No. 12-111

# In the Supreme Court of the United States

WILLIAM J. JEFFERSON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

The federal-official bribery statute, 18 U.S.C. 201(b), prohibits a public official from "corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value * * * in return for [] being influenced in the performance of any official act." 18 U.S.C. 201(b)(2)(A). The statute defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. 201(a)(3). The question presented is as follows:

Whether the "official acts" of a Member of Congress include both acts "taken pursuant to responsibilities explicitly assigned by law" to the Member and "activities that have been clearly established by settled practice as part [of] [the Member's] position" (as the jury was instructed in this case, Pet. App. 117a) or only "matters that are resolved through the formal legislative process" (as petitioner contends, Pet. 26).

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page



Statutes:

Miscellaneous: Page

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 674 F.3d 332. The orders of the district court denying petitioner's motion to dismiss (Pet. App. 100a-114a) and denying petitioner's motion for reconsideration (Pet. App. 79a-99a) are reported at 562 F. Supp. 2d 687 and 634 F. Supp. 2d 595, respectively.

## JURISDICTION

The judgment of the court of appeals was entered on March 26, 2012. On June 8, 2012, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 25, 2012, and the petition was filed on that date. 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 Eastern District of Virginia, petitioner was convicted of two counts of conspiracy, in violation of 18 U.S.C. 371; two counts of soliciting bribes by a public official, in violation of 18 U.S.C. 201(b)(2)(A); three counts of honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346; three counts of money laundering, in violation of 18 U.S.C. 1957; and one count of racketeering, in violation of 18 U.S.C. 1962(c). He was sentenced to 156 months of imprisonment, to be followed by three years of supervised release. The court of appeals vacated his conviction on one count of honest-services wire fraud but otherwise affirmed. Pet. App. 1a-78a. On remand, the district court imposed the same sentence. Am. Judgment 1-2.

1. Starting in 1991, petitioner served nine terms as a Member of the United States House of Representatives, representing Louisiana's Second Congressional District. He served on several House committees and subcommittees, including the Committee on Ways and Means and its Subcommittee on Trade, and he also served as Co-Chair of the Africa Trade and Investment Caucus and the Congressional Caucus on Nigeria. Pet. App. 3a.

Between 2000 and 2005, petitioner participated in numerous bribery schemes in which he solicited bribes from constituent companies and businesspersons in exchange for promoting their interests through his actions in an official capacity. Petitioner's furthest-reaching bribery scheme related to iGate, a telecommunications firm; other schemes involved sugar production, oil exploration and development, a fertilizer plant, waste treatment, and satellite-based education. Pet. App. 16a-38a. Many of petitioner's acts took the form of "constit-

uent services," something petitioner himself described as an important part of his duties as a congressman. On his congressional website, petitioner "urge[d]" constituents to bring their "problems" to him for resolution, explaining that the "most important thing we do is solve problems for local residents and businesses." C.A. J.A. 5913-5914. The "Constituent Services Guide" on petitioner's web site explained that "we are here to help constituents deal with federal agencies," including "help[ing] [constituents] obtain assistance from federal agencies that promote U.S. exports." *Id.* at 5913.

Petitioner performed various acts in exchange for cash and other things of value. He sought to facilitate and promote business ventures between foreign governments in West Africa and the companies that were providing him and his family members with things of value; those efforts often included visiting with foreign leaders and corresponding with them on official congressional letterhead. Pet. App. 21a-33a, 49a-50a.

Domestically, petitioner arranged and participated in meetings with high-ranking Army officers and an Army congressional liaison to promote iGate. Petitioner met in his office with the Brigadier General responsible for managing the annual budget of the Army's information systems, urging the Army to consider purchasing iGate's communications technology. The General left the meeting promising that the Army would give additional testing to iGate's product. See Gov't C.A. Br. 5-6. Petitioner likewise advocated for iGate at a meeting in his office with an Army program manager in charge of procuring telecommunications equipment for Army bases and installations worldwide. See *id.* at 6-7; C.A. J.A. 1569-1572. At a meeting of iGate shareholders, petitioner stated that he was "hoping to solicit additional

support for iGate * * * from his congressional colleagues." *Id.* at 8 n.4. In that vein, petitioner secured a letter of endorsement for iGate from Representative Billy Tauzin, Chair of the House Subcommittee on Telecommunications, Trade, and Consumer Protection, which Tauzin's staff understood was to be used on behalf of one of petitioner's constituents (iGate). Pet. App. 19a.

Petitioner traveled on several occasions to Nigeria and Ghana, and he met with officials of the Export-Import Bank of the United States, to promote the sale of iGate's telecommunications technology in Africa. Pet. App. 20a-25a. He also "vouch[ed]," *id.* at 50a, to Export-Import Bank officials and to the Governor of a Nigerian State for a Louisiana company pursuing a sugar-plant project in Nigeria. *Id.* at 28a-30a. And petitioner supported the application of another Louisiana company to the United States Trade and Development Agency for a grant to fund a feasibility study for a Nigerian fertilizer plant. *Id.* 32a-33a.

