No. _____

In The
Supreme Court of the United States

ALBERT T. ROBLES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ERIK S. JAFFE
(Counsel of Record)
GENE C. SCHAERR
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street, NW
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

QUESTION PRESENTED

18 U.S.C. § 1951 (the Hobbs Act) makes it illegal to affect commerce by engaging in "extortion," defined as "obtaining * * * property from another, with his consent * * * under color of official right," and which includes soliciting or accepting a bribe. 18 U.S.C. § 201(b) makes it illegal for federal officials to accept a bribe. In *United States* v. *McCormick,* 500 U.S. 257 (1991), this Court held that conviction for extortion under the Hobbs Act requires proof of a *quid pro quo* where the alleged bribe was a campaign contribution. Subsequent cases have further required proof of a *quid pro quo* for bribery under § 201. *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999); *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016).

18 U.S.C. § 666 extends § 201's prohibition on bribery involving federal officials to bribery of state and local officials and others whose organizations receive federal funds. The courts of appeals, however, are divided regarding whether the required proof of a *quid pro quo* under the Hobbs Act, § 201 and comparable other statutes likewise extends to § 666.

The Question Presented is:

Whether conviction of a federal bribery charge against a state or local official under 18 U.S.C. § 666 requires proof of a *quid pro quo* where the alleged bribe is a campaign contribution presumptively protected under the First Amendment?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Albert T. Robles was the defendant/petitioner in the district court proceedings on the motion for relief under 28 U.S.C. § 2255 and the defendant/appellant in the Ninth Circuit Circuit. He was the defendant and defendant/appellant in the underlying criminal proceedings.

Respondent United States was the plaintiff/respondent in the district court § 2255 proceedings and the plaintiff/appellee in the Ninth Circuit. It was the plaintiff/appellee in the underlying criminal proceedings.

RELATED CASES

The 28 U.S.C. § 2255 proceeding that is the subject of this Petition was No. 15-cv-00207-SVW in the district court and No. 18-56250 in the court of appeals. The only related cases are those involving the original conviction:

- *United States* v. *Garrido* and *United States* v. *Robles*, No. 04-cr-01594-SVW-4 & -1, original prosecution combined in the district court, and keeping the same case number on remand and resentencing involving only Petitioner Robles.
- *United States* v. *Garrido*, No. 06-50717, and *United States* v. *Robles*, No. 06-50718, combined on appeal in the Ninth Circuit, appealing the original conviction.
- *Robles* v. *United States*, No. 13-8099. Petition for writ of certiorari to this Court from original conviction.
- *United States* v. *Robles*, No. 15-50133, appeal following remand and resentencing and denial of motion for new trial or reconsideration.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability.

OPINIONS BELOW

The Order of the District Court for the Central District of California denying the motion for relief under 28 U.S.C. § 2255 is unpublished and is attached at Appendix E1-E4. The district court's Order denying a certificate of appealability is also unpublished and is attached at Appendix F1. The Order of the Ninth Circuit denying a certificate of appealability is unpublished and is attached at App. A1-A2.

The Opinion of the Ninth Circuit affirming in part and reversing in part the original convictions is available at 713 F.3d 985 (*sub nom. United States* v. *Garrido*), and is attached at Appendix B1-B35

The Order of the district court on remand denying the motion for new trial or reconsideration is unpublished and is attached at Appendix C1-C19.

The Memorandum Opinion of the Ninth Circuit affirming the denial of a new trial or reconsideration on remand is unpublished but available at 698 Fed. Appx. 905 and is attached at D1-D3.

JURISDICTION

The Ninth Circuit issued its order denying a certificate of appealability on August 22, 2019. Justice Kagan granted Petitioner an extension of time to file this Petition to and including January 18, 2020. This

Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES

18 U.S.C. § 666 provides, in relevant part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists—
>
> > (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--
> >
> > * * *
> >
> > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees 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;
> >
> > * * *
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstances referred to in subsection (a) of this section is that the organization, government or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

28 U.S.C. § 2255 provides, in relevant part:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or

correct the sentence as may appear appropriate.

