No. 10-533

In The

Supreme Court of the United States

JEWELL C. "CHRIS" MCNAIR,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

There exists a substantial circuit split over the specific intent the Government must prove to convict a defendant of bribery under § 666.

The language of 18 U.S.C. § 666, which prohibits bribery of local or state officials where federal dollars are involved, does not explicitly state that a quid pro quo is an element of the crime. However, relying on the legal concept of bribery, the statutory context, and this Court's interpretation of a related statute, the Second and Fourth Circuits have held that a conviction under § 666 requires the jury to find that the defendant engaged in a quid pro quo.

In contrast, relying solely on the statute's literal text, the Eleventh Circuit, following the Sixth and Seventh Circuits, recently held that a defendant may be convicted of bribery under § 666 without a jury finding that the defendant engaged in a quid pro quo.

Thus, the Question Presented is as follows:

Whether the Government must prove that the defendant had the specific intent to engage in a quid pro quo to convict the defendant of bribery under 18 U.S.C. § 666.

LIST OF PARTIES

Petitioner:

Jewell C. "Chris" McNair

Co-Petitioners:

Grady R. "Roland" Pugh

Roland Pugh Construction, Inc.

Bobby J. Rast

Daniel B. "Danny" Rast

Rast Construction, Inc.

Floyd W. "Pat" Dougherty

F.W. Dougherty Engineering, Inc.

Respondent:

United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chris McNair respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in *United States v. McNair,* No. 07-11644.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (App. 1a-195a)[1] is published at 605 F.3d 1152. The district court's opinion (App. 196a-207a) is unpublished.

JURISDICTION

The court of appeals affirmed McNair's conviction and the judgment was entered on May 12, 2010. The court denied McNair's petition for rehearing *en banc* on July 20, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

[1] With this Court's permission, co-petitioners have filed only one appendix. Thus, all references to the appendix in McNair's petition refer to the appendix contained in the petition for certiorari filed on behalf of co-petitioner, Roland Pugh.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The texts of 18 U.S.C. § 201 and of 18 U.S.C. § 666 are provided in the Appendix at App. 210a-214a and App. 215a-217a, respectively.

STATEMENT

Congress passed 18 U.S.C. § 666 to extend the bribery prohibition of 18 U.S.C. § 201, which applies only to federal officials, to state and local officials who administer federal funds. The text of § 666, like the text of § 201, does not explicitly state that a quid pro quo is an element of bribery under the statute. However, relying on the legal concept of bribery, the statutory context, and this Court's interpretation of § 201, the Second and Fourth Circuits have held that

a conviction under § 666 requires the jury to find that the defendant engaged in a quid pro quo.

Nonetheless, relying solely on the statute's plain language, the Eleventh Circuit, following the Sixth and Seventh Circuits,[2] recently held that a defendant may be convicted of bribery under § 666 without a jury finding that the defendant engaged in a quid pro quo.

Thus, there is a substantial circuit split over the specific intent the Government must prove to convict a defendant of bribery under § 666. In addition, the reading of § 666 adopted by the Eleventh, Sixth, and Seventh Circuits raises serious due process and federalism concerns, ignores the statutory context, and flies in the face of the this Court's opinion in *United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999).

1. In Birmingham, Alabama, Chris McNair is an icon of the Civil Rights Movement. McNair's oldest daughter, Denise, was killed on September 15, 1963, in the 16th Street Baptist Church bombing. McNair, a professional photographer who has photographed such figures as Martin Luther King, Jr., has operated a photography studio in Birmingham for several

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[2] McNair argued in briefing to the Eleventh Circuit that the Seventh Circuit required a quid pro quo for a conviction under § 666. However, in its opinion in *McNair*, the Eleventh Circuit considered itself to join the Sixth and Seventh Circuits in finding that § 666 requires no quid pro quo. *McNair* at App. 63a.

decades and hosts schoolchildren from around the country at his photography studio to educate them about the Civil Rights Movement.

McNair served in the Alabama legislature and later as one of five county commissioners for Jefferson County, Alabama. In 1996, Jefferson County entered into a consent decree with the Environmental Protection Agency to repair and rehabilitate the county's sewer system to bring it into compliance with federal environmental laws. As a Jefferson County commissioner, McNair's responsibilities included oversight of the Jefferson County Environmental Services Division, which in turn was responsible for carrying out the consent decree.

The sewer project was massive in scope and took approximately ten years to complete. Engineering firms involved in the project received their work through professional services contracts, which Alabama law mandates must be "no-bid" contracts. All five county commissioners voted to approve these no-bid professional services contracts. Neither McNair, nor any other commissioner, had the individual authority to engage a firm in a professional services contract.

Similarly, although McNair ultimately signed off on the construction contracts, the choice of contractors was not up to McNair's discretion because they were awarded to the lowest bidder through a competitive, sealed-bid process. In addition, the Jefferson County Product Review Committee, with which

McNair was not involved, established the requirement that cured-in-place piping be used to repair the county's sewers. Because curing in place was a patented process, this requirement limited the pool of construction companies capable of receiving contracts for the sewer project to a very few companies.

The companies who received the contracts to repair the county sewers had business relationships with Jefferson County that predated McNair's election as a county commissioner, in some cases going back decades. The undisputed evidence at trial showed that each company which received a sewer contract performed high quality work for a fair price.

Some of the companies who received sewer project contracts gave McNair gifts and performed work for free for him during the time they were also performing work for the Jefferson County sewer project. McNair had begun by paying for the work, but then ran out of money. McNair began an expansion of his photography studio to include exhibit space for his civil rights era photographs and a screening room to show the documentary by Spike Lee, *Four Little Girls*. The contractors began construction and design work on McNair's photography studio around 1999.