When traveling to promote the business interests of his paying constituents, petitioner regularly used his official congressional passport and was accompanied by his congressional staff. Pet. App. 22a; Gov't C.A. Br. 51. One witness "described [petitioner's] arrival for meetings in Nigeria as being 'in his full apparatus as a US congressman, with embassy security, embassy vehicles, introduc[ing] himself as a US congressman in charge of overseeing affairs of Nigeria or Africa.'" Pet. App. 23a (quoting trial testimony) (second pair of brackets in original). On one occasion, petitioner met with Nigerian President Obasanjo at his presidential palace, having been driven there with the highest-ranking U.S. diplomat in Nigeria in an armored black limousine with an American flag on the front bumper. Gov't C.A. Br. 14.

In preparation for travel, petitioner used his staff to create trip itineraries and to coordinate with the Department of State to schedule meetings with foreign officials. Pet. App. 22a; Gov't C.A. Br. 51. In those meetings, petitioner held himself out as a Member of Congress seeking to promote trade between the United States and Africa. Petitioner filed travel disclosure forms certifying that his trips to Africa with constituent businesspersons were in connection with his duties as a Member of Congress. See Gov't C.A. Br. 13-14, 23.

The bribes that petitioner solicited took the form of monetary payments and shares of company stock, paid through companies held in the name of petitioner's family members. In all, the bribery schemes netted petitioner and his relatives more than $450,000 and more than 33 million shares of stock in various ventures. Pet. App. 50a n.37; Gov't C.A. Br. 4-6, 19, 36. Petitioner's "criminal mindset," Pet. App. 52a n.38, was on display not only in the deceptive manner in which bribes were collected, but also in his own statements and conduct: In connection with one scheme, he hid $90,000 in cash in his freezer, and he once admonished the president of iGate, "We've got to do this shit right, though. I mean, otherwise, we're going to all be in the goddamn pokey somewhere, fooling with . . . shit like this." *Ibid.* (quoting C.A. J.A. 783-784).

2. On June 4, 2007, a grand jury in the Eastern District of Virginia charged petitioner with conspiring to solicit bribes, commit honest-services wire fraud, and violate the Foreign Corrupt Practices Act, in violation of 18 U.S.C. 371 (Count 1); conspiring to solicit bribes and commit honest-services wire fraud, in violation of 18 U.S.C. 371 (Count 2); soliciting bribes as a public official, in violation of 18 U.S.C. 201(b)(2)(A) (Counts 3 and

4); honest-services wire fraud, in violation of 18 U.S.C. 1343 and 1346 (Counts 5-10); foreign corrupt practices, in violation of 15 U.S.C. 78dd-2(a) (Count 11); money laundering, in violation of 18 U.S.C. 1957 (Counts 12-14); obstructing justice, in violation of 18 U.S.C. 1512(c)(1) (Count 15); and racketeering, in violation of 18 U.S.C. 1962(c) (Count 16). The indictment sought forfeiture of the proceeds of the charged offenses. Indictment; see Pet. App. 3a-4a & n.3 (summarizing indictment).

3. The district court denied petitioner's motion to dismiss the bribery-related charges (Counts 1-10, 12-14, and 16), Pet. App. 100a-114a, and denied petitioner's motion for reconsideration, *id.* at 79a-99a.

The federal-official bribery statute, 18 U.S.C. 201(b), prohibits a public official from "corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value * * * in return for [] being influenced in the performance of any official act." 18 U.S.C. 201(b)(2)(A). The statute defines an "official act" as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. 201(a)(3).

Petitioner contended that the indictment did not sufficiently allege that he had performed any official acts in exchange for the corrupt payments. In particular, petitioner argued that the charged acts—including official travel to Nigeria and Ghana, correspondence and meetings with foreign and domestic government officials, and use of State Department and congressional staff to advance various companies' business interests—were not "official acts" under Section 201(a)(3) but rather were

legal uses of his influence. See Pet. App. 105a, 111a-114a (summarizing petitioner's arguments).

The district court rejected petitioner's argument, explaining that this Court had held under the bribery statute that official acts include "those activities that have been 'clearly established by settled practice' as part of a public official's position." Pet. App. 93a (quoting *United States* v. *Birdsall*, 233 U.S. 223, 231 (1914)). In the case of a Member of Congress, the district court explained, such acts are not "limited to so-called 'legislative acts' such as voting on or introducing a piece of legislation," but also "'encompass all of the acts normally thought to constitute a congressman's legitimate use of his office,'" *ibid.* (quoting *United States* v. *Biaggi*, 853 F.2d 89, 97 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989)).

The district court therefore concluded that the indictment was sufficient because the government could prove its case "by showing that [petitioner's] action (of exerting his influence in person or by written correspondence) was on a * * * matter * * * that may at any time be pending before a member of Congress for advice or recommendation as a matter of custom and settled practice." Pet. App. 97a. The court explained that relevant evidence on that issue might include "[petitioner's] * * * representations that he was acting in his official capacity" or "testimony by a former congressman that a congressman's customary use of his office, as clearly established by settled practice, includes exertion of influence on U.S. and foreign government officials on behalf of individuals seeking to advance business interests in the United States and abroad." *Id.* at 97a-98a.

