Court or another court of appeals. The court of appeals determined that petitioner waived the argument he now raises and that the

evidence was sufficient to support his conviction even under his interpretation of Section 666(a)(1)(B). The petition for a writ of certiorari should be denied.

1. Petitioner primarily contends that Section 666(a)(1)(B) requires proof of a *quid pro quo* involving an "official act," as construed in *McDonnell* v. *United States*, 136 S. Ct. 2355, 2367-2373 (2016). That contention does not warrant this Court's review.

The court of appeals determined that petitioner "waived th[e] issue" of whether the jury should have been required to find a *quid pro quo* involving an "official act" "by failing to raise [that issue] until his reply brief on appeal." Pet. App. 19 n.8. Given that, the court declined "to evaluate the effect of *McDonnell* * * * on § 666(a)(1)(B) or on [its] precedent." *Ibid.* Thus, contrary to petitioner's suggestion (Pet. 6 n.3), the court did not "pass[] on the merits" of his "*McDonnell* arguments." Rather, the court concluded that "[t]his case d[id] not present an opportunity" to consider them. Pet. App. 19 n.8. For that reason alone, no further review is warranted. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citation omitted).

In any event, *McDonnell* addressed not Section 666(a)(1)(B), but instead 18 U.S.C. 201, which makes it a crime for "a public official" to "corruptly" accept "anything of value * * * in return for * * * being influenced in the performance of any official act." 18 U.S.C. 201(b)(2); see 136 S. Ct. at 2365. The Court considered "the proper interpretation of the term 'official act,'"

McDonnell, 136 S. Ct. at 2367, which Section 201 defines as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit," 18 U.S.C. 201(a)(3). The Court held that under Section 201, the "question, matter, cause, suit, proceeding or controversy" must be "something specific and focused" "involv[ing] a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *McDonnell*, 136 S. Ct. at 2372. The Court further held that the "decision or action" under Section 201 may include a public official "using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *Ibid.* The Court determined, however, that "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit th[e] definition of 'official act.'" *Ibid.*

This case does not involve Section 201. Unlike Section 201, Section 666 does not use the term "official act." Rather, Section 666(a)(1)(B) makes it a crime for the "agent" of a state, local government, or organization that receives more than $10,000 in federal funding per year to "corruptly" accept "anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions * * * involving any thing of value of $5,000 or more." 18 U.S.C. 666(a)(1)(B); see 18 U.S.C. 666(b).

Notably, Section 666 applies to bribery of agents of private "organization[s]" that receive federal funds, who do not act in any official government capacity at all. 18 U.S.C. 666(a)(1).*

Although petitioner (Pet. 21-24) cites a number of post-*McDonnell* decisions of the courts of appeals, he does not identify any that have imported *McDonnell*'s holding into Section 666(a)(1)(B). In two of those decisions, the courts of appeals determined that their application of Section 666 was not affected by *McDonnell*. See *United States* v. *Boyland*, 862 F.3d 279, 291 (2d Cir. 2017) (holding that Section 666 is "more expansive" than Section 201, so "the *McDonnell* standard" did not apply); *United States* v. *Maggio*, 862 F.3d 642, 646 n.8 (8th Cir.) ("*McDonnell* had nothing to do with § 666."), cert. denied, No. 17-6272 (Nov. 6, 2017). In *United States* v. *Repak*, 852 F.3d 230 (2017), the Third Circuit upheld convictions under both Section 666 and 18 U.S.C.

