No. 12-1462

In the Supreme Court of the United States

KEVIN A. RING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MYTHILI RAMAN
Acting Assistant Attorney General
JOHN-ALEX ROMANO
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether conviction for honest-services wire fraud, 18 U.S.C. 1343 and 1346, based on participation in a bribery scheme, requires proof not only that the defendant offered something of value to a public official with the intent to induce a corrupt act, but also that the public official agreed to perform the act.

2. Whether the First Amendment precluded the government from introducing evidence about petitioner's campaign contributions, when the evidence was probative of how petitioner's corrupt scheme operated and the district court repeatedly instructed the jury that the contributions themselves were not illegal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rule:

In the Supreme Court of the United States

No. 12-1462

KEVIN A. RING, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 706 F.3d 460. The order of the district court denying petitioner's motion to dismiss the indictment (Pet. App. 29a-81a) is reported at 628 F. Supp. 2d 195.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2013. A petition for rehearing was denied on March 21, 2013 (Pet. App. 102a-103a). The petition for a writ of certiorari was filed on June 17, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was con-

victed on one count of conspiring to pay illegal gratuities and to commit honest-services wire fraud, in violation of 18 U.S.C. 371; one count of paying an illegal gratuity, in violation of 18 U.S.C. 201(c)(1)(A); and three counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346. Gov't C.A. Br. 2-3. The district court sentenced petitioner to 20 months of imprisonment, to be followed by 30 months of supervised release. *Id.* at 3. The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioner was a leading member of a lobbying team headed by Jack Abramoff. Pet. App. 5a; Gov't C.A. Br. 3-4. Between 2000 and 2004, petitioner and others on the team engaged in a scheme to corruptly influence public officials. Gov't C.A. Br. 3-9. They used lawful campaign contributions to establish and maintain relationships with elected officials, and provided things of value (such as drinks, meals, concert and sporting tickets, and travel) to congressmen, congressional staffers, and executive-branch officials in order to induce and reward official action that benefited their clients. *Ibid.*

Petitioner and other team members referred to public officials who provided the best assistance to their clients as "champions," and they described an official's willingness to take official action based on factors other than merit, including receiving things of value, as "getting the joke." Pet. App. 1a, 5a-6a; Gov't C.A. Br. 7-9. Petitioner was personally responsible for providing things of value to three specific "champions" who repeatedly advanced the interests of Abramoff team clients: a congressman who, *inter alia*, helped to defeat an anti-gambling bill opposed by an Abramoff client; a Department of Justice official

who, *inter alia*, helped a Indian-tribe client obtain a $16.3 million federal grant to build a jail; and the chief of staff to a congressman, who helped to secure appropriations for client projects. Gov't C.A. Br. 10-19.

2. On September 5, 2008, a federal grand jury returned an indictment charging petitioner with one count of conspiring to pay illegal gratuities and to commit honest-services wire fraud, in violation of 18 U.S.C. 371; one count of paying an illegal gratuity, in violation of 18 U.S.C. 201(c)(1)(A); and six counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346. Gov't C.A. Br. 2. Honest-services wire fraud is the use of a wire transmission in interstate commerce in furtherance of "any scheme or artifice to defraud," 18 U.S.C. 1343, where the scheme or artifice aims to "deprive another of the intangible right of honest services," 18 U.S.C. 1346. This Court has interpreted the phrase "scheme or artifice to deprive another of the intangible right of honest services" to consist of bribery and kickback schemes. *Skilling* v. *United States*, 130 S. Ct. 2896, 2931 (2010). The indictment also charged petitioner with two counts of obstruction of justice, but those counts were later dismissed on the government's motion. Gov't C.A. Br. 2.

Before trial, petitioner objected to the introduction of evidence describing his campaign contributions and fundraising activities. Gov't C.A. Br. 45. Petitioner contended that introduction of that evidence would be improper under Federal Rule of Evidence 403, which allows the exclusion of evidence "if its probative value is substantially outweighed by a danger of," *inter alia*, "unfair prejudice" or "confusing the issues." Gov't C.A. Br. 45. Petitioner also contended that introduc-

tion of that evidence would be improper under this Court's decision in *McCormick* v. *United States*, 500 U.S. 257 (1991), which held that a public official's receipt of campaign contributions can be punished as extortion "under color of official right" in violation of the Hobbs Act, 18 U.S.C. 1951(a) and (b)(2), only if the contributions "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; see Gov't C.A. Br. 45. In response to petitioner's objection, the government informed the district court that it did not intend to argue that the contributions were part of the illegal stream of benefits provided to officials, but instead intended to use the campaign-contribution evidence to help explain how petitioner and his co-conspirators created relationships with public officials. *Ibid.*

