No. 24-142

In the Supreme Court of the United States

BRIAN BENJAMIN, 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

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QUESTION PRESENTED

Whether the court of appeals correctly determined that an indictment charging federal-funds bribery and honest-services wire fraud based on campaign contributions sufficiently alleged an "explicit" *quid pro quo*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 95 F.4th 60. The opinion and order of the district court (Pet. App. 27a-74a) is available at 2022 WL 17417038.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2024. On April 12, 2024, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 5, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Southern District of New York indicted petitioner on one count of conspiring to commit federal-funds bribery and honest-services wire fraud, in violation of 18 U.S.C. 371, 666, 1343, and 1346; one count

of federal-funds bribery, in violation of 18 U.S.C. 666(a)(1)(B); one count of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; and two counts of falsifying records, in violation of 18 U.S.C. 1519. See Pet. App. 79a-99a. The district court dismissed the conspiracy, bribery, and wire-fraud counts. See *id.* at 27a-74a. The court of appeals reversed and remanded. See *id.* at 1a-26a.

1. From 2017 to 2021, petitioner served as a New York state senator. See Pet. App. 3a. In 2019, he decided to run for New York City comptroller and asked Gerald Migdol, a real estate developer in his district, to help him raise campaign funds. See *ibid.* Migdol responded that he lacked experience as a political fundraiser, that his fundraising efforts were focused on his nonprofit organization, and that the donors from whom he would solicit campaign contributions were the same people from whom he intended to solicit donations to the nonprofit organization. See *id.* at 3a, 82a-83a. Petitioner responded, "Let me see what I can do." *Id.* at 3a.

Two months later, petitioner learned that, as a state senator, he could allocate up to $50,000 in state funds to non-profit organizations in his district. See Pet. App. 3a. Petitioner informed Migdol that he would allocate the full $50,000 to Migdol's nonprofit group. See *ibid.* Migdol later stated that he understood petitioner to be offering the grant in return for Migdol's assistance with campaign fundraising. See *id.* at 3a-4a.

The New York State Senate approved a resolution allocating $50,000 to Migdol's group. See Pet. App. 4a. Soon afterward, Migdol gave petitioner three checks, totaling $25,000, payable to petitioner's campaign. See *ibid.* Petitioner reminded Migdol of the grant and said

that he expected to Migdol to raise small-dollar contributions for his campaign. See *ibid.*

Migdol eventually began providing contributions to petitioner's campaign, but he often falsified the donors' names or covertly funded the donations by reimbursing the donors. See Pet. App. 5a. Meanwhile, his nonprofit group proceeded through the administrative process for the disbursement of the grant, but stopped after a news story about his involvement in fraudulent contributions to petitioner's campaign. See *ibid.* Petitioner, for his part, tried to conceal his arrangement with Migdol in forms submitted to regulators and in a background-check questionnaire. See *ibid.*

2. A federal grand jury indicted petitioner on one count of conspiring to commit federal-funds bribery and honest-services wire fraud, in violation of 18 U.S.C. 371, 666, 1343, and 1346; one count of federal-funds bribery, in violation of 18 U.S.C. 666(a)(1)(B); one count of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; and two counts of falsifying records, in violation of 18 U.S.C. 1519. See Pet. App. 79a-99a.

The district court dismissed the conspiracy, bribery, and honest-services counts. See Pet. App. 27a-74a. In the court's view, those counts required proof of an "'explicit' *quid pro quo*," a requirement that the court applied more "strict[ly]" because this case involves campaign contributions. *Id.* at 59a. And the court viewed the indictment as deficient for "fail[ing] to charge an explicit *quid pro quo*." *Id.* at 59a-60a.

3. The court of appeals reversed and remanded. See Pet. App. 1a-26a.

The court of appeals, like the parties, proceeded on the premise that the *quid pro quo* element of the counts at issue here mirrored the *quid pro quo* element of

Hobbs Act extortion, in violation of 18 U.S.C. 1951. See Pet. App. 10a-11a. It observed that this Court had stated in *McCormick* v. *United States*, 500 U.S. 257 (1991), that the Hobbs Act required proof of an "explicit promise or undertaking," *id.* at 273, but had clarified in *Evans* v. *United States*, 504 U.S. 255 (1992), that a *quid pro quo* may be inferred from the parties' conduct. See Pet. App. 6a, 9a. It accordingly read the word "explicit" in *McCormick* to mean only that a *quid pro quo* must be "clear and unambiguous"—not to require an "express statement" of the bargain. *Id.* at 12a.