4. In 2009, petitioner was convicted following a two-month jury trial. Consistent with the pretrial decisions

described above, at trial the government "presented evidence establishing that [petitioner's] various meetings with foreign and domestic public officials on behalf of his myriad alleged bribers, coconspirators, and coschemers, as well as his use of congressional resources to correspond with such officials and coordinate foreign trips, were part of the well-settled congressional practice known as 'constituent services.'" Pet. App. 8a. The district court instructed the jury on the elements of federal-official bribery. *Id.* at 116a-119a. Of relevance here, it gave the statutory definition of "official act" twice:

> With respect to the third element, the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy which may at any time be pending or which may by law be brought before any public official in such official's official capacity or such official's place of trust or profit.
>
> In order to violate the Bribery Statute, the defendant must have corruptly sought, received or agreed to receive a thing of value in return for being influenced in his own performance of an official act; that is, a decision or action on any question, matter, cause, suit, proceeding or controversy that may at any time be pending or which may by law be brought before the defendant in his official capacity.

*Id.* at 117a. The court further explained to the jury:

> An act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law. Rather, official acts include those activities that have been clearly established by settled practice as part [of] a public official's position.

> Moreover, an act on a particular question or matter may still be official even if the public official did not have authority to make a final decision or take binding action on the issue.

*Ibid.*

The jury convicted petitioner on eleven counts and acquitted him on three honest-services wire fraud counts (Counts 5, 8, 9), the foreign corrupt practices count (Count 11), and the obstruction of justice count (Count 15). With respect to the forfeiture allegations, the jury found that more than $450,000 and more than 33 million shares of stock constituted proceeds derived from the offenses in the counts of conviction. Pet. App. 9a & n.6.

5. The court of appeals affirmed petitioner's convictions on ten of the eleven counts. Pet. App. 1a-78a.[1] As relevant here, the court rejected petitioner's contention that the district court erroneously instructed the jury on the definition of an "official act." *Id.* at 38a-53a.

The court of appeals began with this Court's decision in *Birdsall*, *supra*, which reinstated a bribery indictment against an attorney who allegedly paid, and officers of the Department of the Interior who allegedly accepted, money in exchange for recommendations to the Commissioner of Indian Affairs that certain individuals convicted of liquor trafficking offenses receive leniency. Pet. App. 40a-41a; see *Birdsall*, 233 U.S. at 227-229. Interpreting a prior version of the federal-official bribery statute, this Court concluded in *Birdsall* that an "official action" need not be "prescribed by statute" or "pre-

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[1] The court of appeals vacated petitioner's conviction on Count 10 because it concluded that the Eastern District of Virginia was not a proper venue for that count. Pet. App. 67a-78a.

scribed by a written rule or regulation" because "[i]n numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the [bribery] statutes." *Id.* at 231.

The court of appeals found "no distinction in substance between an official act as defined by *Birdsall*, and an official act under [petitioner's] indictment." Pet. App. 42a. The court explained that although the predecessor version of the bribery statute (the one at issue in *Birdsall*) "employed the phrase 'decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit,' * * * the bribery statute now uses the substance of the predecessor's phrase to define an 'official act' under [18 U.S.C.] 201." *Id.* at 41a (quoting *Birdsall*, 233 U.S. at 230). The court further determined that the "boundaries" of an official act "fixed by the Supreme Court in *Birdsall* * * * have never been altered," *id.* at 46a (citing cases), and it held that the district court's instructions "square[d] with the *Birdsall* precedent." *Id.* at 46a-47a.

The court of appeals rejected petitioner's argument that *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999), required a different result. *Sun-Diamond* held that a conviction under 18 U.S.C. 201(c)(1)(A) for giving an illegal gratuity requires that the thing of value be given to the public official not merely "by reason of the donee's office" (526 U.S. at 408), but rather for or because of some "particular" or "specific" "official act" (*id.* at 406, 414), as the term is defined in Section 201(a)(3). Petitioner argued that *Sun-Diamond*'s rea-

soning precluded interpreting "official act" as including the performance of duties clearly established by settled practice. Pet. App. 47a. The court of appeals first noted that "*Sun-Diamond* did not mention *Birdsall* at all—a curious omission if the Court intended to overturn its landmark decision on the definition of 'official act.'" *Ibid.* The court further explained that *Sun-Diamond* "simply embraced a narrow reading of the illegal gratuity statute" and that the case discussed the "official act" definition only in "rebuttal to the hypothetical impact of the Court's narrow reading" of the illegal gratuity statute. *Id.* at 47a-48a. "Without a more explicit directive," the court of appeals was "unwilling to translate *Sun-Diamond*'s brief discussion of the 'official act' definition into an unqualified exclusion of all settled practices by a public official from the bribery statute's definition of an official act." *Id.* at 48a.

Petitioner also argued that the jury instructions were inconsistent with *Valdes* v. *United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc), which held that a police officer's "moonlighting" or misuse of police resources was not an "official act" because such conduct was not "action on [a] question, matter, cause, suit, proceeding or controversy." *Id.* at 1323-1324. The court of appeals agreed with *Valdes* that "the bribery statute does not encompass every action taken in one's official capacity," Pet. App. 48a-49a, although it disagreed with *Valdes* on how central *Sun-Diamond*'s discussion of the definition of "official act" was to the latter case's holding, see *id.* at 44a-45a. The court of appeals reconciled *Valdes* with its holding by explaining that to be an "official act," an action must not only be "within the range of official duty," as *Birdsall* explained, but also "must * * * adhere to the definition confining an official act to a pending 'ques-

tion, matter, cause, suit, proceeding or controversy,' " as *Valdes* held. *Id.* at 49a. The court emphasized that its approach to this case was particularly consistent with *Valdes*'s approving citation to *Biaggi*, 853 F.2d at 96-99, which held that the federal-official bribery statute covers "a congressman's use of his office to secure Navy contracts for a ship repair firm." Pet. App. 50a (quoting *Valdes*, 475 F.3d at 1325) (emphasis omitted).