The district court overruled petitioner's objection, determining to admit the campaign-contribution evidence accompanied by an instruction about the purposes for which it could be considered. C.A. Supp. J.A. 14. The district court found the evidence "highly relevant" to proving how the conspiracy operated, *id.* at 13, which was to use legal contributions "to rope people in to be receptive" to the illegal stream of benefits, such as meals and tickets, provided by the conspirators, *id.* at 11. The district court also did not find the evidence to be categorically prejudicial. *Ibid.*

3. At petitioner's first trial, the jury was unable to agree on a verdict. Pet. App. 6a. The district court stayed the retrial pending this Court's decision in *Skilling* v. *United States*, *supra*, which concerned the scope of the honest-services-fraud statute, 18 U.S.C. 1346. Pet. App. 6a. Following the decision in *Skilling*,

which construed Section 1346 to cover "only bribery and kickback schemes," 130 S. Ct. at 2907, the district court held a second trial. Pet. App. 6a.

The district court again admitted evidence of campaign contributions as background on how the conspiracy operated. Gov't C.A. Br. 46. But the district court gave a limiting instruction "virtually every time campaign contribution evidence was presented," to the effect that "such contributions are legitimate lobbying tools and * * * the jury must not consider the lawfulness of [petitioner's] contributions in reaching its verdict." Pet. App. 21a; see, *e.g.*, C.A. Supp. J.A. 39 (initial instruction); see generally Gov't C.A. Br. 47. The district court's final jury instructions likewise emphasized that "the propriety or legality of any campaign contributions was not before the jury and the jury was therefore instructed not to consider campaign contributions as part of the illegal stream of benefits that [petitioner] was charged with providing to certain public officials." Pet. App. 21a (alterations omitted).

With respect to the honest-services-fraud charges, the district court instructed the jury that "[i]n this case, the *only* type of scheme that the honest services law forbids is a scheme to deprive the public of its right to honest services through bribery." C.A. J.A. 368. The court further instructed:

> The thing of value must be given with the intent to corruptly influence the public official in the performance of his or her official acts. This requires some specific *quid pro quo* (a Latin phrase meaning "this for that" or "these for those"), that is, a defendant must intend to receive an official act in return for the receipt by the public official of a

> thing of value. The defendant must intend that the public official realize or know that he or she is expected, as a result of receiving this thing of value, to exercise particular kinds of influence or decision-making to benefit the giver as specific opportunities to do so arise. It is not necessary for the government to prove that the scheme was successful; that is, that the public official actually accepted the thing of value or agreed to perform the official act or participated in the scheme or artifice to defraud. However, this *quid pro quo* must include a showing that the things of value either were conditioned upon the performance of an official act or pattern of acts or upon the recipient's express or implied agreement to act favorably to the donor when necessary.

Id. at 368-369. Petitioner objected to that instruction on the ground that the government should have to prove that the defendant successfully obtained the public official's agreement to participate in his intended scheme. *Id.* at 317. The district court overruled that objection. Gov't C.A. Br. 24.

The jury convicted petitioner on the conspiracy count, the illegal-gratuity count, and three of the honest-services-fraud counts. Pet. App. 6a. The district court sentenced petitioner to 20 months of imprisonment, to be followed by 30 months of supervised release, Gov't C.A. Br. 3, but stayed the sentence pending appeal, Pet. App. 106a-110a.

4. The court of appeals affirmed. Pet. App. 1a-28a. As relevant here, the court of appeals determined that the district court had correctly instructed the jury that conviction for bribery under the honest-services statute requires "a specific intent to influence official

acts, an intent that the official 'realize or know' that the corrupt exchange is being proposed, and a showing that the gifts 'were conditioned upon' the official's act or agreement." *Id.* at 14a-15a.