* * *

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * *

STATEMENT OF THE CASE

1. This case involves a conviction under 18 U.S.C. § 666, the federal bribery statute applicable recipients of federal funds, including agents and officials of state and local governments. That conviction was based on the receipt of in-kind campaign contributions, but the jury was not required to find any *quid pro quo* in exchange for such contributions. Rather, it was instructed that the government must show that Robles "corruptly solicited, demanded, accepted, or agreed to accept something of value with the intent to be influenced or rewarded and to influence or reward in connection with any business, transaction, or series of transactions, of the City of South Gate." Trial Transcript 1930-31; App. C14-C15.

For bribery involving federal agents and officials, this Court has required, under various comparable statutes, proof of a *quid pro quo* in order to convict. See, *e.g.*, *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016), and *United States* v. *Sun-Diamond Growers of California*, 526 U.S. 398 (1999). Indeed, given First Amendment concerns raised by charging bribery in connection with lawful campaign contributions, this Court has applied a *quid pro quo* requirement with

particular vigor under the Hobbs Act, requiring the agreement for exchange of *quid* and *quo* to be express. *United States* v. *McCormick,* 500 U.S. 257 (1991).

There is a substantial circuit split on whether the same standards apply to § 666, and the application of a criminal bribery statute to state and local campaign contributions without an express *quid pro quo* raises substantial constitutional questions regarding the freedoms of speech and association and regarding federalism.

2. At the times relevant to the underlying facts of this case, Petitioner Robles was the elected Treasurer of the City of Southgate, California. App. B3. He previously had served as Mayor and as an elected member of the City Council. The indictment alleged that, while Treasurer, Petitioner used his influence with the City Council to award sewer repair contracts to a company in which he had undisclosed economic interests and received portions of the money from those contracts. Those allegations formed the basis of several counts alleging honest services mail and wire fraud, and money laundering under 18 U.S.C. §§ 1341, 1343, 1346, and 1957. Those allegations are no longer relevant to this case given that the convictions have already been reversed on direct appeal.

The indictment also alleged that Petitioner later improperly used his influence and position to cause the City Council to award a waste-hauling contract to a company owned by Michael Klistoff. Klistoff had previously made campaign contributions to Petitioner. Based on those events, Petitioner was charged under 18 U.S.C. § 666 with accepting bribes from

Klistoff in connection with the waste-hauling contract.

> The Indictment charged Robles with "corruptly accept[ing] and agree[ing] to accept * * * payments for goods and services and campaign contributions from Michael Klistoff and All City Services, intending to be influenced and rewarded in connection with a transaction of [a local government] * * * namely, the awarding of a multiple-year refuse collection and recycling contract in South Gate worth approximately $48 million."

App. B26 n. 11.

At the trial Klistoff was a cooperating witness for the government. He testified, however, that there was no *quid pro quo*, no agreement, and no promises in return for the campaign contributions. Rather, he merely hoped to gain Petitioner's favor in connection with the future consideration of the waste hauling contract. Trial Transcript 1223-25. The jury was instructed that the government only had to show corrupt "intent" by Petitioner in accepting the contributions and later helping Klistoff and was not required to find a *quid pro quo*.

3. Petitioner was convicted on all counts and thereafter appealed to the Ninth Circuit. That appeal was stayed pending this Court's decision in *Skilling* v. *United States*, 561 U.S. 358 (2010), where it eventually narrowed the scope of honest-services fraud to bribery and kickback schemes.

After *Skilling* was decided, the Ninth Circuit reversed all of the fraud and money laundering counts, which were predicated in primary part on mere fail-

ure to disclose personal interests, but affirmed the bribery convictions under § 666. App. B34-35.