The court of appeals determined that the jury instructions here captured the two foregoing requirements because the district court "gave its 'settled practice' instruction in tandem with the statutory definition of 'official act.' " Pet. App. 51a. The court explained that under the instructions, the jury "could not rely exclusively on [petitioner's] settled practices" and "was not authorized to ignore the directive that [petitioner's] official acts must pertain to a pending question, matter, or cause that was before him." *Ibid.* The court of appeals also noted that the government's case at trial supported findings on both aspects of the "official act" question: the government had presented expert testimony on the nature of congressional duties, both as to constituent services and committee assignments, and "additional evidence that [petitioner] was largely responsible for promoting trade in Africa and reaching out to African government officials to foster commercial relationships between those countries and the United States." *Id.* at 52a. Based on that evidence, the court explained, "the jury was free to find, first of all, that performing constituent services was a settled official practice of [petitioner's] congressional office and, second, that African trade issues were 'matters' or 'causes' that were pending before him," and therefore to conclude that petitioner's

actions "in connection with both" constituted "official acts." *Id.* at 52a-53a.

**ARGUMENT**

Petitioner contends that part of the district court's instruction to the jury on the meaning of an "official act" was erroneous and that the decision below conflicts with *United States* v. *Sun-Diamond Growers*, 526 U.S. 398 (1999), and *Valdes* v. *United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc). In petitioner's view, the "official acts" of a Member of Congress are "confined to the formal *legislative* process." Pet. 25. Petitioner's cramped interpretation of the federal-official bribery statute is incorrect and his claims of conflict lack merit. Further review is not warranted.

1. The court of appeals correctly concluded that the district court's "official act" instructions accurately stated the law.

a. In this case, the district court twice read to the jury 18 U.S.C. 201(a)(3)'s definition of "official act." See Pet. App. 117a. It then explained to the jury that "[a]n act may be official even if it was not taken pursuant to responsibilities explicitly assigned by law" and that, in particular, "official acts include those activities that have been clearly established by settled practice as part [of] a public official's position." *Ibid.* Petitioner's contention that an "official" act cannot encompass acts that are "clearly established by settled practice" to form part of the official's activities lacks merit.[2]

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[2] To the extent that petitioner suggests that the "clearly established by settled practice" instruction supplanted the statutory definition, that contention is also incorrect. See Pet. i (characterizing the jury instructions here as "defining 'official acts' as *any and all* activities that are 'part [of] a public official's position' based on 'settled practice'") (emphasis added; brackets in original); Pet. 12

The portion of the district court's "official act" instruction that petitioner challenges was taken verbatim from *United States* v. *Birdsall*, 233 U.S. 223 (1914), which construed the materially identical language of a prior version of the federal-official bribery statute.[3] In that case, the district court sustained a demurrer to charges that an attorney bribed two special officers of the Department of the Interior to influence advice they provided to the Commissioner of Indian Affairs on clemency recommendations in liquor-trafficking cases, on the ground that no Act of Congress conferred a duty on that Department to make clemency recommendations. *Id.* at 227-229, 231. This Court reversed, holding that an act may be "official" even if it was not "prescribed by statute" and that it is "sufficient" if the official action is "governed by a lawful requirement of the department under whose authority the officer was acting." *Id.* at 231. Nor is it "necessary," the Court went on, "that the requirement should be prescribed by a written rule or regulation." *Ibid.* Rather, it "might also be found in an established usage which constitute[s] the common law of the department," *ibid.*, an interpretation the Court grounded in its longstanding recognition that "of neces-

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(asserting that "the Fourth Circuit * * * ruled that 'official act' includes *any* conduct that is part of a public official's 'settled practice'") (emphasis added). As the court of appeals recognized, the instructions as a whole, see *Jones* v. *United States*, 527 U.S. 373, 391 (1999), did not allow the jury to "rely exclusively on [petitioner's] settled practices"; to convict petitioner, the jury also had to find that petitioner's decision or action "pertain[ed] to a pending question, matter, or cause that was before him." Pet. App. 51a.

[3] Petitioner does not dispute the court of appeals' conclusion (Pet. App. 41a-42a) that the statutory text interpreted by *Birdsall* was carried forward in the current federal-official bribery statute's definition of "official act."

sity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits," *United States* v. *Macdaniel*, 32 U.S. (7 Pet.) 1, 15 (1833). See *Birdsall*, 233 U.S. at 231 (citing *Macdaniel*).