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* Petitioner contends (Pet. 22-23 & n.15) that the government's filings in other cases suggest that *McDonnell*'s interpretation of Section 201 should apply here, but that contention is mistaken. In one of the filings petitioner cites (Pet. 23 n.15), the government argued that "[n]owhere in *McDonnell* did the Supreme Court purport to hold that the Section 201 definition applies in all federal corruption prosecutions." Gov't Opp. to Def. Mot. for Bail Pending Appeal at 27, *United States* v. *Skelos*, No. 15-cr-317 (S.D.N.Y. July 25, 2016); see also *United States* v. *Skelos*, No. 16-1618, 2017 WL 4250021, at *2 (2d Cir. Sept. 26, 2017) (applying *McDonnell* to the Section 666 claims in that case only because the jury instructions were phrased in terms of "official acts"). In the other filing petitioner cites (Pet. 23 n.15), the government argued that "there is no reason to believe that *McDonnell*'s interpretation of the statutory language of Section 201 should apply wholesale to cases involving statutes that use different language." Gov't Opp. to Def. Mot. to Dismiss Indictment or for a Bill of Particulars at 29, *United States* v. *Ng Lap Seng*, No. 15-cr-706 (S.D.N.Y. Nov. 30, 2016).

1951 but applied *McDonnell* only to its analysis under Section 1951. 852 F.3d at 252-254. And the remaining decisions did not involve Section 666 at all. See *United States* v. *Tavares*, 844 F.3d 46, 54 (1st Cir. 2016) (18 U.S.C. 1961 (2006); Mass. Ann. Laws ch. 268A, § 3(a) (LexisNexis 2010)); *United States* v. *Silver*, 864 F.3d 102, 110 n.22 (2d Cir.) (18 U.S.C. 1341, 1343, 1346, 1951, 1957), petition for cert. pending, No. 17-562 (filed Oct. 11, 2017); *United States* v. *Ferriero*, 866 F.3d 107, 128 (3d Cir. 2017) (N.J. Stat. Ann. § 2C:27-2 (West 2005)); *United States* v. *Bennett*, 688 Fed. Appx. 169, 171 (3d Cir. 2017) (Anti-Kickback Act of 1986, 41 U.S.C. 51 *et seq.* (2000)).

2. To the extent petitioner contends (Pet. 16) that the decision below conflicts with pre-*McDonnell* decisions of other circuits, he is likewise incorrect. There is no indication that any other circuit would find the appointment of a law-enforcement officer in return for money, see Pet. App. 13, insufficient to sustain a conviction under Section 666(a)(1)(B). See *United States* v. *Ford*, 435 F.3d 204, 213 (2d Cir. 2006) (explaining that under Section 666(a)(1)(B), "the recipient must have accepted the thing of value while 'intending to be influenced'"); *United States* v. *Bryant*, 655 F.3d 232, 241 (3d Cir. 2011) (explaining that "a conviction can occur if the Government shows that the defendant accepted payments or other consideration with the implied understanding that he would perform or not perform an act in his official capacity") (brackets and citation omitted); *United States* v. *Jennings*, 160 F.3d 1006, 1012, 1018 (4th Cir. 1998) (upholding a conviction under Section 666(a)(2) where "a reasonable juror could have concluded that there was a course of conduct involving payments flowing from [the defendant] to [the official] in

exchange for a pattern of official actions favorable to [the defendant's] companies"); *United States* v. *Griffin*, 154 F.3d 762, 763 (8th Cir. 1998) (describing a *quid pro quo* in the context of the Sentencing Guidelines as the "payment of money by [a person] in exchange for [the defendant's] official actions on her behalf").

3. At all events, this case would be an unsuitable vehicle for further review because the court of appeals determined that even under petitioner's construction of Section 666(a)(1)(B), the evidence was sufficient to support his conviction. Pet. App. 20. The court found that the evidence showed that petitioner "did much more than set up meetings, make connections, or advocate for Majzoub." *Ibid.* Rather, the evidence showed that, "in exchange for bribes," petitioner "appointed Majzoub as an LPD law enforcement officer." *Ibid.* As a "formal exercise of governmental power" on a "specific and focused" matter, that appointment itself constituted an "official act." *McDonnell*, 136 S. Ct. at 2372. The evidence also showed that petitioner pressured the Commission to certify Majzoub and advised the District of Columbia Protective Services Police to hire him, Pet. App. 5-7, "knowing or intending such advice to form the basis for an 'official act,'" *McDonnell*, 136 S. Ct. at 2371. Thus, even if petitioner were correct that Section 666(a)(1)(B) required proof of a *quid pro quo* involving an "official act," this Court's review would have no effect on the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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