In discussing the honest services counts the court addressed and rejected the government's argument that the bribery counts could sustain the honest services conviction post-*Skilling* even if the undisclosed interests could not. App. B14-B15. The court observed, however, that unlike bribery under § 666, bribery as a predicate for fraud under the other statutes required a *quid pro quo*. App. B20-22 & nn. 9-10. Because the elements of bribery under § 666 were insufficient to establish bribery as a predicate for honest services fraud under § 1346, and because the jury was instructed on now-impermissible theories of fraud based on mere non-disclosures, and for several additional reasons not relevant here, the court of appeals vacated the honest services and money laundering convictions. App. B24.

Regarding the bribery counts the court of appeals rejected Petitioner's claim that as Treasurer he had no authority over awarding the contract and hence did not perform any "official act," and distinguished *Sun–Diamond,* 526 U.S. 398, as involving a different statute, 18 U.S.C. § 201. App. B29-B30. It further noted that § 666 did not require a comparable limitation to official acts because it was limited by the requirement that there be a corrupt intent and that the gift or bribe be worth more than $5,000. App. B30.

In a brief discussion still in the context of the "official acts" issue, the court also held that § 666 did not require the government to show a *quid pro quo*. App. B31-34. The court did not discuss any of the serious First Amendment concerns raised by using campaign

contributions as the basis of a bribery conviction, and merely sided with several of its sister circuits in rejecting a *quid pro quo* requirement in general.

Petitioner sought and was denied rehearing and rehearing *en banc* and this Court denied a petition for certiorari. *Robles* v. *United States*, 571 U.S. 1222 (2014).

4. On remand for resentencing, Petitioner again moved for a new trial based on the availability of new evidence reflecting that the alleged bribes were lawful campaign contributions and hence posed a heightened need for a *quid pro quo* limitation. The motion noted that the court of appeals did not address the more specific question whether conviction under § 666 required a showing of a *quid pro* quo where the alleged bribe was a campaign contribution.

The district court denied the motion for a new trial or reconsideration, noting, *inter alia*, that "[u]nder the legal standard for a § 666 conviction on which the jury was instructed at trial, it did not matter whether Klistoff's payments were personal gifts or campaign contributions. They simply needed to be 'something of value.'" App. C14. The district court thereafter proceeded with resentencing proceedings.

On January 12, 2015, while resentencing was proceeding, Petitioner moved to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. (It is this motion that forms the basis of the current Petition in this Court.)

Among the several grounds for that motion was that counsel had provided ineffective assistance by failing to adequately argue the heightened need to prove a *quid pro quo* for bribery convictions based

upon campaign contributions protected under the First Amendment. He further argued that his bribery convictions were invalid because there was no evidence of a *quid pro quo* agreement, and to the extent this Court implicitly held otherwise in *Garrido* that holding was undermined by this Court's subsequent decisions in *McCutcheon* v. *FEC*, 134 S. Ct. 1434 (2014) (invalidating on First Amendment grounds certain limits on campaign contributions), and *McCormick,* 500 U.S. 257 (requiring *quid pro quo* under Hobbs Act for extortion involving public officials based on, *inter alia*, First Amendment concerns).

On March 19, 2015, the district court issued an opinion regarding resentencing and on March 31, 2015 entered a First Amended Judgment and Commitment sentencing Petitioner to time served of 84 months imprisonment, plus three years supervised release. The court did not rule on the § 2255 motion at that time.

Petitioner appealed that resentencing and the denial of the earlier motion for a new trial or reconsideration. Resolution of the § 2255 motion in the district court was then stayed pending that appeal. Shortly thereafter the appeal was also stayed pending this Court's decision in *McDonnell*, wherein this Court eventually adopted a narrow standard for what "official acts" could form part of a prosecution for *quid pro quo* bribery under § 201 in order to avoid constitutional concerns with a more expansive understanding of bribery. 136 S. Ct. at 2372.