This coincided with the time period in which the 16th Street Baptist Church bombing cases were being reopened. McNair believed that he received free work and other gifts from the recipients of sewer contracts due to his stature in the community as a Civil Rights

icon, his decades-long friendships with some of the contractors, and the fact that he and his family were once again in the media spotlight due to the trial of the church bombers and the Spike Lee documentary.

2. The Government indicted McNair in the U.S. District Court for the Northern District of Alabama for bribery under 18 U.S.C. § 666 and conspiracy to commit bribery under 18 U.S.C. § 371. The indictment also named 15 other defendants. The other defendants included individuals and businesses that had received sewer contracts as well as additional county officials. McNair filed a pretrial motion for a bill of particulars requesting, among other things, that the Government specify the quid pro quo in its allegations of bribery. The district court denied the motion. McNair also filed several motions for severance, with the final result that McNair was a defendant in two trials.

In district court case 05-61, McNair was one of nine co-defendants. All of the defendants except for McNair were accused of giving bribes rather than receiving them. At trial, the Government offered no evidence that any part of the bid process was in any way rigged or altered. The Government itself admitted that there were so many layers of approval required for awarding contracts that McNair's final nod on the contracts was merely a "ministerial act."

McNair did not dispute his receipt of gifts[3] from the defendant contractors. Instead, McNair's only defense was that he believed the gifts were mere goodwill gifts and that he neither intended to nor did he ever exchange anything for the gifts. McNair's defense was that the contractors would have received the sewer contracts in any event and that he and the contractors had no agreement, explicit or otherwise, that the contractors would "reward" McNair for the contracts. Thus, McNair objected to the jury charge because it did not instruct the jury that, to convict McNair of bribery, they had to find that he intended to engage in a quid pro quo with the defendants. The district court rejected McNair's requested jury instructions, and McNair was convicted of bribery and conspiracy to commit bribery.[4]

McNair was also set to be a defendant in 05-543. In that case, his co-defendants were a company that received sewer contracts and two officers of the company. Prior to trial, McNair received a severance to stand trial alone. However, McNair entered a guilty plea in 05-543, conditioned on a holding against McNair on a legal issue he had raised in both trials. The Eleventh Circuit eventually affirmed the trial court on that issue.

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[3] With one exception: the count alleging McNair received cash from the Pugh defendants, on which McNair was acquitted.

[4] *See* note 3, *supra.*

McNair was sentenced to sixty months incarceration on all counts from both cases, to run concurrently. He was also sentenced to pay restitution. Over McNair's objection, the district court found that the restitution owed equaled the amount of the alleged bribes received by McNair. McNair is currently on bond, pending the outcome of this petition.

3. The Eleventh Circuit affirmed McNair's conviction and sentence and denied McNair's petition for rehearing *en banc* on July 20, 2010.

Addressing the Question Presented, the Eleventh Circuit stated that its holding was that "[Section] 666 does not require a *specific* quid pro quo." *United States v. McNair*, 605 F.3d 1152, 1203 (11th Cir. 2010) (emphasis added) App. 59a. However, the Eleventh Circuit also indicated that its holding was that § 666 does not require *any* quid pro quo. For example, the Eleventh Circuit stated that by its holding it joined the Sixth and Seventh Circuits in adopting "a *no*-quid pro quo requirement." *Id.* at App. 63a-64a (emphasis added). The Eleventh Circuit also considered its holding at odds with the Second and Fourth Circuits, which have held that the jury must find a quid pro quo to convict a defendant of bribery under § 666. *Id.*

The Eleventh Circuit's decision in *McNair* purports to rest on a strict adherence to the plain language of § 666. Because the court found the statute's language to be "clear and unambiguous," the court considered itself restrained from straying beyond the statute's literal text. *See McNair* at App. 58a, n.40.

For example, the court began its discussion of § 666 by noting, "Importantly, [§ 666 does not] contain the Latin phrase quid pro quo."[5]

The Eleventh Circuit addressed this Court's analysis of 18 U.S.C. § 201 in *Sun-Diamond* at length. Section 201 applies to federal officials and prohibits bribery and illegal gratuities. In *Sun-Diamond*, this Court held that the district court erred by giving a jury instruction to the effect that the defendant had violated the illegal gratuity provision of § 201 if he gave a federal official a gift merely because of his "official *position*" rather that for a specific "official *act*." *Sun-Diamond*, 526 U.S. 398, 405-06 (emphasis added).

The court acknowledged that this Court stated in *Sun-Diamond* that "'for bribery there must be a quid pro quo.'" App. 66a (quoting *Sun-Diamond*, 526 U.S. at 404). The Eleventh Circuit compared the bribery provision of § 201, § 201(b), with the bribery provision of § 666 and noted that bribery under § 201(b) "requires that a bribe be . . . received to influence an 'official act' or 'in return for' and 'official act.'" *McNair* at App. 67a (quoting 18 U.S.C. § 201(b)). The court reasoned that "§ 666 sweeps more broadly than [§ 201 because § 666] requires only that money be given with intent to influence or reward a government agent 'in connection with any business, transaction,

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[5] Section 201 also does not contain the phrase "quid pro quo." 18 U.S.C. § 201.

or series of transactions.'" *Id.* (quoting 18 U.S.C. § 666(b)). The court explained, "Section 666 does not say 'official act' but says 'any business, transaction, or series of transactions' [and] does not say 'in return for' or 'because of' but says 'in connection with.'" *Id.* (internal citation omitted) (quoting 18 U.S.C. §§ 201(b) and 666(b)).

The court added, "More importantly, the Supreme Court in *Sun-Diamond* was concerned with accidentally criminalizing legal gratuities under § 201(c), such as giving a . . . token gift [to an official merely because of his] official position and not linked to an identifiable act." *Id.* (quoting *Sun-Diamond*, 526 U.S. at 406-07). The court reasoned that "that concern is diminished [in § 666] because § 666 contains a corrupt intent requirement" which keeps § 666 from criminalizing legal behavior.[6] *McNair* at App. 68a.