*Birdsall* accordingly concluded that "[i]n numerous instances, duties not completely defined by written rules are *clearly established by settled practice*, and action taken in the course of their performance must be regarded as within the provisions of the [bribery statute]." 233 U.S. at 231 (emphasis added). The district court used the italicized language to instruct petitioner's jury for the same purpose this Court used it in *Birdsall*: to capture the commonsense reality that an official may be bribed in the performance of customary (if unwritten) actions in his official capacity, just as he may be bribed in discharging his formal, required duties.

b. Petitioner contends (Pet. 30-31) that *Birdsall* supports only the narrowest understanding of what actions may be "official acts," and he further contends (Pet. 25-28) that the district court's "clearly established by settled practice" instruction is inconsistent with the statutory definition of an "official act." Those arguments lack merit.

i. Petitioner contends that *Birdsall* does not support the district court's jury instructions quoting that case because, in petitioner's view, that case "was focused on the 'duties' or responsibilities required of an officeholder as part of his official position," Pet. 30, while petitioner was not charged with being influenced in the performance of a congressional duty, Pet. 31. That argument is flawed. The paragraph in *Birdsall* that begins with the statement that "[e]very action that is within the

range of official duty comes within the purview of [the bribery statute]" ends with this Court's conclusion that "duties not completely defined by written rules [may nonetheless be] clearly established by settled practice." 233 U.S. at 230-231. The Court's focus throughout the paragraph was on whether the action "sought to be influenced was official action." *Id.* at 230. A Member of Congress is acting "within the range of official duty" and engaged in "official action" when, for example, he calls meetings in his congressional office with high-ranking Army officers to discuss government business. The same is true when he directs his congressional staff to coordinate travel with the Department of State, uses his official congressional passport, and travels in an armored U.S. embassy limousine with U.S. embassy security, for meetings with foreign leaders where he advocates for U.S. business interests. See pp. 3-5, *supra*.

ii. Petitioner argues that "with respect to Members of Congress, an 'official act' is confined to the formal *legislative* process, or, at the very most, to *governmental* decision-making." Pet. 25. But nothing in the text of Section 201(a)(3) limits "official acts"—when the official is a Member of Congress or otherwise—to legislative acts or formal decisionmaking. Rather, the statute broadly defines "official act" to include "*any* decision or action on *any* question, matter, cause, suit, proceeding or controversy, which may at *any* time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. 201(a)(3) (emphasis added). The definition's embrace of any "question" or "matter" as a potential subject of official action—in addition to the more formal categories of "cause, suit, proceeding [and] controversy"—refutes petitioner's

argument that Section 201(a)(3) is limited to legislative acts or formal decisionmaking. See generally *United States* v. *Brewster*, 408 U.S. 501, 524 (1972) ("[M]any non-legislative activities are an established and accepted part of the role of a Member."). Here, for example, petitioner's corrupt actions on behalf of constituents to intercede with high-ranking Army officers, foreign leaders, and even another Member of Congress, are naturally described as official-capacity "action" on a pending "question" or "matter." Indeed, petitioner's own congressional website invited constituents to bring their "problems" to him for resolution, and it specifically noted that "we are here to help constituents deal with federal agencies," including "obtain[ing] assistance from federal agencies that promote U.S. exports." C.A. J.A. 5913.

Petitioner contends that the statute's use of the phrases "'pending' and 'by law brought' contemplate questions or matters that are resolved through the formal legislative process." Pet. 26. But "pending" means simply "[n]ot yet decided or settled." *American Heritage Dictionary of the English Language* 1299 (4th ed. 2006) (def. 1); accord *Webster's Third New International Dictionary* 1669 (1993) (third entry, def. 1: "not yet decided: in continuance: in suspense"). It is an alternative to questions and matters that "may by law be brought" before the officials (referring to matters yet to be put before the federal official). Petitioner offers (Pet. 26 n.10) definitions that he reads as requiring a greater level of formality than the constituent services here. But those definitions do not capture the more basic temporal point of the statutory text: to cover, expansively and through disjunctive alternatives, matters that are presently before the official and matters that

may in the future come before him. To the extent that petitioner suggests that these words restrict the statute to matters that come before the official by formal legal process, *Birdsall* rejected that cramped view. "To constitute * * * official action, it was not necessary that it should be prescribed by statute" or "by a written rule or regulation." 233 U.S. at 230-231.

iii. Petitioner is not assisted by his reliance on legislative history related to the 1962 enactment of what is substantially the current version of the federal-official bribery statute. The most natural inference from the history petitioner cites is that Congress endorsed the language from *Birdsall* that the district court read to petitioner's jury. When Congress reenacts legislation that has been subject to a "settled judicial construction," the courts will "apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them." *Keene Corp.* v. *United States*, 508 U.S. 200, 212-213 (1993) (collecting cases); accord *Lindahl* v. *OPM*, 470 U.S. 768, 782 n.15 (1985). And by 1962, lower courts had treated *Birdsall*'s formulation as authoritative. See, *e.g.*, *McGrath* v. *United States*, 275 F. 294, 298 (2d Cir. 1921) (citing the "broad and comprehensive meaning" of official action under *Birdsall*); *Wilson* v. *United States*, 230 F.2d 521, 524 (4th Cir.) (referring to *Birdsall*'s "extremely liberal interpretation" of official action), cert. denied, 351 U.S. 931 (1956).