5. On October 11, 2017, the Ninth Circuit affirmed the new sentence and denial of the motion for a new trial or reconsideration. App. D1-D3. It con-

cluded that the new evidence regarding campaign contributions was raised more than 3 years after the verdict, the evidence was merely newly available rather than newly discovered, and evidence that any claimed gifts were in fact campaign contributions would not matter given the court was bound by the prior holding in *Garrido* that a *quid pro quo* was not required and *Garrido* was not "clearly irreconcilable" with the subsequent decisions in either *McCutcheon* v. *FEC* or *McDonnell* "because these intervening higher authorities addressed the interpretation of statutes other than § 666." App. D3.

6. On July 25, 2018, the district court lifted the stay on and denied the § 2255 motion. It held that the issue had already been decided on direct appeal. App. E2-E3. But while the court cited to the Ninth Circuit's general discussion of whether a *quid pro quo* for an "official act" was required, it pointed to no place where the Ninth Circuit addressed the First Amendment concerns unique to bribery charges based on campaign contributions. The court then opined that on the merits counsel was not obliged to raise the issue because it would not have been successful in any event and hence caused no prejudice. App. E3-E4 n. 2.

The district court thereafter denied a certificate of appealability regarding its § 2255 ruling. App. F1.

Petitioner filed a notice of appeal and moved for a certificate of appealability from the Ninth Circuit to review the denial of the § 2255 motion.

On August 22, 2019 the Ninth Circuit denied the certificate of appealability. App. A1-A2.

REASONS FOR GRANTING THE WRIT

This Court should grant the Petition in order to resolve the broad split over whether 18 U.S.C. § 666 requires a *quid pro quo* in order to convict a state official of bribery, both generally and particularly where the alleged bribe is a campaign contribution.

As a preliminary matter, Petitioner notes that the denial of a certificate of appealability was predicated on the issue having been decided on direct appeal, and hence not open for consideration by the district court or a subsequent appellate panel on collateral review. While Petitioner disagrees that he had, and that counsel adequately provided, a full and fair opportunity to argue the First Amendment need for a *quid pro quo* requirement, such concerns do not constrain *this* Court from addressing the issue. The underlying question whether § 666 requires proof of a *quid pro quo* at least in the context of campaign contributions was not addressed by this Court on the merits on direct appeal and this Court, of course, is not bound by the Ninth Circuit's decision in *Garrido*. For present purposes, therefore, whether Petitioner should receive a certificate of appealability collapses back to this Court's view of the merits of the Question Presented. If it agrees that First Amendment concerns require a *quid pro quo* requirement for § 666, as with other bribery statutes, then Petitioner would be entitled to § 2255 relief or, at a minimum, further proceedings to determine whether counsel's failure adequately to present that argument was ineffective.

I. There Is a Substantial Split Over Whether a *Quid Pro Quo* Is Required To Convict a State Official of Bribery Under § 666.

This Court should grant certiorari to review whether proof of a *quid pro quo* is required to establish bribery in violation of § 666 based on campaign contributions.

In *Garrido* the Ninth Circuit held that a *quid pro quo* for an "official act" was not required to convict for bribery under § 666. While it did not address the heightened First Amendment concerns surrounding campaign contributions in that decision, the subsequent decisions in this case have treated *Garrido* as controlling that question as well.

The court of appeals joins several of its sister circuits in rejecting a *quid pro quo* requirement under § 666. See *United States* v. *Abbey*, 560 F.3d 513, 520 (6th Cir. 2009) ("the text [of § 666] says nothing of a *quid pro quo* requirement to sustain a conviction, express or otherwise: while a '*quid pro quo* of money for a specific * * * act is sufficient to violate the statute,' it is 'not necessary' " (citation omitted)), *cert. denied*, 558 U.S. 1051 (2009); *United States* v. *Gee*, 432 F.3d 713, 714-15 (7th Cir. 2005) ("Gee contends that the absence of a *quid pro quo* prevents conviction. Yet the statute [§ 666] does not require any such link. A *quid pro quo* of money for a specific legislative act is *sufficient* to violate the statute, but it is not *necessary*." (emphasis in original)), *cert. denied*, 547 U.S. 1113 (2006); *United States* v. *McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010) ("we now expressly hold there is no requirement in § 666(a)(1)(B) or (a)(2) that the government allege or prove an intent that a specific

payment was solicited, received, or given in exchange for a specific official act, termed a *quid pro quo*"), *cert. denied*, 562 U.S. 1270 (2011); *United States* v. *White*, 663 F.3d 1207, 1214 n. 6 (11th Cir. 2011) (standing by *McNair* post-*Skilling*), *cert. denied*, 568 U.S. 1030 (2012).