The court of appeals rejected petitioner's contention that conviction for bribery under the honest-services statute requires the jury to find that the official actually accepted the bribe offer. Pet. App. 11a-14a. It concluded that petitioner's argument was "foreclosed by the text and structure of the federal bribery statute," 18 U.S.C. 201(b), which petitioner acknowledged to be "the benchmark for honest-services bribery." Pet. App. 11a. The court of appeals explained that the bribery statute "expressly criminalizes a mere 'offer' of something of value with the intent to influence an official act" and defines "the act of offering a bribe and the act of soliciting or accepting a bribe" as separate crimes. *Id.* at 11a-12a (citing 18 U.S.C. 201(b)(1) and (2)). The court also observed that this Court's holding in *United States* v. *Brewster*, 408 U.S. 501 (1972)—"that, with respect to a bribe *payee*, the 'acceptance of the bribe is the violation of the statute'"—supports the "parallel proposition" that for a "bribe *payor*" the "offer of the bribe is the violation of the statute." Pet. App. 12a (quoting *Brewster*, 408 U.S. at 526). It found "black-letter bribery law" on this point to have added force in the context of honest-services wire fraud, because "the wire fraud statute 'punishes the scheme, not its success.'" *Ibid.* (quoting *Pasquantino* v. *United States*, 544 U.S. 349, 371 (2005)); see *ibid.* ("In other words, though the offeror of a bribe is guilty of honest-services fraud, his attempted target may be entirely innocent.").

The court of appeals separately rejected petitioner's contention that introduction of evidence about his campaign contributions had violated Federal Rule of Evidence 403 and the First Amendment. Pet. App. 20a-28a. The court of appeals observed that this Court "has made clear that the [First] Amendment simply 'does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.'" *Id.* at 22a (quoting *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993)). The court added that "[n]othing in *McCormick*—which is silent on the use of campaign contributions as evidence of *other* criminal activity—suggests that contributions are an exception to that general rule." *Ibid.*

The court of appeals additionally concluded that even assuming the First Amendment "plac[ed] a thumb on * * * the scale" in favor of petitioner in determining whether campaign-contribution evidence was admissible under Rule 403, the district court had not abused its discretion in admitting that evidence. Pet. App. 22a-28a. The court of appeals found that the evidence had "significant probative value" as, *inter alia*, "strong modus operandi evidence that demonstrated [petitioner's] transactional relationship with officials and the manner in which he pursued his client's political aims." *Id.* at 23a-24a. The court also observed that "the extent to which it was inexorably intertwined with other evidence weighed heavily in favor of admission." *Id.* at 27a. And although the court believed that "the contribution evidence had a strong tendency to prejudice, confuse, and mislead the jury," *id.* at 24a, the court found it "significant that the district court repeatedly instructed the jury that

the campaign contributions were not illegal," *id.* at 27a.

ARGUMENT

Petitioner renews (Pet. 9-23) his contentions that (1) conviction for honest-services bribery requires not only a corrupt offer but also the public official's agreement and (2) the admission of evidence of his campaign contributions violated the First Amendment. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision by this Court or another court of appeals. No further review is warranted.

1. a. The court of appeals correctly concluded that the jury was not required to find that public officials accepted petitioner's bribe offers in order to convict him of honest-services wire fraud. Pet. App. 11a-14a. The statutes defining that crime contain no such requirement. The wire-fraud statute prohibits anyone who has "devised or intend[s] to devise any scheme or artifice to defraud" from making a wire transmission in interstate commerce "for the purpose of executing such scheme or artifice." 18 U.S.C. 1343. The honest-services statute, 18 U.S.C. 1346, defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." This Court's decision *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), held that this definition covers "bribery and kickback schemes." *Id.* at 2931 n.43; see *id.* at 2931, 2933. Nothing in the statutory language permits a defendant who has "devised or intend[s] to devise" a scheme to bribe public officials, and who makes wire transmissions in furtherance of the scheme he has devised, to avoid criminal liability on the ground that the scheme did not actually en-

snare a public official. To the contrary, this Court has recognized that "the wire fraud statute punishes the scheme, not its success." *Pasquantino* v. *United States*, 544 U.S. 349, 371 (2005) (brackets and citation omitted).

The jury's determination that petitioner offered bribes to public officials in exchange for official acts, Pet. App. 14a-15a, along with the uncontested fact that petitioner sent wire transmissions in furtherance of his efforts, thus fully supports his conviction for honest-services wire fraud. Contrary to petitioner's contention (Pet. 11-12), nothing in *Skilling* requires the agreement of a public official as a prerequisite for a conviction of "devis[ing] or intending to devise" a bribery scheme. Petitioner observes (Pet. 11-12) that three cases identified by the Court in a particular "[s]ee also, *e.g.*" citation in *Skilling* involved public officials who were directly involved in the illegal schemes at issue. 130 S. Ct. at 2934. But the Court did not hold that honest-services-fraud prosecutions are limited to the precise fact patterns that those cases presented.