The legislative history reflects that Congress intended to give the reenacted bribery statute the same "broad scope of the [previous] bribery statutes as construed by the courts." S. Rep. No. 2213, 87th Cong., 2d. Sess. 1 (1962); accord H.R. Rep. No. 748, 87th Cong., 1st Sess. 17 (1961) (noting that bill did "not limit in any way the broad interpretation that the courts have given to the

bribery statutes; rather, the intent is to insure that this broad interpretation shall be given universal application"); see *Dixson* v. *United States*, 465 U.S. 482, 496 (1984) (citing Congress's "longstanding commitment to a broadly drafted federal bribery statute" and noting that the 1962 revisions reflected its "expressed desire to continue that tradition").

iv. Finally, petitioner contends (Pet. 28 n.12) that "[i]nterpreting 'official act' for Congressmen as encompassing *only* legislative conduct * * * prevent[s] the bribery statute from irrationally encroaching upon [18 U.S.C.] 203(a)(1)." That overlooks the fundamentally different conduct proscribed by each statute. Section 203(a)(1) precludes a Member from soliciting or receiving compensation for "representational services" with respect to matters in which the United States is a party or has a direct and substantial interest. Section 203(a)(1) is therefore implicated when Members represent clients as attorneys, agents, or otherwise. In contrast, Section 201(b) has no such requirement, but instead requires that the public official act "corruptly" and in his *official* capacity. Thus, Sections 201(b) and 203(a)(1) are "entirely different offense[s]," *United States* v. *Kidd*, 734 F.2d 409, 412 (9th Cir. 1984). And even if there were some potential for overlap, the "mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Pasquantino* v. *United States*, 544 U.S. 349, 358 n.4 (2005).

2. Petitioner contends (Pet. 18-22, 29) that *Sun-Diamond* abrogated *Birdsall*. The court of appeals correctly rejected that contention, and its decision is consistent with both *Sun-Diamond* and *Birdsall*.

In *Sun-Diamond*, this Court held that an illegal gratuity conviction under 18 U.S.C. 201(c)(1)(A) requires that the thing of value be given to the public official for or because of some "particular" or "specific" official act. 526 U.S. at 406, 414. The defendant in *Sun-Diamond* had been charged with giving the Secretary of Agriculture things of value, and the indictment "alluded to two matters in which [the defendant] had an interest in favorable treatment from the Secretary at the time it bestowed the gratuities," but "did not allege a specific connection between either of them * * * and the gratuities conferred." *Id.* at 401, 402. The district court instructed the jury that it was "not necessary for the indictment to allege a direct nexus" of that sort and that it was "sufficient for the indictment to allege that [the defendant] provided things of value to [the Secretary] because of his position." *Id.* at 402-403 (quoting 941 F. Supp. 1262, 1265 (D.D.C. 1996), rev'd, 138 F.3d 961 (D.C. Cir. 1998), aff'd, 526 U.S. 398 (1999)). This Court reversed the defendant's conviction because it "refus[ed] to read [the illegal gratuity statute] as a prohibition of gifts given [merely] by reason of the donee's office." *Id.* at 408. That holding, and the errors in the jury instructions given in *Sun-Diamond*, have no relevance here because petitioner does not contend in this Court that the government failed to allege or prove an appropriate nexus between the things of value provided by petitioner's paying constituents and the acts he performed.

Petitioner focuses (Pet. 18-22) on a portion of the *Sun-Diamond* opinion in which this Court pointed out that reading the illegal gratuity statute to reach gifts given merely "by reason of the donee's office" would potentially criminalize *de minimis* gift-giving—for example, the President's receipt of a replica jersey from a

championship sports team visiting the White House, "a high school principal's gift of a school baseball cap to the Secretary of Education," or "a group of farmers * * * providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of [Department] policy." 526 U.S. at 406-407. This Court acknowledged that its "more narrow interpretation * * * can also produce some peculiar results" if one were to treat the hypothetical gifts as given "'for or because of' the official acts of receiving the sports teams at the White House, visiting the high school, and speaking to the farmers." *Id.* at 407. But the Court observed that such "absurdities," *id.* at 408, would be avoided if "those actions * * * are not 'official acts' within the meaning of [Section 201(a)(3)]," *id.* at 407.

As the court of appeals explained, "[t]here is simply no indication that *Sun-Diamond* sought to undermine *Birdsall's* holding." Pet. App. 47a. Indeed, this Court "did not mention *Birdsall* at all," *ibid.*, even though, as petitioner points out (Pet. 31 n.13), *Birdsall* was cited in the briefs to this Court in *Sun-Diamond*. The most natural inference is not that *Sun-Diamond* silently overruled *Birdsall*, but rather that the Court understood its observations in *Sun-Diamond* about the scope of "official act" to be compatible with *Birdsall*. Although the Court did not explain precisely why the *Sun-Diamond* hypotheticals—ceremonial and public events like receiving sports teams, visiting schools, and making speeches—would not be "official acts," the Court may have assumed that none entails action on a "question, matter, cause, suit, proceeding or controversy," 18 U.S.C. 201(a)(3). If that is correct, then such activities would not properly be the basis for a bribery conviction, even if

engaging in such activities is "clearly established by settled practice" as part of an official's office. See Pet. App. 48a-49a.

3. Petitioner's contention (Pet. 13-22) that the decision below deepens an existing circuit conflict is incorrect. No circuit has rejected a *Birdsall*-based instruction given in conjunction with the definition of "official act," as the district court instructed here, and no other conflict warrants review in this case.

a. As the court of appeals noted (Pet. App. 46a), *Birdsall* has been widely applied by the lower courts. See, *e.g.*, *United States* v. *Moore*, 525 F.3d 1033, 1041 (11th Cir. 2008); *United States* v. *Parker*, 133 F.3d 322, 326 (5th Cir.), cert. denied, 523 U.S. 1142 (1998); *United States* v. *Biaggi*, 853 F.2d 89, 97 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989); *United States* v. *Muntain*, 610 F.2d 964, 967 n.3 (D.C. Cir. 1979); *United States* v. *Carson*, 464 F.2d 424, 434 (2d Cir.), cert. denied, 409 U.S. 949 (1972).