By contrast, the Second, Fourth, and Eighth Circuits require at least some showing of a *quid pro quo* agreement to convict under § 666. See *United States* v. *Ford*, 435 F.3d 204, 213 (2d Cir. 2006) (vacating § 666 conviction for accepting free consulting services in connection with a campaign for reelection as a union officer, concluding that "as the Supreme Court put it plainly in *Sun–Diamond Growers,* there must be a *quid-pro-quo*"); *United States* v. *Jennings*, 160 F.3d 1006, 1014, 1020-21 (4th Cir. 1998) (in case involving campaign contributions as alleged bribes, instruction using "intent to influence" language without including a *quid pro quo* requirement was plain error; instruction gave false impression that the law "prohibits *any* payment made with a generalized desire to influence or reward (such as a goodwill gift), no matter how indefinite or uncertain the payor's hope of future benefit."); *United States* v. *Griffin*, 154 F.3d 762, 763-64 (8th Cir. 1998) (in sentencing a state legislator for accepting a bribe under § 666, rather than a gratuity, court holds the "distinction between a bribe and an illegal gratuity is the corrupt intent of the person giving the bribe to receive a *quid pro quo* * * *. We agree with the District Court that the evidence established the necessary *quid pro quo*, or payment of money by Simmons in exchange for Griffin's official actions on her behalf"; "The core difference between a

bribe and a gratuity is not the time the illegal payment is made, but the *quid pro quo*, or the agreement to exchange cash for official action."); *United States* v. *Redzic*, 627 F.3d 683, 692 (8th Cir. 2010) (confirming requirement of *quid pro quo*), *cert. denied*, 563 U.S. 956 (2011); cf. *United States* v. *Ganim*, 510 F.3d 134, 151-52 (2d Cir 2007) (affirming a conviction under § 666 where trial court correctly "instructed the jury that to convict Ganim of federal programs bribery, it would have to find a 'specific *quid pro quo*.' As *Sun–Diamond* explained, what distinguishes a bribe from a gratuity is its intent element: only bribery requires 'the specific intent to give or receive something of value in exchange for an official act.' " (citation omitted)).

Commentators have readily acknowledged the split in the circuits over whether § 666 required proof of a *quid pro quo*. See, *e.g.*, Jared W. Olen, *The Devil's in the Intent: Does 18 U.S.C. § 666 Require Proof of Quid-Pro-Quo Intent?*, 42 SW. L. REV. 229, 233, 234-40, 261 (2012) ("Confusion has arisen, however, over the level of proof required by § 666's 'in connection with' language,[] with some circuits requiring proof of a *quid-pro-quo* arrangement and others not.[]" (footnotes omitted); describing split at length and siding with those requiring proof of a *quid pro quo*); Adam F. Minchew, *Who Put the* Quo *in* Quid Pro Quo*?: Why Courts Should Apply* McDonnell*'s "Official Act" Definition Narrowly*, 85 FORDHAM L. REV. 1793, 1811-12, 1822-23 (2017) (describing cases and noting that "the division between the circuit courts on the issue of whether the text of § 666 requires prosecutors to prove a *quid pro quo*, including an 'official