To the contrary, the sentence introducing that citation explained that the honest-services statute "draws content not only from [prior] case law, but also from federal statutes proscribing—and defining—similar crimes." *Skilling*, 130 S. Ct. at 2933. The Court specifically identified 18 U.S.C. 201(b), which criminalizes the bribery of a public official, and 18 U.S.C. 666(a)(2), which criminalizes bribery of agents of certain federally funded entities, as examples of such statutes. *Skilling*, 130 S. Ct. at 2933. Both of those statutes criminalize the act of offering a bribe, even if the offeree does not accept.

Section 201(b), which petitioner himself has acknowledged to be "the benchmark for honest-services bribery," "defines * * * the act of offering a bribe and the act of soliciting or accepting a bribe" as "two separate crimes." Pet. App. 11a-12a. One subsection makes it a crime to, *inter alia*, "corruptly give[], *offer*[] or promise[] anything of value to any public official * * * with intent to influence any official act," 18 U.S.C. 201(b)(1) (emphasis added), and a separate subsection criminalizes "corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or *agree[ing]* to receive or accept" a bribe. 18 U.S.C. 201(b)(2) (emphasis added); see Pet. App. 11a-12a. As the court of appeals observed (*ibid.*), the first subsection "expressly criminalizes a mere 'offer,'" and "the official need not accept that offer for the act of bribery to be complete." Section 666(a) similarly criminalizes the act of "corruptly giv[ing], offer[ing], or agree[ing] to give" certain types of bribes in one subsection, 18 U.S.C. 666(a)(2), and criminalizes the solicitation and acceptance of such bribes in a separate subsection, 18 U.S.C. 666(a)(1)(B).

Petitioner is therefore wrong to assert (Pet. 10) that "an agreement is an essential element of bribery." His reliance (Pet. 10-11) on *United States* v. *Brewster*, 408 U.S. 501 (1972), is misplaced. That decision involved the prosecution of a Member of Congress "for *accepting* a bribe," *id.* at 502 (emphasis added), and does not hold that agreement of a public official is a necessary element in a prosecution for *offering* a bribe. Indeed, as the court of appeals noted (Pet. App. 12a), *Brewster*'s treatment of accepting a bribe as a stand-alone crime supports the proposition that offering a bribe is likewise a stand-alone crime.

Petitioner is also wrong in suggesting (Pet. 11) that a reference in *Skilling* to "offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes," 130 S. Ct. at 2930-2931, means that a public official's actual violation of a fiduciary duty is a necessary element for conviction under Sections 1343 and 1346. As the First Circuit has explained, that reference "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; nothing in *Skilling*'s language or context suggests that the Court was distinguishing between the fiduciary who received the bribe and the non-fiduciary who gave it, a distinction that would conflict with the [mail-fraud] statute's language embracing those who participate in 'any scheme * * * to defraud.'" *United States* v. *Urciuoli*, 613 F.3d 11, 17-18, cert. denied, 131 S. Ct. 612 (2010) (quoting 18 U.S.C. 1341); see also *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.").

Finally, petitioner and his amici incorrectly suggest that the court of appeals' decision here will make it difficult for lobbyists to know whether they are violating the law. See, *e.g.*, Pet. 23; NACDL and Rutherford Inst. Amicus Br. 14-17; Center for Competitive Politics and Ronald D. Rotunda Amicus Br. 4-12. That suggestion overlooks the court of appeals' conclusion, which was not contested by the government, that conviction of a bribery scheme under the honest-services-fraud statutes requires proof that a "payor

defendant * * * at least intend[ed] to *offer*" a corrupt exchange. Pet. App. 14a; see *ibid.* (noting that amici had urged this position and that petitioner had adopted it as a fallback). That same specific-intent principle has long been part of the definition of other statutes that criminalize bribe offers. See *United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 404-405 (1999) ("[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act."). Neither petitioner nor his amici provides any evidence that the principle has proven too vague or otherwise problematic in those contexts, and this Court's decision in *Skilling* made clear that those contexts inform the definition of bribery in the context of honest-services fraud. *Skilling*, 130 S. Ct. at 2933.

b. None of the cases cited by petitioner (Pet. 12-15), demonstrates that another circuit would have decided this case differently from the court of appeals. None of those cases reversed an honest-services-fraud conviction on the ground that the government had failed to prove that the target of a bribery scheme accepted the bribe, which is the theory on which petitioner relies.

