No. 21-_____

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Court-Appointed (CJA)
Counsel of Record
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200
peter.goldberger@verizon.net

Attorneys for Petitioner

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QUESTIONS PRESENTED

1. In *McCormick v. United States*, 500 U.S. 257 (1991), this Court held that a conviction for extorting a campaign contribution "under color of official right" (18 U.S.C. § 1951(a)) requires proof of an "explicit" *quid pro quo*; that is, proof that the contribution was "made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." When campaign contributions are not at issue, the *quid pro quo* need not be "explicit." The lower courts all apply these same standards to honest services fraud bribery charges under 18 U.S.C. § 1346. The question presented is:

> When a prosecution for Hobbs Act extortion "under color of official right" and for honest services fraud bribery is premised on campaign contributions, may the jury find a promise of official action in exchange for the payment to be "explicit" (as this Court requires), even if that promise is not "express," as held by the court below and one other Circuit, or is an unexpressed promise necessarily other than "explicit," and thus insufficient, as held by four Circuits?

2. In *Evans v. United States*, 504 U.S. 225 (1992), this Court held that the required *quid pro quo* in a Hobbs Act extortion case could be established by the receipt of "a payment to which [the official] was not entitled, knowing that the payment was made in return for official acts." A closely divided Court construed "under color of official right" to permit conviction if the official's position was the reason for the payment, dispensing with any requirement of proving an act of inducement. The question presented is:

> Should *Evans v. United States*, 504 U.S. 225 (1992), be overruled in part, because the phrase "under color of official right" – as used in the law of extortion as of the time that the Hobbs Act was enacted – applied only to a *pretense* of *entitlement* to the payment by virtue of the recipient's position?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties to this petition (petitioner Davis and respondent United States). Petitioner had a co-defendant at trial, John Green, but their appeals were not consolidated.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

James Davis respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit upholding his convictions for conspiracy to commit Hobbs Act extortion and honest services fraud.

OPINIONS BELOW

The Third Circuit's January 5, 2021, non-precedential opinion (authored by Judge Shwartz and joined by Judges Greenaway and Fuentes), is available at 841 Fed.App'x 375 (3d Cir., Jan. 5, 2021). A copy is Appendix A. On September 12, 2018, the United States District Court for the Eastern District of Pennsylvania (Beetlestone, J.) filed, but did not publish, an opinion explaining the denial of a post-trial motion for judgment of acquittal. Appx. B.

JURISDICTION

On January 5, 2021, the United States Court of Appeals for the Third Circuit filed its judgment and opinion affirming petitioner's convictions and sentence. Appx. A. On February 9, 2021, the Third Circuit denied a timely petition for rehearing *en banc*. Appx. C. As a result, pursuant to this Court's Rules 13.1 and 13.3, and this Court's Order filed March 19, 2020, this petition for certiorari is timely filed within 150 days of February 9, that is, not later than July 9, 2021. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION and STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, "Congress shall make no law … abridging the freedom of speech …."

Title 18, United States Code, provides, in pertinent part:

§ 1343. Fraud by wire, radio, or television

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. * * *

18 U.S.C. § 1343.

§ 1346. Definition of 'scheme or artifice to defraud'

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

§ 1349. Attempt and conspiracy

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. § 1349.

§ 1951. Interference with commerce by threats or violence

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or

> threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
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> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
>
> (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
>
> (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101–115, 151–166 of Title 29 or sections 151–188 of Title 45.

18 U.S.C. § 1951 ("the Hobbs Act").

STATEMENT OF THE CASE

John Green served as the elected sheriff of Philadelphia County, Pennsylvania, between 1988 and 2010. One of the sheriff's duties is to conduct auction sales of foreclosed, tax-delinquent properties, referred to as "sheriff's sales." Notices of sheriff's sales were advertised in local newspapers, as required by law. Petitioner James Davis

owned an advertising business in Philadelphia, called Reach Communications Services ("Reach"). Soon after Green's first election, Davis approached the new sheriff and proposed that Reach handle the production and placement of sheriff's sale advertisements at the prevailing standard rate. Green, acting on his own authority and discretion, agreed to this arrangement.

Reach went on to handle advertising and public relations for the sheriff's department during the entire two decades of Green's tenure, with an expanding scope of work. Reach eventually employed a staff of 40 or more. By 2007, some 90% of Reach's income was derived from services rendered to the Sheriff's Office. Sheriff Green personally approved the additional and expanded contracts with Reach.