act,' is apparent"; "Before the lower courts read *McDonnell* to apply more broadly, the Supreme Court should first resolve the existing problematic circuit split over whether § 666 requires proof of a *quid pro quo*.[ ] Absent such clarification, a more onerous standard for proving Hobbs Act extortion will do very little because § 666 is more than capable of filling the void and effectively relegating Hobbs Act extortion to only the most clear-cut instances of state and local bribery." (footnote omitted)); Lauren Garcia, *Curbing Corruption Or Campaign Contributions? The Ambiguous Prosecution of "Implicit"* Quid Pro Quos *Under The Federal Funds Bribery Statute*, 65 RUTGERS L. REV. 229, 230-59 (2012) ("Shortly after the Supreme Court set forth an explicit *quid pro quo* requirement in the campaign contribution context under *McCormick*,[ ] federal courts were presented with the question of whether the explicit *quid pro quo* requirement is also applicable under § 666 bribery within the campaign contribution context. While the circuits are split, the Supreme Court has yet to address whether the *McCormick* explicit *quid pro quo* requirement should also apply in the campaign contribution context under § 666 bribery * * *" (footnote omitted)).

Given such a split the standards for a certificate of appealability – that the issue be fairly "debatable," *Slack* v. *McDaniel*, 529 U.S. 473, 484 (2000) – were met. There is a significant possibility this Court will agree with those circuits requiring a showing of a *quid pro quo* under § 666, particularly where the alleged "bribe" was a campaign contribution protected by the First Amendment.

This Court should grant certiorari to resolve the long-standing split regarding whether § 666 requires proof of a *quid pro quo*, at least where the alleged *quid* is a campaign contribution.

II. A *Quid Pro Quo* Should Be a Required Element for Conviction Under § 666 in Order To Avoid Serious Constitutional Concerns.

This Court also should grant the Petition because the decision below also is inconsistent with this Court's decisions in *McCormick*, *Sun-Diamond*, and *McDonnell*.

In *McCormick*, this Court read a *quid pro quo* requirement into the broad definition of extortion set out in the Hobbs Act. That statute defines "extortion," *inter alia*, as "the obtaining of property from another * * * under color of official right." 18 U.S.C. § 1951(b)(1). This Court held that, in the context of campaign contributions, the statute required proof of an express *quid pro quo*. 500 U.S. at 272-74. "To hold otherwise," the Court explained, "would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable." *Id.* at 272.

In *Sun-Diamond Growers*, Justice Scalia writing for a unanimous Court applied the *quid pro quo* requirement to charges of federal-official bribery under § 201(b):

> Bribery requires intent "to influence" an official act or "to be influenced" in an official act * * *. In other words, for bribery there must be a *quid pro quo*—a specific intent to give or re-

> ceive something of value *in exchange* for an official act.

526 U.S. at 404-05.

In *McDonnell*, this Court further narrowed the scope of illegal *quid pro quos* under § 201, and narrowly construed the sorts of "official acts" that can serve as the "*quo*" in order to avoid the "significant constitutional concerns" posed by the more "expansive interpretation" advocated by the government. 136 S. Ct. at 2371-72. The Court was rightly concerned with the government's " 'breathtaking expansion of public-corruption law [that] would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties.' " *Id*. at 2372 (citation omitted). Indeed, a broad reading would undermine many fundamental predicates of representative democracy:

> The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. Officials might wonder whether they could respond to even the most commonplace requests for assistance, and

> citizens with legitimate concerns might shrink from participating in democratic discourse.

Id.

This Court was right to be concerned then and should be concerned with the implications of § 666 now. The broad definition of bribery in this case, requiring only a vague intent to "influence" or be influenced, rather than a specific *quid pro quo*, would criminalize a wide swath of commonly accepted behavior, would apply to substantial First Amendment activity, and thus raises serious constitutional questions.

Campaign contributions, OpEds, newspaper endorsements, or a wide range of independent expenditures are of considerable "value" to a candidate or officeholder. Volunteer work on a campaign, fundraising or "bundling," and other forms of political activity likewise are of value to candidates and government officials. If the person or entity making such contributions, endorsements, writings, or expenditures were thereafter to meet with the candidate or officeholder and give their views on any number of issues, that could be construed by an aggressive prosecutor as demonstrating the earlier conduct was an attempt to gain influence on the latter issues. Or that the candidate or officeholder intended to be influenced by the views of such valuable supporters. Indeed, volunteering for a campaign or helping fund-raise often is done with the unabashed hope of gaining "influence" and landing a position in the ensuing administration, and often results in precisely that. The don't call the list of key federal jobs the "Plum Book" for nothing. https://www.govinfo.gov/features/2016-plum-book.