The court summarized its holding on the intent required for a conviction under § 666 by merely quoting the language of the statute: "The intent that must be proven is an intent to corruptly influence or to be influenced 'in connection with any business' or 'transaction,' not an intent to engage in any specific quid pro quo." *McNair* at App. 60a. Thus, the court's holding rests on the conclusion that bribery under § 201 requires proof of a quid pro quo, while bribery under § 666 does not.

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[6] Section 201's bribery provision contains a corrupt intent requirement as well. 18 U.S.C. § 201(b).

The court also held that the jury charge, which also merely repeated the language of the statute, was adequate to inform the jury of the specific intent necessary to convict McNair. The court also rejected McNair's argument that the jury instruction on "corruptly," which told the jury something was done "corruptly" if it was done to accomplish an illegal purpose, was circular and did not give the jury the possibility of acquitting McNair if they believed his defense.

The Eleventh Circuit also held that the rule of lenity did not require a quid pro quo to be read into § 666 because the statute does not contain any "grievous ambiguity." *McNair* at App. 69a. Also, the court reasoned that, because the statute only criminalizes "acts done 'corruptly,'" the statute poses no danger of criminalizing "innocent behavior." *Id.*

REASONS FOR GRANTING THE WRIT

It would seem obvious that, as a bribery provision, a conviction for bribery under § 666 requires the jury to find that the defendant engaged in quid pro quo, despite Congress' failure to expressly require a quid pro quo in the statutory language. This is especially so because this Court noted in *Sun-Diamond* that § 201, which also does not expressly require a quid pro quo, does require one. In fact, *Sun-Diamond* makes clear that a quid pro quo is the essence of bribery.

Nonetheless – parting ways with the Second and Fourth Circuits – the Eleventh, Sixth, and Seventh Circuits have recently held that a defendant may be convicted of bribery under § 666 without the jury finding the defendant engaged in a quid pro quo.

In *United States v. Salinas*, 522 U.S. 52, 58 (1997), this Court explained that prior to the enactment of § 666, the only general bribery provision in the federal criminal code was § 201. Therefore, Congress passed § 666 to "extend [the] federal bribery prohibitions [of § 201] to bribes offered to state and local officials employed by agencies receiving federal funds." *United States v. Salinas*, 522 U.S. 52, 58; *United States v. Sabri*, 541 U.S. 600, 606-08 (2004). Thus, "[Section 666] forbids acceptance of a bribe." *Salinas*, 522 U.S. at 57.

In *Sun-Diamond*, this Court explained, "for bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act." *Sun-Diamond*, 526 U.S. at 405. In addition, at common law and in multitudinous judicial opinions, it has been understood that the essence of bribery is an exchange of one thing for another, *i.e.* a quid pro quo.

In addition to deepening a circuit split and being completely at odds with the statutory context, the Eleventh Circuit's interpretation of § 666 raises significant due process concerns. First, interpreting § 666 strictly according only to its literal text yields a statute which would be void for vagueness. Second,

the Eleventh Circuit's interpretation of § 666 creates a new hybrid form of bribery which, unlike bribery under § 201 does not require a quid pro quo, but unlike an illegal gratuity under § 201 also does not require a specific connection between the gift and any specific official act. Thus, the Eleventh Circuit's "novel construction" of § 666 criminalizes "conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *See United States v. Lanier,* 520 U.S. 259, 267 (1997).

Finally, the Eleventh Circuit's interpretation of § 666 violates principles of federalism because the interpretation would cause the statute to function more like an ethics code than a criminal statute, causing the federal government to impinge on a state function where Congress has not indicated any such intention.

In summary, "In light of the conflicts among the Circuits; the longstanding confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies" certiorari should be granted in this case so that this Court may "squarely confront both the meaning and the constitutionality of [§ 666]." *See Sorich v. United States,* 129 S. Ct. 1308, 173 L.Ed.2d 645 (2009) (mem.) (Scalia, J., dissenting).

I. Federal appellate courts are deeply divided over whether a conviction for bribery under 18 U.S.C. § 666 requires the Government to show that the defendant engaged in a quid pro quo.

This Court's Holding in *Sun-Diamond*

All of the circuits that have decided the Question Presented addressed this Court's holding in *Sun-Diamond*. In *Sun-Diamond*, this Court held that the district court erred by giving a jury instruction to the effect that the defendant had violated § 201(c)(1) if he gave a federal official a gift merely because of his "official *position*" rather than for a specific "official *act*." *Sun-Diamond*, 526 U.S. at 405-06 (emphasis added).

Section 201, unlike § 666,[7] contains an illegal gratuity provision. Section 201(b) prohibits bribery

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[7] This Court appears to have treated it as a given that § 666, unlike § 201, prohibits only bribery and does not criminalize gratuities. *See, e.g., Sabri,* 541 U.S. 600, 602 (2004); *Salinas*, 522 U.S. 52, 56-58 (1997). This seems obvious because § 666 has no provision analogous to § 201(c), the illegal gratuity provision of § 201. *See* 18 U.S.C. § 666. In addition, § 666 has no punishment provision analogous to § 201's shorter prison term of only two years for an illegal gratuity. *Compare* 18 U.S.C. § 666(a) with 18 U.S.C. §§ 201(b) and 201(c). Section 201 provides a maximum sentence of two years for an illegal gratuity and 15 years for a bribe. 18 U.S.C. §§ 201(b) and 201(c). In contrast, § 666 provides only a maximum ten year prison term. 18 U.S.C. § 666(a). *See also, United States v. Jennings*, 160 F.3d 1006, 1014 n.3,4 (4th Cir. 1998) (assuming without deciding that § 666 punishes only bribes but noting confusion among the federal

(Continued on following page)

and § 201(c) prohibits illegal gratuities. *See Sun-Diamond,* 526 U.S. at 404. Thus, this Court explained that the difference between a bribe and a gratuity is the specific intent which must be shown for each crime. For bribery, the Government must prove "a quid pro quo – a specific intent to give or receive something of value *in exchange* for an official act."[8] *Sun-Diamond*, 526 U.S. at 405-06. In contrast, "[a]n illegal gratuity . . . may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *Id.* Thus, *Sun-Diamond* held that an illegal gratuity requires a connection between the gift and a *specific* official act. However, for bribery, there is an even closer nexus between the gift and the official act: one of exchange, or *causation. Id.*; *see also, United States v. Ganim*, 510 F.3d 134, 146-47 (2d Cir. 2007).