In 2015, just short of five years after Green retired, a grand jury in the Eastern District of Pennsylvania charged Green and Davis with operating a kickback scheme. The ten-count superseding indictment, filed December 15, 2015, alleged that in exchange for the sheriff department's lucrative business, Davis provided Green with a stream of benefits consisting of both personal benefits – including selling a house to Green on favorable terms, hiring Green's wife as a consultant, and various gifts and loans – as well as campaign contributions, many but not all of which conformed to Pennsylvania and local law.

The indictment's first count charged both Davis and Green with conspiracy, in violation of 18 U.S.C. § 371, to commit honest-services wire fraud, *id.* § 1346, and Hobbs Act extortion under color of official right, *id.* § 1951(a).[1] In addition, the

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[1] Both the Hobbs Act and the wire fraud law have their own specific conspiracy provisions (*see* 18 U.S.C. §§ 1349, 1951(a), in Statutes Involved, *ante*), each with a higher maximum penalty than § 371 (and no overt act requirements), but only the latter permits the charging of a dual-

indictment included four substantive counts charging both Davis and Green with honest-services wire fraud, *id.* §§ 1343, 1346; and five tax-related counts charging Davis in some years for filing false income tax returns, in violation of 26 U.S.C. § 7206(1), and in others for failing to file a required return, *id.* § 7203.

After a 25-day joint trial, a jury found Davis guilty of conspiracy (count 1), one count of honest-services wire fraud (count 5), and all five tax counts (counts 6 to 10).[2] At trial, no evidence was presented that Green made any express promise to Davis at any time that the making of campaign contributions (or any particular contribution) would result in the extension of Reach's contracts with the sheriff's office (or Green's taking of any other official action). The court instructed the jury – as to both the extortion conspiracy offense and as to honest services fraud – that any conviction based on campaign contributions would require proof of an "explicit" promise, "but there is no requirement that it be express." CA3Appx5903 (Hobbs Act), 5915 (honest services fraud).[3]

(cont'd)

object conspiracy in a single count, based on a single agreement. Whether a two-member conspiracy based on what amounts to bribery of one conspirator by the other is lawful under § 371 was not raised below. Compare *Ocasio v. United States*, 578 U.S. 282 (2016) (§ 1951(a) conspiracy), with *Pinkerton v. United States*, 328 U.S. 640, 643 (1946) ("There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime.").

[2] Of the other three honest-services fraud counts, the jury found Davis not guilty on two and hung on the remaining one. As to Green, the jury hung on the conspiracy count and one honest-services wire fraud count and found him not guilty on the others. (The jury thus concluded that petitioner Davis had conspired with Green, but did not agree that Green had conspired with Davis.) The government moved prior to sentencing for dismissal of the mistried counts, which the district court granted.

[3] The court included in its pretrial, preliminary charge explaining "honest services fraud," the requirement of an "explicit" promise, as to any illegal *quid pro quo* based on a campaign contribution, without drawing the purported distinction between "explicit" and "express." CA3Appx325. No objection was lodged to any of these instructions.

Petitioner filed a post-trial motion for judgment of acquittal, raising grounds including the government's failure to prove that Green had made any "express" promise to petitioner Davis in exchange for any campaign contribution. (DC Dkt. #172, at ECF p. 14). The court denied this motion. Appx. B, at 5–6. On March 1, 2019, the district court sentenced the petitioner to serve over ten years' (121 months') imprisonment, to be followed by one year of supervised release. The court also ordered him to pay more than $872,000 in "restitution" to the Internal Revenue Service (as a special condition of supervised release), and a criminal forfeiture to the United States of more than $1.7 million.[4] Both the district court and a Third Circuit panel in turn denied bail pending appeal.

On appeal, petitioner challenged the sufficiency of the evidence to prove "bribery," for lack of any express promise to perform an official act in exchange for any campaign contribution or contributions.[5] For this point, petitioner relied on the holding and language of this Court's decision in *McCormick v. United States*, 500 U.S. 257 (1991). In that case, Justice White wrote for a five-Justice majority (and joined as to this point by Justice Scalia, concurring, *id.* 276) that:

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[4] There is no statutory authority for "restitution" to be ordered directly at sentencing for an offense under title 26. *See* 18 U.S.C. §§ 3663, 3663A (applicable to title 18 offenses only); *e.g.*, *United States v. Neff*, 954 F.2d 698, 700 (11th Cir. 1992). Nor did petitioner possess $1.7 million in proceeds from the offense in original or derivative form at the time of sentencing that he might therefore lawfully have been ordered to "forfeit." No challenge to either of these onerous financial terms of the sentence was included in petitioner's direct appeal.