The court of appeals rejected the contention that *McCormick* and *Evans* establish different standards for different types of *quid pro quo*s, with *McCormick*'s test governing cases involve campaign contributions and *Evans*'s test involving other cases. See Pet. App. 14a-23a. The court explained that "*Evans* is an elaboration of *McCormick* rather than a separate test," *id.* at 14a, and that both decisions "apply to cases involving an illicit payment to a public official, even if the payment is given as a campaign contribution," *id.* at 18a.

The court of appeals then found that the indictment "sufficiently alleged an explicit *quid pro quo*." Pet. App. 23a. It highlighted the indictment's allegations that petitioner solicited and received campaign contributions "in exchange for" petitioner's use of official authority to obtain the state grant. *Ibid.* (citation and emphasis omitted). The court explained that "the phrase 'in exchange for' * * * satisfied the *quid pro quo* requirement of *McCormick* because it alleged an unambiguous agreement to exchange an official public act by [petitioner] for financial contributions from Migdol." *Id.* at 23a-24a.

ARGUMENT

Petitioner contends (Pet. 13-28) that a conviction for federal-funds bribery or honest-services fraud based on campaign contributions to a public official may not rest on a *quid pro quo* inferred from the circumstances. The petition for a writ of certiorari is interlocutory, which alone provides a sufficient reason to deny it. In any event, the court of appeals correctly rejected petitioner's contention, and its decision does not conflict with any decision of this Court or any other court of appeals. This Court has repeatedly denied in other cases presenting that issue, and it should do the same here. See *Allinson* v. *United States*, 143 S. Ct. 427 (2022) (No. 22-328); *Davis* v. *United States*, 142 S. Ct. 401 (No. 21-5081); *Blagojevich* v. *United States*, 138 S. Ct. 1545 (2018) (No. 17-658); *Terry* v. *United States*, 571 U.S. 1237 (2014) (No. 13-392); *Siegelman* v. *United States*, 566 U.S. 1043 (2012) (No. 11-955); *Scrushy* v. *United States*, 566 U.S. 1043 (2012) (No. 11-972).

1. As a threshold matter, the decision below is interlocutory; the court of appeals reversed the district court's judgment and remanded the case for further proceedings. See Pet. App. 26a. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *National Football League* v. *Ninth Inning, Inc.*, 141 S. Ct. 56, 57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari). The Court routinely denies interlocutory petitions in criminal cases. See Stephen M. Shapiro et al., *Supreme Court Practice* § 4-55 n.72 (11th ed. 2019).

That practice promotes judicial economy. If petitioner is acquitted on remand, his current claims will

become moot. If he is convicted, he may raise his current claims, together with any other claims that may arise on remand, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) ("[W]e have authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals."). This case presents no occasion for this Court to depart from its usual practice.

To the contrary, the procedural posture of the case makes it an especially unsuitable vehicle for considering petitioner's contentions. Petitioner challenges the sufficiency of an indictment, and an indictment is sufficient if it (1) "contains the elements of the offense charged" and (2) "enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); see *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 106-111 (2007). It is "generally sufficient that an indictment set forth the offense in the words of the statute itself." *Hamling*, 481 U.S. at 117.

The indictment in this case tracked the statutory language, and provided sufficient specificity to allow petitioner to enter a plea and defend against the charges. The federal-funds-bribery count alleged that petitioner "solicited and received" contributions from Migdol "intending to be influenced in connection with [petitioner's] use of official authority and influence to obtain" a state grant. Pet. App. 94a-95a; see 18 U.S.C. 666(a)(1)(B). The honest-services-fraud count alleged that petitioner used "wire, radio, and television communication" for the purpose of executing a "scheme and artifice to defraud, and to deprive the public of its right to

his honest services." Pet. App. 95a; see 18 U.S.C. 1343, 1346. And the indictment identified the specific bribery scheme—contributions in exchange for directing state funds—at issue. Pet. App. 82a-91a.

The indictment thus sufficiently sets forth the charged crimes. See Pet. App. 23a-24a. Petitioner's contentions (Pet. i) about what the government must "prove" at trial, and about whether a *quid pro quo* can be "inferred or implied" from circumstantial evidence, are premature.

2. In any event, petitioner errs in arguing that, when the government charges a public official with federal-funds bribery or honest-services fraud based on his agreement to exchange official acts for campaign contributions, "the *quid pro quo* [must] be 'express, rather than implied or inferred." Pet. 29 (citation omitted).

a. In *McCormick* v. *United States*, 500 U.S. 257 (1991), this Court addressed the elements of a prosecution for extortion under color of official right in violation of the Hobbs Act. In that case, the defendant, a state legislator, received campaign contributions from a lobbyist; the defendant and lobbyist also discussed legislation favored by the lobbyist, which the defendant later sponsored. *Id.* at 260-261. The defendant was charged with extortion, and the jury was instructed that it could find the defendant guilty if the payment was made "with the expectation that [it] would influence [the defendant's] official conduct, and with knowledge on the part of [the defendant] that they were paid to him with that expectation." *Id.* at 265 (citation omitted). This Court reversed the resulting conviction on the ground that the instruction had not required proof of an actual *quid pro quo*. *Id.* at 273-274.