The reason the specific "one-to-one" linkage required for a gratuity conviction under *Sun-Diamond*

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appellate courts on the issue). *But see, United States v. Zimmermann*, 509 F.3d 920, 927 (8th Cir. 2007) (affirming a conviction under § 666 for accepting illegal gratuities); *United States v. Bonito,* 57 F.3d 167, 171 (2d Cir. 1995) (holding that § 666 encompasses bribes *and* illegal gratuities).

[8] In *Sun-Diamond*, the defendant had been accused of giving an illegal gratuity, rather than receiving one; thus, the discussion of § 201 in that case focuses on the intent of the *giver*. In contrast, McNair was accused of receiving a bribe. Thus, throughout this petition, for the sake of brevity, McNair discusses the specific intent required for a conviction under § 666 only as applied to the alleged *recipient* of a bribe.

is not required for a bribe is that the "quid pro quo" requirement of bribery obviates the need for a one-to-one linkage *by its requirement of exchange*. *Sun-Diamond*, 526 U.S. at 405-06; *Ganim,* 510 F.3d 134, 146-47. The requirement of exchange is *inherent* within the concept of bribery. *Id.*

Thus, it is completely inaccurate to describe *Sun-Diamond* as requiring a "heightened quid pro quo standard"[9] for illegal gratuities under § 201, as the Sixth Circuit did in *United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009). *Sun-Diamond* indicates that the jury need find *no quid pro quo at all* to convict a defendant for giving an illegal gratuity. Instead, to show an illegal gratuity, the Government must show that the defendant desired to reward a *specific official act* rather than merely to generate good will. A gratuity conviction under § 201 requires what might be called a "heightened *specificity* standard," but heightened, *not in relation to bribes*, but in relation to legal gratuities. *Sun-Diamond,* 526 U.S. at 405. To prove an illegal gratuity, "[*Sun-Diamond* required that the] Government show a link to a 'specific official act' to supply a limiting principle that would distinguish an illegal gratuity from a legal one." *Ganim*, 510 F.3d at 146-47; *Sun-Diamond*, 526 U.S. at 405-06.

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[9] In fact, *Sun-Diamond* indirectly states that, like a gratuity conviction under § 201, a bribery conviction under § 201 would require a "connection between [the would-be briber's] intent and *a specific official act*." *Sun-Diamond*, 526 U.S. at 1406 (emphasis added).

In short, in *Sun-Diamond*, this Court made clear that the defining characteristic of bribery is the intent to engage in a quid pro quo exchange. *Sun-Diamond*, 526 U.S. at 405-06.

The Second and Fourth Circuits

In *Ganim,* then-Judge Sotomayor, writing for the Second Circuit, rejected the defendant's argument that *Sun-Diamond* should be extended to bribery under § 666 so that, just as for gratuities under § 201, for a bribe, each gift would have to be *linked to a specific action*. "[*Sun-Diamond*'s requirement that, to prove an illegal gratuity, the Government must show a link to a 'specific official act' . . . is not needed in the . . . bribery context[ ] . . . because it is the requirement of an intent to perform an act *in exchange* for a benefit – *i.e.,* the quid pro quo agreement – that distinguishes [bribes] from both legal and illegal gratuities." *United States v. Ganim*, 510 F.3d 134, 146-47 (emphasis added). Justice Sotomayor explained the relationship between the holding of *Sun-Diamond* and § 666, "[N]ow, as before *Sun-Diamond*, so long as the jury finds that *an official accepted gifts in exchange for a promise to perform official acts for the giver,* it need not find that the specific act to be performed was identified at the time of the promise, nor need it link each specific benefit to a single official act." *Ganim*, 510 F.3d at 147 (emphasis added).

In *United States v. Jennings*, the Fourth Circuit held that a jury charge essentially identical to the one

given by the trial court in this case constituted plain error because the charge failed to inform the jury that a conviction for bribery under § 666 required the jury to find a quid pro quo. *United States v. Jennings*, 160 F.3d 1006, 1020-21 (4th Cir. 1998). The Fourth Circuit also held that the same instruction on the "corrupt intent" element of bribery given in this case, which "leaves out the requirement of intent to engage in a quid pro quo" constituted plain error. *Id.*

Although the Eleventh Circuit considered *Jennings* to have required a specific quid pro quo, the Fourth Circuit stated that "each payment need not be correlated with a specific official act," and that a sufficient quid pro quo may be "this for these." *See United States v. Jennings*, 160 F.3d 1006, 1014.

The Fourth Circuit also assumed without deciding that § 666 prohibits only bribes and not gratuities. The court considered the statute's legislative history to support the view that "[Section] 666 accepts the longstanding bribe/gratuity distinction, adopts the traditional meaning of 'corrupt intent' in § 201, and criminalize only bribes." *Jennings,* 160 F.3d at 1015.

The Eleventh, Sixth, and Seventh Circuits

In *McNair*, although ostensibly holding only that no *specific* quid pro quo need be found for a conviction under § 666, the Eleventh Circuit actually held that *no* quid pro quo need be shown for a conviction under § 666. The court so held because it found the plain

language of § 666 to be unambiguous, and the plain language of the statute does not require a quid pro quo. In so holding, the Eleventh Circuit stated that by its holding it joined the Sixth and Seventh Circuits in adopting "a no-quid pro quo requirement." *McNair* at App. 63a-64a.