The Second Circuit's decision in *Biaggi* is particularly relevant here because it rejected an interpretation of Section 201(a)(3) that would have limited a Member of Congress's "official acts" to legislative acts. In *Biaggi*, a Member was convicted of accepting illegal gratuities in connection with helping a ship-repair company resolve rent-payment disputes with the City of New York and secure contracts from the U.S. Navy. 853 F.2d at 91-94. The Member in *Biaggi* wrote the Mayor of New York on official congressional letterhead urging the City to reach a compromise with the company, *id.* at 92; he "sought to assist [the company] with the Navy" by calling a United States Senator from New York and telling the Senator that the company was being treated unfairly, *id.* at 93; he met with the Senator to prepare for the Senator's

meeting with the Secretary of the Navy, *id.* at 94; and he telephoned "the Commandant of the Coast Guard in an attempt to get more work for [the company]," *ibid.*

The Second Circuit held that the congressman's actions on behalf of the company—the "congressman's own invocation of his position and of congressional interest in his intercession with others on behalf of a constituent"—were "official acts." *Biaggi*, 853 F.2d at 98-99. The court rejected as "untenable" the argument that a congressman's official acts are limited to "acts in the legislative process itself," explaining that "[t]he language of the section does not mention legislative acts, and courts have read the section and its predecessors sufficiently broadly to encompass all of the acts normally thought to constitute a congressman's legitimate use of his office." *Id.* at 97; see also *Carson*, 464 F.2d at 426-427, 434 (affirming bribery conviction of United States Senator's administrative aide who attempted to exert influence on Department of Justice officials).[4]

b. Petitioner contends that the decision below conflicts with the D.C. Circuit's decision in *Valdes*, *supra*. But *Valdes* accepted *Biaggi*'s holding and thus necessarily did not produce a decision that conflicts with the holding here. In *Valdes*, a police officer was convicted of receiving illegal gratuities for accepting money from a confidential informant in exchange for accessing police databases for information about license-plate records and outstanding arrest warrants. 475 F.3d at 1320-1322. The D.C. Circuit reversed the conviction because it found insufficient evidence that the officer had committed any official acts, holding that his actions amounted

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[4] This Court denied the *Biaggi* defendants' petition for a writ of certiorari, which had renewed their argument about the scope of official acts. *Biaggi* v. *United States*, 489 U.S. 1052 (1989).

to "moonlighting" or the "misuse of government resources," but not action on a "question, matter, cause, suit, proceeding or controversy" within the meaning of Section 201(a)(3). *Id.* at 1322-1326.

*Valdes* interpreted "question, matter, cause, suit, proceeding or controversy," 18 U.S.C. 201(a)(3), as "refer[ring] to a class of questions or matters whose answer or disposition is determined by the government," 475 F.3d at 1323-1324. In so holding, *Valdes* rejected the argument that "*Birdsall* * * * stand[s] for the proposition that every action within the range of official duties *automatically* satisfies [Section] 201's definition." *Id.* at 1323. Rather, the D.C. Circuit explained, "[*Birdsall*] merely made clear the coverage of activities performed as a matter of custom." *Ibid.* Far from conflicting with the decision below, *Valdes*'s characterization of *Birdsall* underscores the appropriateness of the "clearly established by settled practice" jury instruction the district court gave in this case. And the decision below embraces *Valdes*'s holding that *Birdsall* does not "stand for the proposition that every action within the range of official duties *automatically* satisfies [Section] 201's definition." *Id.* at 1323; see Pet. App. 48a-49a ("[T]he bribery statute does not encompass every action taken in one's official capacity, and * * * *Birdsall* did not so hold.").

Moreover, to the extent that *Valdes* held that the jury instructions in that case were flawed, see 475 F.3d at 1321, 1325, those instructions differ critically from the instructions here. *Valdes* emphasized that, "[o]ver the explicit objection of the defendant, the court refused to include either the statutory language on which we have focused—the definition of 'official act'—or anything comparable." *Id.* at 1325. Here, in contrast, the statutory definition of "official act" was read to petitioner's

jury twice. See Pet. App. 117a. And the court of appeals emphasized the importance of those instructions, in recognizing that the jury had to find that petitioner's "official acts * * * pertain[ed] to a pending question, matter, or cause that was before him" and that the jury could not rely "exclusively on [petitioner's] settled practices." *Id.* at 51a.

c. Petitioner also suggests that the decision below conflicts with what he characterizes as *Valdes*'s holding that "with respect to Members of Congress, an 'official act' is confined * * * to *governmental* decision-making." Pet. 25; see *Valdes*, 475 F.3d at 1323-1324 ("question [or] matter" in Section 201(a)(3) excludes "[q]uestions not subject to resolution by the government"). Because *Valdes* did not consider an application of the "official act" requirement to a Member of Congress, it cannot be viewed as creating either a holding or a conflict on that issue. And to the extent that *Valdes* spoke to the liability of a Member of Congress, it is entirely consistent with the decision below. *Valdes* went out of its way to describe "a congressman's use of his office to secure Navy contracts for a ship repair firm, as in [*Biaggi*]," as "clearly covered by the statute." *Id.* at 1325. The court of appeals below viewed *Biaggi* as essentially this case. Pet. App. 50a (describing *Biaggi* as "a decision substantially identical to this case").