One year later, the Court again addressed extortion under color of official right in *Evans* v. *United States*, 504 U.S. 255 (1992). The defendant in that case, a county commissioner, was convicted under the Hobbs Act for accepting $8000, purportedly as a contribution to his reelection campaign, knowing that it was intended to secure his vote and lobbying efforts on a particular matter. *Id.* at 257. The jury had been instructed that "if a public official demands or accepts money in exchange for a specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." *Id.* at 258 (brackets and citation omitted). The Court held that the instruction "satisfie[d] the *quid pro quo* requirement of *McCormick*." *Id.* at 268.

b. The decision below accords with *McCormick* and *Evans*. As the court of appeals correctly recognized, a *quid pro quo* can be inferred "from the official's and the payor's words and actions." Pet. App. 12a. The quid pro quo need not be "expressly stated." *Ibid.* In arguing otherwise, petitioner overreads (Pet. 14-18) this Court's statement in *McCormick* that "[t]he receipt of [campaign] contributions is also vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273.

Petitioner errs in suggesting that the statement precludes conviction in a campaign-contributions bribery case whenever the parties to the bribe are careful never to directly articulate (at least around others) their otherwise evident *quid pro quo* arrangement. The pivotal issue in *McCormick* was whether the jury was required

to find a *quid pro quo* at all, not whether that *quid pro quo* had to be express rather than implied. See 500 U.S. at 274. The Court's subsequent decision in *Evans*, in contrast, did present the question of what an instruction must say to "satisf[y] the *quid pro quo* requirement of *McCormick*," and the Court upheld an instruction that did not require an express *quid pro quo*. *Evans*, 504 U.S. at 268.

Petitioner's reliance (Pet. 15-16) on this Court's decision in *McDonnell* v. *United States*, 579 U.S. 550 (2016), is misplaced. In *McDonnell*, the Court stated that a *quid pro quo* agreement "need *not* be explicit" and that "the public official need *not* specify the means that he will use to perform his end of the bargain." *Id.* at 572 (emphasis added). "A jury could, for example, conclude that an agreement was reached if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return." *Ibid.*

c. Petitioner's proposed requirement of an "express" promise between the payor and the official would allow the evasion of criminal liability through "knowing winks and nods," *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment), even where (as the indictment alleges here) the parties had a meeting of the minds and agreed to exchange things of value for official action. Under a standard that requires not just a *quid pro quo*, but one that is verbally spelled out, all but the most reckless public officials will be able to avoid criminal liability for exchanging official action for campaign contributions.

Petitioner errs in contending (Pet. 22) that courts must apply a "heightened standard in campaign-contribution cases." This Court did not require an express

quid pro quo in *Evans*, even though that case involved a campaign contribution. See 504 U.S. at 257-258. Petitioner argues that *Evans* "focused" on a "personal cash payment" rather than a campaign contribution, but that is incorrect. Pet. 24 (emphasis omitted). *Evans* focused on whether a jury instruction "properly describe[d] the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution." 504 U.S. at 268. And it upheld that instruction, notwithstanding the defendant's argument that it "did not properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution." *Id.* at 267-268.

Contrary to petitioner's contention (Pet. 15), the court of appeals' decision comports with "First Amendment principles." The court recognized that "campaign contributions implicate the First Amendment." Pet. App. 22a. But it explained that the First Amendment does not protect *quid pro quo* agreements involving the exchange of official acts for contributions. See *id.* at 22a-23a. Further alleviating any constitutional concerns, the court emphasized that, while a *quid pro quo* may be inferred from the parties' "words and actions," it still "must be clear and unambiguous." *Id.* at 12a.

3. Petitioner is incorrect in asserting (Pet. 18-23) that the question presented has divided the courts of appeals. In fact, as the court below recognized, "[e]very other circuit to have considered this question has held" that the "*quid pro quo* requirement may be met by implication from the official's and the payor's words and actions and need not entail an express statement." Pet. App. 12a; see *United States* v. *Correia*, 55 F.4th 12, 31 (1st Cir. 2022); *United States* v. *Allinson*, 27 F.4th 913, 925 (3d Cir. 2022), cert. denied, 143 S. Ct. 427 (2022);

United States v. *Terry*, 707 F.3d 607, 613 (6th Cir. 2013), cert. denied, 571 U.S. 1237 (2014); *United States* v. *Blagojevich*, 794 F.3d 729, 738 (7th Cir. 2015), cert. denied, 577 U.S. 1234 (2016); *United States* v. *Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992), cert. denied, 113 S. Ct. 332 (1992); *United States* v. *Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011), cert. denied, 566 U.S. 1043 (2012).