The Eleventh Circuit's decision in *McNair* closely parallels the analysis of the Sixth Circuit in *Abbey*. Also like the Sixth Circuit, the Eleventh's Circuit's decision appears to rely on a rejection of the logic and holding of the Second Circuit in *Ganim*. The Eleventh Circuit noted with approval that the Second Circuit had held that *Sun-Diamond* should not be "extended beyond the illegal gratuity context." *McNair* at App. 68a (quoting *Ganim*, 510 F.3d at 146). The Eleventh Circuit also acknowledged that *Ganim* held that, unlike for a gratuity, for bribery under § 666, it is sufficient for the jury to find that the defendant agreed to exchange items of value for influence even if the particular favor to be done by the official was not identified at the time of the agreement. Nonetheless, the Eleventh Circuit considered the Second Circuit's "acceptance" of a quid pro quo requirement to put the Second Circuit at odds with the Sixth, Seventh, and Eleventh Circuits. *See McNair* at App. 63a-64a.

By adding the word "specific" to its holding, the Eleventh Circuit muddies the water and ignores the fact that the essential characteristic of a bribe is the intention to make an *exchange* of some kind. *Sun-Diamond*, 526 U.S. at 404-05; *Ganim*, 510 F.3d at

146-47. The *sine qua non* of bribery is not the specific identity of the items to be exchanged, but the specific intent to *exchange* one thing for another. In other words, the essential finding by the jury is not the identity of the quid and the quo, but the intent to *exchange* the quid for the quo. Thus, the mere fact that the favor is as-yet unidentified would not prohibit a finding of a quid pro quo. *See, e.g., Jennings*, 160 F.3d at 1014.

In *Abbey*, the Sixth Circuit stated its holding on the Question Presented: "to sustain a conviction under 18 U.S.C. 666 . . . [the Government need not] prove a direct link between a specific gift given to a public official and an explicit promise by that official to perform a specific, identifiable official act in return." *United States v. Abbey*, 560 F.3d 513, 515. Thus, like the Eleventh Circuit, the Sixth Circuit ostensibly held only that no specific quid pro quo be shown for a conviction under § 666. However, also like the Eleventh Circuit's holding in *McNair*, the Sixth Circuit's holding in *Abbey* is in fact that a conviction under § 666 does not require *any* proof of a quid pro quo. Like the Eleventh Circuit, the Sixth Circuit based its holding on the fact that "the text [of § 666] says nothing of a quid pro quo requirement to sustain a conviction, express or otherwise." *Abbey*, 560 F.3d at 520. Because the plain language of the statue has no quid pro quo requirement, then "hewing to the statute's language," *no* quid pro quo is required. *See Abbey*, 560 F.3d at 521. As the Eleventh Circuit, the Sixth Circuit states the specific intent the

Government must show to sustain a conviction under § 666 merely by repeating the exact language of the statute itself. *Abbey*, 560 F.3d at 521.

The Sixth Circuit reasoned that this Court's discussion of the difference between a bribe and an illegal gratuity in *Sun-Diamond* was not relevant to the Question Presented because § 201, at issue in *Sun-Diamond*, is "a markedly different statute." *Id.* The court saw this "marked difference" in § 201 for three reasons. First, the court considered the textual differences in the two statutes significant. Secondly, the court reasoned that § 666's requirements of corrupt intent and that the illegal gift or bribe be worth over $5,000 meant that § 666 did not have the potential to "criminal[ize] legal gratuities." Finally, the court believed that this Court's admonition in *Sun-Diamond* that § 201 could be properly interpreted only by keeping in mind that the statute is "'merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials'" did not apply to § 666. *Abbey*, 560 F.3d at 521 (quoting *Sun-Diamond,* 526 U.S. at 409).

Citing the Seventh's Circuit's opinion in *United States v. Gee*, the Eleventh Circuit states it is joining the Sixth and Seventh Circuits in adopting "a no-quid pro quo requirement." *Id.* at App. 63a-64a (citing *United States v. Gee*, 432 F.3d 713 (7th Cir. 2005)). However, it is not clear that the Seventh Circuit has

adopted "a no-quid pro quo requirement."[10] In *Gee,* devoting only one paragraph to the Question Presented, the Seventh Circuit clearly rejects the theory that the Government must show a one-to-one correspondence between the gift and official action. However, the court conflates "quid pro quo" with the requirement of a one-to-one correspondence. Nonetheless, the court concludes, "A sensible jury could conclude that the defendants intended that "federal money in [the agency's] hands was *exchanged for George's influence.*" *United States v. Gee*, 432 F.3d 713, 714-15. *See also, United States v. Medley,* 913 F.2d 1248, 1260 (7th Cir. 1990) ("The essential element of a § 666 violation is a quid pro quo.") *But see, United States v. Agostino*, 132 F.3d 1183, 1190 (7th Cir. 1997) (We decline to import an additional, specific quid pro quo requirement into the elements of § 666[ ] [when the] statutory language . . . does not require any specific quid pro quo.").

II. The Question Presented arises frequently and is extremely important.

The Eleventh Circuit noted that the question of whether § 666 "requires the Government to prove a specific quid pro quo to obtain a § 666 conviction" had been before that Court twice, but the Court had never "squarely answer[ed] it." *McNair* at App. 56a. The several Circuits which have found it necessary to

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[10] *See* note 2, *supra.*

squarely address the specific intent required for a conviction under § 666, in addition to the many courts which have addressed the issue indirectly, are ample evidence that the issue has arisen frequently. As the Eleventh Circuit stated in *McNair*, "confusion reigns" regarding the specific intent required for a conviction under § 666. *McNair* at App. 64a. Without clarification by this Court, confusion will continue to prevail, and defendants will be subject to prosecution under a statute which some courts have interpreted to criminalize conduct which, while possibly unwise or even unethical, cannot be *illegal* because it cannot be *defined*. *See United States v. Williams,* 553 U.S. 285, 306 (2008) (A statute is unconstitutionally vague when the conduct it prohibits cannot be precisely defined).