The only point of clear disagreement between *Valdes* and the decision below is, as petitioner points out (Pet. 15-16), the Fourth Circuit's rejection (Pet. App. 45a & n.35) of the D.C. Circuit's conclusion in *Valdes* (475 F.3d at 1323) that *Sun-Diamond*'s holding was based on the statutory definition of an "official act." But that narrow and abstract interpretive disagreement does not warrant this Court's review absent a clear indication that

that disagreement underlies a more concrete disagreement about the meaning of "official act." As explained above, no such disagreement exists as applied to corrupt constituent services performed by a Member of Congress.

d. Petitioner also argues (Pet. 13-16) that this Court should grant review to resolve a disagreement between *Valdes* and the Eleventh Circuit's decision in *Moore*, *supra*. The defendants in *Moore*, two correctional officers, were convicted of, *inter alia*, conspiring to accept an illegal gratuity—receiving sexual favors from inmates in exchange for contraband. 525 F.3d at 1038-1039. The defendants contended that the government failed to prove an "official act" and urged the Eleventh Circuit to adopt the D.C. Circuit's approach in *Valdes* and to hold that their "'low-level actions' * * * [we]re similar to those of the police officer in *Valdes*." *Id.* at 1040-1041. The Eleventh Circuit rejected *Valdes* and found the government's evidence at trial sufficient to show that the officers' "actions f[e]ll within the broad definition of 'official act' set forth in *Birdsall*." *Id.* at 1041.

Petitioner does not claim that the decision below conflicts with *Moore*. And this case would not be an appropriate vehicle for addressing any tension between *Valdes* and *Moore*. First, this case involves a type of conduct—a congressman's corrupt use of his office to advance the business interests of constituents, as in *Biaggi*—that all circuits agree is covered by the statute. See *Valdes*, 475 F.3d at 1325; *Moore*, 525 F.3d at 1041; Pet. App. 50a-51a. Second, the district court instructed petitioner's jury using both the statutory definition of "official act" and *Birdsall*'s "clearly established by settled practice" instruction, and neither *Valdes* nor *Moore* suggests that such a set of instructions is in error.

4. Finally, this Court should not review petitioner's contention that the district court's "clearly established by settled practice" instruction "defines 'official act' in a way that is so indeterminate that it renders the bribery statute unconstitutionally vague." Pet. 32. The court of appeals declined to consider that claim because petitioner "d[id] not provide any argument regarding the elements of an impermissibly vague statute, but instead pose[d] a series of sixteen rhetorical questions." Pet. App. 45a n.36; see Pet. C.A. Br. 18-19, 21-22. This Court ordinarily does not entertain claims that were neither adequately pressed nor passed upon in the courts below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In any event, the district court's "clearly established by settled practice" instruction did not render the bribery statute unconstitutionally vague. "[T]he void-for-vagueness doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions." *Skilling* v. *United States*, 130 S. Ct. 2896, 2933 (2010) (citing *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)). A "statute's *mens rea* requirement [helps] blunt[] any notice concern" over the statute's application. *Id.* at 2933-2934. And a vagueness challenge is judged "as applied to the particular facts at issue" not as applied "'to the conduct of others.'" *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (quoting *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)).

The instruction given in this case that the settled practice be "clearly established" itself insured against the extension of the statute to remote or tangential activities of a Member of Congress. The only activities that would qualify must necessarily be known and ac-

cepted components of a Member's official duties. And a Member can be expected to know his "clearly established" official activities. *Birdsall* has been the law since 1914, and petitioner cites no example from the ensuing 98 years of a prosecution based on marginal (as opposed to "clearly established") practices. Cf. Pet. 32-33 (positing a series of hypothetical questions). In any event, given the undoubted clear application of the statute to petitioner's corrupt efforts to, among other things, use his official influence to open doors to meetings with foreign leaders and with federal officials and agencies, he cannot complain of any lack of prior notice. See, *e.g.*, *Biaggi*, 853 F.2d at 98 ("[T]he duties of senators and representatives routinely include interceding with various agencies on behalf of their constituents.").

In addition, the *mens rea* component of the offense prevents ensnaring an unwary Member. The district court instructed the jury that it could convict petitioner of bribery only if it found that petitioner acted "corruptly"—which it defined as "to act knowingly and dishonestly for a wrongful purpose"—and that petitioner had "a specific intent to receive something of value in exchange for being influenced in the performance of an official act." Pet. App. 116a, 118a. Those requirements eliminate the possibility that petitioner lacked fair notice that his conduct was criminal. Indeed, the evidence graphically illustrated that petitioner knew his conduct was illegal as the bribery schemes were ongoing. See, *e.g.*, *id.* at 53a n.38 (quoting petitioner's statement to president of iGate: "We've got to do this shit right, though. I mean, otherwise, we're going to all be in the goddamn pokey somewhere, fooling with . . . shit like this.").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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