Similarly, OpEds and independent expenditures often are an express attempt to influence or reward the official conduct of an officeholder even while they are of value to that officeholder. At a minimum they are an inducement to stay the course or risk losing such political support.

Where the thing of value is itself protected First Amendment activity—a campaign contribution, volunteer campaign assistance, an endorsement, or an independent expenditure in support of a candidate—criminalizing the mere hope and intent that such conduct leads to favorable future treatment is constitutionally suspect, to say the least. Indeed, it would involve a complete paradigm shift in our democratic processes and hand prosecutors a powerful tool to harass political opponents. At a minimum there needs to be an express *quid pro quo* before leveling charges of bribery, and even then, not all *quids* and not all *quos* can constitutionally be viewed as unlawful or corrupt attempts to bribe and official.[1]

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[1] In some instances, even if there were an express *quid pro quo*, the behavior might still be protected by the First Amendment. See *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) (observing that a candidate or public official altering or affirming his positions on issues because of a contribution is not evidence of *quid pro quo* corruption). A newspaper or a prominent individual who expressly conditions their endorsement on a politician's promise to act in a certain way on a particular issue—abortion, immigration, discrimination, etc.—is doing absolutely nothing wrong, even if such endorsement is of value to the politician and even if it in fact influences that politician on such issues. That is the essential *quid pro quo* of democracy and a core aspect of free speech.

Part of what makes the above examples so shocking is the breadth of persons to whom it would apply. Section 666 covers countless entities that receive federal funds, and thus have countless employees and officials who might be thought to be the targets of influence-seeking from ordinary or protected interactions. Under the government's view, all such officials and employees would need to be kept at arm's length by all those who might ever interact with them regarding their official duties. Indeed, the spouses, children, and relatives of such persons would be off limits too, lest hiring them or providing an internship deemed worth more than $5,000 be deemed an attempt to gain influence. Yet that is the consequence of the broad approach adopted below that eschews the requirement of a direct *quid pro quo*, requiring only the amorphous hope or intent to give or gain general influence or favor. *Cf. McDonnell*, 136 S. Ct. at 2372-73 (looking beyond conduct in the case before it to overbroad applications when deciding to narrowly construe statute).

The constitutional concerns motivating imposition of a *quid pro quo* requirement under other bribery statutes thus apply with equal or greater force to the federal-programs bribery statute, § 666, which forbids the same range of conduct as § 201(b) in circumstances involving entities that receive federal assistance. Indeed, this Court has unanimously construed § 666 in a manner "[]congruous" with § 201(b) in light of the statutory language of § 666 and the events leading to its enactment, both of which "demonstrate[d]" that § 666 was "designed to extend" the "federal bribery prohibitions" of § 201 to "bribes offered to state and

local officials employed by agencies receiving federal funds." *Salinas* v. *United States*, 522 U.S. 52, 58 (1997); *Sabri* v. *United States*, 541 U.S. 600, 607 (2004) (same); see also *Skilling*, 561 U.S. at 412 (identifying § 201 and § 666 as illustrative of the "core" bribery conduct from which the honest-services fraud statute "draws content").