III. This case is an ideal vehicle for this Court to resolve the Question Presented.

This case presents a perfect opportunity for this Court to address what specific intent the jury must find to convict a defendant of bribery under § 666. This case cleanly presents the issue because McNair never denied his receipt of gifts. The only significant issue in the case was McNair's *intent* in receiving the gifts.

IV. The decision of the Eleventh Circuit is erroneous.

The Eleventh Circuit's interpretation of § 666 rests on the premise that, because no quid pro quo is explicitly called for in the statutory text, the Eleventh Circuit must plug its ears to the statutory context showing that, just as any other bribery statute, § 666 requires a quid pro quo. The Eleventh Circuit failed to recognize that the plain language of § 666, read literally and without reference to its legislative context, yields a statute which is at worst unconstitutional and at best absurd.

A. Under the Eleventh Circuit's construction of 18 U.S.C. § 666, the statute is vague and overbroad, in violation of the Due Process Clause.

A criminal statute violates the Due Process Clause if it "fails to give fair warning of the conduct which it prohibits." *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964). Thus, this Court "[has] struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent' – wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings. *Id.*

The text of § 666(a)(1)(B), which applies to the alleged recipient of a bribe, provides, in relevant part, that an official who "corruptly" accepts a gift "intending to be influenced or rewarded in connection with

any business, transaction, or series of transactions" of his agency has violated the statute. The statutory text standing alone does not explicitly state that the public official receive the gift *in exchange* for anything, or even that the official be influenced *to do* anything.[11]

Thus, the text alone would make it illegal for the gift recipient to feel warmly toward the gift giver when simultaneously contemplating certain transactions, even if the recipient took no action whatsoever as a result of those warm feelings. *It is not possible to know when "influence" has occurred if it need not be manifested by any overt act.* This result is unconstitutionally vague because "[w]hat renders a statute vague is . . . the indeterminacy of precisely what . . . fact [must be established to show guilt]." *Williams*, 553 U.S. at 306. Obviously, a law which criminalizes a particular state of mind, unaccompanied by any overt action, would be enforceable only by "thought police."[12]

To say the least, such a statute would meet neither of the "two due process essentials" recently reiterated by this Court in *Skilling v. United States*, "a penal statute [must] define the criminal offense

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[11] Stylistically, with serious constitutional implications, the phrase "to be influenced" cries out to be modified by a verb phrase such as "in awarding of contracts or business," rather than the limp prepositional phrase, "in connection with."

[12] George Orwell, *1984* 19 (1949).

[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling v. United States,* 130 S. Ct. 2896, 2927-28 (2010) (internal quotations omitted). For example, in *Skilling*, this Court held that the the honest services provision of 18 U.S.C. § 1346 was unconstitutionally vague because the outer limits of the conduct prohibited by the statute could not be defined. *Skilling,* 130 S. Ct. at 2931.

In addition, the Eleventh Circuit's analysis violates due process by creating a new, judge-made, hybrid form of bribery. Unlike bribery under § 201, this new crime does not require a quid pro quo, but unlike an illegal gratuity under § 201, it does not require that the gift be connected to any particular official act. Thus, in addition to violating the separation of powers doctrine, *Boulware v. United States*, 552 U.S. 421, 434 (2008), by creating a new crime, the Eleventh Circuit's expansive reading of § 666 also violates due process by unforeseeably broadening the reach of a criminal statute. *See Bouie v. City of Columbia,* 378 U.S. 347, 355 (holding that unforeseeably broad state-court construction of a criminal statute would "deprive [defendant] of due process of law by denying him fair warning that his contemplated conduct constitutes a crime."); *United States v. Lanier,* 520 U.S. 259, 267 (1997) ("Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor

any prior judicial decision[13] has fairly disclosed to be within its scope.").

Finally, in light of the due process concerns raised by a literal adherence to the text of § 666, the Eleventh Circuit erred by not applying the rule of lenity. For example, in *Skilling*, because of the "amorphous" nature of the honest services doctrine, this Court applied a limiting construction to § 1346. *Skilling,* 130 S. Ct. at 2905. The Court explained, "'[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Id.* (quoting *Cleveland v. United States,* 531 U.S. 12, 25 (2000)).

B. Because strict adherence to the literal text of § 666 renders the statute violative of due process, the Eleventh Circuit erred by refusing to read the statute narrowly.

The Eleventh Circuit erred in refusing to read § 666 narrowly because of the due process concerns raised by a literal reading of the statute. For example, as noted above, in *Skilling*, to save the statute from invalidation on vagueness grounds this Court interpreted § 1346 narrowly. *Skilling,* 130 S. Ct. at 2927-28. This result is in keeping with this Court's

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[13] *Abbey* was decided after McNair's trial. Although *Gee* was decided prior to McNair's trial, *Gee's* holding is not entirely clear.

previous cases following the rule that, where the text of a statute can reasonably be construed in a way that does not violate the Constitution, that construction should be employed. *Hooper v. California*, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality").

Also, in *United States v. Witkovich*, to avoid constitutional doubts, this Court read an immigration statute much more narrowly than its text "read in isolation and literally" would justify. This Court noted that, under such circumstances, "once the tyranny of literalness is rejected, all relevant considerations for giving a rational content to the words become operative . . . [including] the Act as a whole [and] the persuasive gloss of legislative history." *United States v. Witkovich*, 353 U.S. 194, 199 (1957).