Petitioner cites (Pet. 19-21) cases from the First, Sixth, Eighth, and Ninth Circuits, but in each case, the court (1) considered *quid pro quo* arrangements outside the campaign-contribution context and (2) affirmed the conviction. See *United States* v. *McDonough*, 727 F.3d 143, 155 n.4, 166 (1st Cir. 2013), cert. denied, 571 U.S. 1177 (2014) (No. 13-732); *United States* v. *Abbey*, 560 F.3d 513, 518-519 (6th Cir.), cert. denied, 558 U.S. 1051 (2009); *United States* v. *Chastain*, 979 F.3d 586, 591, 594 (8th Cir. 2020); *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 926, 936-938 (9th Cir.), cert. denied, 558 U.S. 1077 (2009). Any statements in those decisions about how to analyze a case involving campaign contributions would therefore not bind those courts in future cases. Indeed, when directly confronted with cases involving campaign contributions, the First, Sixth, and Ninth Circuits have all made clear that a *quid pro quo* need not be express in order to support a conviction. See *Correia*, 55 F.4th at 31 (1st Cir.); *Terry*, 707 F.3d at 613 (6th Cir.); *Carpenter*, 961 F.2d at 827 (9th Cir.).

Petitioner also cites (Pet. 20 n.1) the Fourth Circuit's decision in *United States* v. *Taylor*, 993 F.2d 382, cert. denied, 510 U.S. 891 (1993) but that decision does not establish a circuit conflict either. The defendant's conviction in that case rested on monetary payments made to him while he was a member of a state legislature. See *id.* at 383. Although the defendant argued that the

payments were "simply campaign contributions," *ibid.*, the Fourth Circuit neither addressed that argument nor concluded that campaign-contribution cases require proof of an express *quid pro quo*. The court instead found the jury instructions defective under *McCormick* and *Evans* because they allowed the jury to find the defendant guilty "upon a finding that the payments were made to [him] simply because he held office." *Id.* at 385.

Finally, petitioner asserts (Pet. 21) that the court of appeals' decision in this case conflicts with its decisions in previous cases. The court of appeals, however, did not see any of any prior decisions as binding, Pet. App. 21a, and any intracircuit conflict would not, in any event, warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

4. No sound basis exists for petitioner's request (Pet. 28-29) to grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case (GVR) in light of *Snyder* v. *United States*, 144 S. Ct. 1947 (2024). Section 666 prohibits agents of federally funded entities from corruptly soliciting or accepting payments intending to be "influenced or rewarded" in connection with official business. 18 U.S.C. 666(a)(1)(B). In *Snyder*, this Court held that Section 666 reaches "bribes" (*i.e.*, "payments made or agreed to *before* an official act in order to influence the official with respect to that future official act") but not "gratuities" (*i.e.*, payments paid "*after* an official act as a token of appreciation"). 144 S. Ct. at 1951-1952.

That holding has no bearing on the indictment in this case, which rests on a bribery theory rather than a gratuity theory. The indictment alleges that petitioner and

Migdol agreed beforehand to exchange campaign contributions for a state grant, not that Migdol made contributions after the fact to reward petitioner's efforts in procuring the grant. See pp. 2-3, *supra*. And the court of appeals accordingly described the Section 666 count as charging petitioner with "soliciting bribes," not with soliciting gratuities. Pet. App. 2a.

Contrary to petitioner's contention (Pet. 28-29), *Snyder* does not cast doubt on the court of appeals' rejection of an alternative theory accepted by the district court. The district court had concluded in the alternative that the indictment was insufficient because the state grant "had not yet been disbursed" when petitioner accepted Migdol's campaign contributions. Pet. App. 25a. The court of appeals correctly rejected that contention. See *id.* at 24a-25a. Bribery consists of *agreeing* to exchange an official act for a thing of value; the official need not actually perform the act. See *McDonnell*, 579 U.S. at 572. And *Snyder* recognizes that "the timing of the agreement is the key, not the timing of the payment." 144 S. Ct. at 1959. If anything, the indictment's allegation that the specifics of the deal were made clear to both parties before the grant was disbursed simply underscores that this is a *quid pro quo* bribery case. See Pet. App. 82a-85a.

In any event, the interlocutory posture of this case makes a GVR order unnecessary. Petitioner remains free on remand to raise any contentions about the effect of this Court's intervening decision in *Snyder*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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