Because § 666(a)(1)(B) mirrors the bribery provision of § 201 and raises the same constitutional and federalism concerns, this Court should reach the same conclusion here that it reached in *McDonnell* and require a *quid pro quo* for any conviction under § 666, particularly where the "*quid*" is a First-Amendment-protected campaign contribution. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

Indeed, failure to apply such limits on § 666 could end up undermining the very protections this Court adopted for the Hobbs Act and potentially for § 201 as well. Because of the broad reach of § 666, some commentators believe that without a *quid pro quo* requirement this bribery statute will "become the unchallenged favorite of federal prosecutors" to convict public officials when it becomes too difficult to prove violations under other federal statutes. Minchew, *Who Put the* Quo *in* Quid Pro Quo*?*, 85 FORDHAM L. REV. at 1793; see also Note, *The Hobbs/Leviathan: The Dangerous Breadth of the Hobbs Act and Other*

Corruption Statutes, 87 NOTRE DAME L. REV. 383, 386, 411 (2011) (noting this Court's efforts to limit DOJ excesses in using broad federal criminal statutes and characterizing § 666 as "a wide-open alternative, ripe for an expansive interpretation whenever the Supreme Court limits its sister statutes").

This Court thus should grant the Petition to bring the requirements of prosecution for bribery under § 666 into line with the requirements established by this Court for other federal bribery statutes.

III. This Case Is a Good Vehicle for Addressing the *Quid Pro Quo* Question.

While the government argued below that the *quid pro quo* issue was raised and decided on direct appeal, Petitioner notes that the court of appeals in *Garrido* did not address the First Amendment concerns driving the *quid pro quo* requirement where campaign contributions are involved. Furthermore, Petitioner's § 2255 argument is that counsel was inadequate in presenting that argument. While the district and circuit courts felt bound by their reading of the decision in *Garrido*, this Court is not so bound. In denying certiorari from the direct appeal, this Court did not rule on the merits of the *quid pro quo* issue, and consequently Petitioner now is still seeking his first full consideration of the merits of his argument here.[2]

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[2] The district court cited two cases suggesting that § 2255 cannot be used as a second appeal. App. E2-E3 n. 1 (citing *United States* v. *Berry*, 624 F.3d 1031, 1038 (9th Cir. 2010) ("[T]he [Supreme] Court has cautioned that § 2255 may not be used as a chance at a second appeal."), and *United States* v. *Hayes*, 231

To say that there was no ineffective assistance because there is no *quid pro quo* requirement simply begs the question. If this Court agrees with Petitioner that proof of a *quid pro quo* is required under § 666, then the argument is, by definition, meritorious and counsel should have pressed it effectively. Indeed, the fact that there is a circuit split on the issue is sufficient reason to preserve and press the argument for later review, even if Ninth Circuit law was to the contrary.

As for prejudice, that too collapses back to the merits. If this Court rules that a *quid pro quo* was required, Petitioner would, at a minimum have his conviction vacated based on the failure to provide an instruction requiring *quid pro quo*, and would likely receive a directed verdict of acquittal given that the government's own key witness adamantly maintained that there was no *quid pro quo*.

The § 2255 motion and propriety of a certificate of appealability thus largely merge into this Court's determination of the merits of the Question Presented and any further issues can be addressed on remand after that question is resolved.

F.3d 1132, 1139 (9th Cir. 2000) ("When a defendant has raised a claim and has been given a full and fair opportunity to litigate it on direct appeal, that claim may not be used for a subsequent § 2255 petition.")). While that is true as far as it goes, it does not preclude a § 2255 motion for ineffective assistance and it does not block this Court from considering a subsidiary question collaterally that it did not consider on direct appeal. Indeed, the very nature of an ineffective assistance claim is that the prior consideration of the issues was not in fact full and fair.

Setting the proper standards for bribery prosecutions and instructions and avoiding the unconstitutional and absurd overbreadth of the standards applied below are important tasks for this Court and this case is a sound vehicle through which to address those issues. The fundamental issue is the improper overbreadth of the instructions permitting the jury to convict based on a mere intent to be influenced by campaign contributions rather than on an express *quid pro quo* for an improper official act. Those issues are not fact-bound, involve looking at the overbreadth implications of the law as instructed, and thus can be readily addressed in this case.

CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
GENE C. SCHAERR
JOSHUA J. PRINCE*
SCHAERR | JAFFE LLP
1717 K Street, NW
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

Counsel for Petitioner

* Not admitted in D.C.

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