C. The Eleventh Circuit erred in strictly adhering to the plain text of § 666 and ignoring the statutory context.

This Court looks to the statutory context to avoid an unconstitutional reading of a statute. *Williams,* 553 U.S. at 307 (Stevens, J., concurring); *see also, United States v. Witkovich*, 353 U.S. 194, 199. But even in the absence of due process concerns, this Court has often looked to the statutory context to determine Congress' intent. For example, this Court has instructed that, where statutes use similar language and were enacted for related purposes, they

"should be interpreted *pari passu*." *Northcross v. Board of Ed.*, 412 U.S. 427, 429 (1973). *See also, Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (in interpreting a statute, courts should not ignore related statutes); *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) ([W]here "there exists a substantial body of case law interpreting similar [statutory] language" courts should construe the language consistently.).

For example, in *Salinas,* this Court rejected the defendant's interpretation of § 666 in part because the interpretation would be "incongruous" with the Court's interpretation of § 201. Such an incongruity would be unacceptable because § 666 "was designed [by Congress] to extend [the federal bribery prohibitions of § 201] to state and local officials."[14] *Salinas*, 522 U.S. 52, 58.

As another example, in *United States v. Kummer*, interpreting 18 U.S.C. § 1954, which prohibits bribery related to an employee benefit plan, the Eleventh Circuit looked to other bribery statutes. In so doing, the Eleventh Circuit recognized that "the language 'because of, or with intent to be influenced'

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[14] In *United States v. Crozier*, 987 F.2d 893, 898-900 (2d Cir. 1993), the Second Circuit pointed out that the text of § 666 is identical to that of § 215, the bank bribery provision, and noted the legislative history indicating that "[§ 666] parallels the bank bribery provision (18 U.S.C. 215)." *United States v. Crozier*, 987 F.2d 893, 898-900 (2d Cir. 1993) (citing H.R. Rep. No. 99-797, 34, n.9 (1986)).

corresponds with a bribe/gratuity dichotomy. The 'with intent to be influenced' language prohibits a bribe, which involves a quid pro quo. The 'because of' language prohibits a gratuity, which involves no quid pro quo, but is a payment made 'because of [an official] act.'" *United States v. Kummer*, 89 F.3d 1536, 1540 (11th Cir. 1996) (some internal quotations and citations omitted) (citing *United States v. Mariano,* 983 F.2d 1150, 1159 (1st Cir. 1993); *United States v. Muldoon,* 931 F.2d 282, 287 (4th Cir. 1991). Although neither 18 U.S.C. § 1954, § 201, nor § 666 use the phrase "quid pro quo," all of these bribery statutes have been interpreted to require one. *Kummer*, 89 F.3d 1536, 1540 (§ 1954); *Sun-Diamond,* 526 U.S. at 405 (§ 201); *United States v. Ford*, 435 F.3d 204, 213 (2d Cir. 2006) (§ 666).

Furthermore, in enacting § 666, Congress "merely adopt[ed] into federal statutory law a concept of crime already so well defined in common law and statutory interpretation" that Congress' silence on the requirement of a quid pro quo cannot be taken to mean that none is required. *See Morissette v. United States*, 342 U.S. 246, 261-62 (1952) (holding that, even though the text of a statute prohibiting conversion of government property did not make criminal intent an element of the crime, the court must read an intent requirement into the statue because criminal intent was an essential element of conversion at common law and had been recognized as such in "an unbroken course of judicial decision[s]").

When Congress uses "terms of art . . . in which are accumulated the legal tradition and meaning of

centuries of practice" a court interpreting the statute at issue should understand Congress to be cognizant of and intending to "adopt[ ] the cluster of ideas that were attached to each borrowed word . . . and the meaning its use will convey to the judicial mind. . . . In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States,* 342 U.S. 246, 263.

Applying this rule of statutory construction to § 666 means that when Congress enacted § 666 in 1985 and amended the statute in 1986, *Jennings*, 160 F.3d at 1015 n.4, it did so intending to incorporate the common law understanding of bribery and the body of case law recognizing that the essence of bribery is exchange, *i.e.,* a quid pro quo. *See United States v. Brecht,* 540 F.2d 45, 48 (2d Cir. 1976) (citing Bishop on Criminal Law § 85(1), at 62 (9 ed. 1923) for common law definition of bribery); *see also, e.g., United States v. Washington*, 688 F.2d 953, 958 (5th Cir. 1982) (Bribery is a quid pro quo exchange.); *United States v. Campbell*, 684 F.2d 141, 148 (D.C. Cir. 1982) (noting distinction between bribe and gratuity under § 201 and that bribery under § 201 requires a quid pro quo); *United States v. Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980) (same); *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976) ("'Bribery' imports the notion of some more or less specific quid pro quo for which the gift or contribution is offered or accepted.").

Thus, courts have continued to recognize that the distinction between a bribe and a gratuity is that the bribe requires a quid pro quo. *See, e.g., United States v. Ford,* 435 F.3d 204, 213 (2d Cir. 2006) (vacating conviction because jury charges failed to convey that a conviction under § 666 requires a quid pro quo); *United States v. Griffin*, 154 F.3d 762, 763 (8th Cir. 1998) ("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, something that the recipient would not otherwise have done."); *United States v. Gatling*, 96 F.3d 1511, 1522 (D.C. Cir. 1996) ("This court has held that '[p]ayments to a public official for acts that would have been performed in any event . . . are probably illegal gratuities rather than bribes.'"); *United States v. Mariano,* 983 F.2d 1150, 1159 ("The [defining characteristic of] a bribe . . . is the intention of the bribe giver to effect a quid pro quo."); *United States v. Muldoon*, 931 F.2d 282, 287 (noting that when the official gives something in exchange for a gift, that constitutes a bribe; but where official action might have been taken "without any payment," that is a gratuity).

D. The Eleventh Circuit's expansive reading of § 666 violates principles of federalism by turning § 666 into something more akin to an ethics standard than a penal statute.