In *United States* v. *Terry*, 707 F.3d 607 (2013), the Sixth Circuit affirmed the conviction of a public official who *accepted* bribes, *id.* at 610-611; it did not directly address the circumstances of a defendant convicted of *offering* bribes. See, *e.g.*, *id.* at 612 ("Terry's second claim turns on the proper definition of a bribe *when it comes to a public official*.") (emphasis added). In *United States* v. *Scruggs*, 714 F.3d 258 (2013), the Fifth Circuit "assume[d] *arguendo*, for the purposes of this case only, that a *quid pro quo*" was required to

prove honest-services fraud in the context of a promise to recommend a state judge for a federal judgeship, *id.* at 260-261, 266; found "overwhelming[]" evidence "of a corrupt bribery agreement," *id.* at 267; and affirmed the denial of the defendant's motion for post-conviction relief, *id.* at 268. That holding would not support reversal of petitioner's conviction on the facts here.

In *United States* v. *Rosen*, 716 F.3d 691 (2013), the Second Circuit affirmed convictions that "could be proven by evidence of an illegal quid pro quo agreement." *Id.* at 699-700. It rejected the defendant's arguments that the honest-services statute was too vague to cover such conduct, *id.* at 700, and that the government had presented insufficient evidence of his "specific intent to enter into illegal quid pro quo arrangements," *id.* at 702. Although the court appeared to presume that evidence of a *quid pro quo* agreement was necessary for conviction, *id.* at 699, that issue was neither expressly examined by the court nor outcome-determinative.

Finally, in *United States* v. *Wright*, 665 F.3d 560 (2012), the Third Circuit reviewed the honest-services-fraud convictions of three defendants—a public official and two citizens seeking benefits—whose trial took place before *Skilling*. *Id.* at 565-567. The court vacated those convictions on the ground that the jury instructions would have permitted conviction on a theory that *Skilling* had later deemed to be outside the scope of the honest-services statute. *Id.* at 570-572. The court concluded, however, that sufficient evidence supported conviction for honest-services fraud on a bribery theory. *Id.* at 567-570. In reaching that conclusion, the court stated that conviction on

that theory required proof of both offer and acceptance of the bribe. *Id.* at 568. Although that statement is in tension with the position adopted by the court of appeals here, the conclusions of the cases (both of which recognize that the circumstances would support honest-services-fraud bribery convictions) do not conflict. And the court in *Wright* did not engage in an extended analysis of the issue, which was not contested by the government in the context of that case. See, *e.g.*, Gov't C.A. Br. at 77, *Wright*, *supra* (Nos. 09-3467, 09-3731, and 09-3965) (arguing that "the evidence plainly permits a reasonable inference of quid pro quo bribery"). Accordingly, the Third Circuit's decision in *Wright* does not create a conflict warranting further review.

2. Petitioner's objection to the campaign-contribution evidence introduced at trial also does not warrant further review. Petitioner does not challenge the court of appeals' conclusion (Pet. App. 22a-28a) that the evidence was admissible under Federal Rule of Evidence 403. In particular, he does not contest the court of appeals' determination (Pet. App. 23a-24a, 27a) that the evidence "had significant probative value" because it "gave jurors a window into the way in which lobbyists like [petitioner] gain influence with public officials"; informed the jury "why an official would sacrifice his integrity for a few Wizards tickets"; "amounted to strong modus operandi evidence that demonstrated [petitioner's] transactional relationship with officials and the manner in which he pursued clients' political aims"; and "was inexorably intertwined with other evidence." Nor does petitioner dispute that nearly every time campaign-contribution evidence was introduced, the district court reminded

the jury that campaign contributions are not illegal, or that the final jury instructions included an admonishment not to consider the contributions to be part of the "illegal stream of benefits that [petitioner] was charged with providing." *Id.* at 21a; see *id.* at 27a. Petitioner instead appears to contend that, notwithstanding its probative force and notwithstanding the repeated limiting instructions, the First Amendment categorically precluded the government from introducing any campaign-contribution evidence at trial.

This Court's decisions do not support that contention. To the contrary, as the court of appeals observed (Pet. App. 22a), the Court's decision in *Wisconsin* v. *Mitchell*, 508 U.S. 476 (1993), expressly recognized that the First Amendment "does *not* prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent," *id.* at 489 (emphasis added). It neither punishes nor chills campaign contributions, which receive less First Amendment protection than direct political speech, see *Buckley* v. *Valeo*, 424 U.S. 1, 21-24 (1976) (per curiam), to introduce them as background for understanding the genesis and operation of a scheme designed to corrupt public officials by other, non-contribution means.

Petitioner's suggestion (Pet. 17) that *Mitchell* is limited to the use of speech to prove racial animus in hate-crime prosecutions cannot be squared with the reasoning of that decision. The Court in *Mitchell* observed that "[e]vidence of a defendant's previous declarations or statements is *commonly* admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." 508 U.S. at 489 (emphasis added). The Court discussed, for example, its conclusion in *Haupt* v. *United States*, 330

U.S. 631 (1947), that speech by a defendant on trial for treason, which showed sympathy with Nazi Germany and hostility towards the United States, "clearly w[as] admissible * * * on the questions of intent and adherence to the enemy." *Mitchell*, 508 U.S. at 489-490 (quoting *Haupt*, 330 U.S. at 642). The Court also cited its plurality opinion in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251-252 (1989), as "allowing evidentiary use of [a] defendant's speech in evaluating Title VII discrimination claim." *Mitchell*, 508 U.S. at 490. Accordingly, courts of appeals have regularly applied *Mitchell* outside the hate-crime context. See, *e.g.*, *United States* v. *Amawi*, 695 F.3d 457, 482 (6th Cir. 2012) (terrorism prosecution), cert. denied, 133 S. Ct. 1474 (2013); *United States* v. *Salameh*, 152 F.3d 88, 111-112 (2d Cir. 1998) (same), cert. denied, 525 U.S. 1112 (1999); see also *United States* v. *Fullmer*, 584 F.3d 132, 158 (3d Cir. 2009) (prosecution under the Animal Enterprise Protection Act of 1992, 18 U.S.C. 43 (2002)).

Petitioner also errs in asserting (Pet. 16) that the decision below conflicts with *McCormick* v. *United States*, 500 U.S. 257 (1991), and *Citizens United* v. *Federal Election Commission*, 558 U.S. 310 (2010). *McCormick* considered when an official's receipt of campaign contributions constitutes Hobbs Act extortion "under color of official right," 18 U.S.C. 1951(a) and (b)(2). 500 U.S. at 273. Here, the jury was expressly instructed that campaign contributions were *not* part of the illegal activity with which petitioner was charged, Pet. App. 21a, and the court of appeals correctly concluded that "[n]othing in *McCormick*—which is silent on the use of campaign contributions as evidence of *other* criminal activity—suggests that

contributions are an exception to th[e] general rule" permitting the evidentiary use of speech in a criminal trial, *id.* at 22a. *Citizens United* addressed the constitutionality of a prohibition on the use of corporate treasury funds for independent campaign-related speech. 558 U.S. at 318-319. It nowhere suggests that the Constitution precludes evidence about campaign contributions, to show modus operandi or for other evidentiary purposes, in a prosecution for scheming to bribe public officials.

Petitioner effectively acknowledges (Pet. 19, 23) that the court of appeals' conclusion on this issue does not conflict with the decision of any other circuit. He contends only that, in *United States* v. *Caronia*, 703 F.3d 149 (2d Cir. 2012), the court "reached a result that is difficult to square with the decision below." Pet. 18. That contention lacks merit. In *Caronia*, the Second Circuit reversed a conviction because it construed the underlying criminal statute, 21 U.S.C. 331(a), not to prohibit certain activities that the court considered to be protected speech. 703 F.3d at 168-169. The court determined that the defendant had been convicted for his participation in those uncovered activities, rejecting the government's argument that evidence of such activities had simply provided background for a conviction on other grounds. *Id.* at 160-162. In discussing that issue, the court expressly recognized that *Mitchell* stands for the proposition that the First Amendment "does not prohibit the use of speech to establish . . . intent," *id.* at 161 n.8 (quoting *Mitchell*, 508 U.S. at 489), and nothing in the decision suggests that the First Amendment should have barred the use of campaign-contribution evi-

dence as background evidence of petitioner's unlawful bribery scheme in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
MYTHILI RAMAN
Acting Assistant Attorney General
JOHN-ALEX ROMANO
Attorney

AUGUST 2013