In addition, the Eleventh Circuit's interpretation of § 666 raises concerns of federalism because the

interpretation would cause the statute to function more like an ethics code than a criminal statute. This Court has held that, even though § 666 is a federal bribery law directed at state and local officials, § 666 is a valid exercise of Congress' power, *Sabri*, 541 U.S. at 604-06, because the statue contains parameters which keep it from "turn[ing] almost every act of fraud or bribery into a federal offense." *Fischer v. United States,* 529 U.S. 667, 676 (2000). Without such a limitation, the statute would "upset[ ] the proper federal balance." *Id.*

For example, in *Rapanos v. United States*, this Court rejected an interpretation of the Clean Water Act which would "result in a significant impingement of the States' traditional and primary power over . . . a quintessential state and local power." This Court explained, "The extensive federal jurisdiction urged by the Government would authorize the [Army Corps of Engineers] to function as a de facto . . . local zoning board." *Rapanos v. United States*, 547 U.S. 715, 738 (2006).

The Eleventh Circuit's interpretation of § 666 renders the statute so expansive as to authorize federal law enforcement to function as an ethics board with the power to incarcerate anyone whose judgment falls below a nebulous, undefined standard. "Bad men, like good men, are entitled to be tried and sentenced in accordance with law." *Green v. United States,* 365 U.S. 301, 309 (1961) (Black, J., dissenting). Thus, § 666 should not be interpreted in such a way that it impinges on state sovereignty by creating

something more akin to an ethics standard than a penal law. *See McNally v. United States,* 483 U.S. 350, 360 (1987) (construing mail fraud statute narrowly to avoid "leav[ing] its outer boundaries ambiguous [in a way that] involves the Federal Government in setting standards of disclosure and good government for local and state officials"); *see also, Gregory v. Ashcroft*, 501 U.S. 452, 460-67 (1991) (noting that because this Court "assume[s] Congress does not exercise lightly" its "extraordinary power" to regulate state officials, any statute which does so must be given the narrowest construction reasonably allowed by the statute's language).

E. The Eleventh Circuit's holding on the jury charge and on the indictment were erroneous.

McNair objected to the indictment and the jury charge because both tracked the language of the statute, which fails to convey the specific intent required for bribery. This Court has held that an indictment which sets forth the charge in "the words of the statute itself," is only sufficient "as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Hamling v. United States,* 418 U.S. 87, 117-18 (1974) (internal quotations omitted). Thus, if this Court holds that a quid pro quo is required for a bribery conviction under § 666, then the indictment was insufficient as a

matter of law for failing to set out the quid pro quo element.

McNair objected to the jury charge for the same reason. The district court gave a jury charge which, in relevant part, merely repeated the language of the statute,[15] which says nothing of a quid pro quo. This omission could have been, but was not, corrected by a definition of "corruptly" which informed the jury of the quid pro quo requirement.

Instead, the only definition of "corruptly" that the jury received told the jury that "[a]n act is done 'corruptly' if it is performed voluntarily, deliberately, and dishonestly for the purpose of either accomplishing an unlawful end or result or of accomplishing some otherwise lawful end or lawful result by an unlawful method or means." In other words, the instruction told the jury that McNair did something corruptly, causing his conduct to be illegal, if he did it "dishonestly" to accomplish an illegal purpose. This definition of "corruptly" is circular because it fails to inform the jury what end, result, method, or means would be illegal in the first place. To tell a jury that something is done corruptly if it is done to accomplish something unlawful "is a textbook example of begging the question [because exactly what

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[15] The fact that neither the Eleventh nor Sixth Circuits were able to convey the intent required for conviction under § 666 except by quoting the statute verbatim would seem to indicate that the statute's meaning is unclear.

mens rea is required under § 666] is the very issue in the case." *See, e.g., United States v. Santos*, 128 S. Ct. 2020, 2026 (2008).

In contrast, in *Jennings*, the Fourth Circuit held that Congress' use of the word "corruptly" in § 666 supplies the specific intent to engage in a quid pro quo missing in the plain language of the statute's text. *Jennings*, 160 F.3d at 1020-21; *see also, United States v. Alfisi*, 308 F.3d 144, 151 n.2 (2d Cir. 2002) (the use of the term "corruptly" in § 201 is what conveys the requirement of a quid pro quo and distinguishes a bribe from a gratuity); *United States v. Gatling*, 96 F.3d 1511, 1522 (D.C. 1996) (same). Thus, the Fourth Circuit held that a jury instruction which failed to "define[ ] 'corrupt intent' to include the quid pro quo requirement . . . gave an erroneous instruction on an essential element of bribery." *Jennings*, 160 F.3d at 1020-21. The jury charge held to be plain error in *Jennings* was essentially identical to the one given by the trial court in this case.[16]

The Eleventh Circuit held that there was no error in the jury charge because "A finding that a gift was made or accepted with corrupt intent necessarily excludes friendship and good will gifts." *McNair* at

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[16] The Fourth Circuit explained the likely source of the erroneous instruction was that it was "an incomplete version of the definition from the respected treatise, *Edward J. Devitt*, et al., 3 Federal Jury Practice and Instructions, § 25.09 (1990) (pattern instructions for 18 U.S.C. § 201; "Corruptly Defined")." *Jennings*, 160 F.3d at 1021, n.6.

App. 76a. First, this reasoning is flawed because the definition of corrupt intent did not tell the jury anything. Secondly, even if the definition of "corruptly" given the jury excluded "friendship and goodwill gifts," which it did not, it certainly did not exclude the specific intent which would constitute an illegal gratuity under § 201 and is not punishable under § 666. Thus, the jury could have incorrectly convicted McNair of bribery even if they believed that he had only engaged in conduct which amounted to receiving a legal or an illegal gratuity rather than a bribe.

The erroneous jury instruction was particularly harmful to McNair because his only defense was that he lacked the intent to exchange any action on his part for any gift and that he never did so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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