[5] Petitioner did not choose to challenge the jury instructions on the same grounds. Had he done so, he would have had to overcome – for lack of objection in the trial court – a "plain error" hurdle. The court of appeals had no problem addressing the appeal on the terms specified by petitioner Davis as appellant. Appx. A, at 7 n.5 (citing *Musacchio v. United States*, 577 U. S. 237, 243 (2016)).

> The receipt of such contributions is also vulnerable [to prosecution] under the Act as having been taken under color of official right, *but only if the payments are made in return for an explicit promise or undertaking by the official* to perform or not to perform an official act. In such situations *the official asserts that his official conduct will be controlled by the terms of the promise* or undertaking.

Id. 273 (emphasis added). The court of appeals nevertheless affirmed. Appx. A. The court did not dispute petitioner's showing that there was no evidence in the lengthy trial record of any express promise by Sheriff Green. Instead, relying on the opinions of two other Circuits (while ignoring those that disagree), the court below ruled, in agreement with the district court, that a public official's promise of a specific official action in exchange for a campaign contribution can be "explicit" within the meaning of *McCormick* without being "express." Appx. A, at 7–8. On that legal basis, the court held the evidence at trial sufficient. Appx. A, at 9–10.[6]

The court of appeals denied petitioner's timely request for rehearing, either by the panel or *en banc*. Appx. C. This petition follows.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

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[6] The court of appeals also affirmed petitioner's sentence against a challenge to the interpretation and application of the governing provision of the U.S. Sentencing Guidelines. Appx. A, at 11–13. That issue is not included in this petition.

REASONS FOR GRANTING THE WRIT

1. This case squarely presents a critical question of interpreting the import of a prior decision of this Court, explaining a frequently invoked federal criminal statute, on which the Circuits are divided.

Three decades ago, this Court held in *McCormick v. United States*, 500 U.S. 257 (1991), that the offense of "extortion under color of official right" under the Hobbs Act, 18 U.S.C. § 1951(a), requires proof of a *quid pro quo*. The *quid pro quo* is one or more valuable benefits, offered or given to a public official in exchange for the performance or promise to perform an official act or acts, modeled on the law of bribery. The *McCormick* case arose in the context of a political contest, which led the Court to note that privately financed election campaigns are part of the American political system. This inherently includes the making of campaign contributions by persons who select their favored candidates based on what official actions they anticipate the candidate will take if elected. The Court therefore went on to hold that because donors to political campaigns properly expect the recipient to promise and then carry out policies, legislation, and other official acts that the donors favor, the criminal law must be narrowly framed to distinguish between permitted and prohibited (corrupt) donations.

The line the Court drew was sharp: campaign contributions can support a Hobbs Act extortion case "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* 273. "In such situations," the opinion continued, "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.* Petitioner's case concerns the proper interpretation of the precise line-drawing designed and articulated by this Court in *McCormick*.

As explained by Justice White, writing for the majority:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. 272. As Justice Scalia re-articulated (and endorsed) the *McCormick* holding in his separate concurrence, the Hobbs Act "should not be interpreted to cover campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for an explicit promise of favorable future action." *Id.* 276 (cleaned up).

The *McCormick* Court never expressly mentioned the First Amendment, but it is clear that the Constitution's protection for political campaign activity, including fundraising (*see, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010)), is what underlies this discussion. The *McCormick* holding is thus in keeping with the Court's long-standing rule that whenever activity falling within the shadow of the First Amendment is alleged to be criminal, courts are required to apply the strictest standards in ensuring that only deliberate criminal activity is prosecuted and not constitutionally protected actions, beliefs or associations. See *NAACP v. Claiborne Hardware Co.*, 458

U.S. 886, 918–19 (1982) (boycott activity, which was aggressive but not itself violent, including sympathetic support for violent action, aimed at and resulting in the loss of business profits, was constitutionally protected); *Noto v. United States*, 367 U.S. 290, 299–300 (1961) (requiring "rigorous standards of proof" in Smith Act prosecutions).[7] In the same light, the *McCormick* decision is in keeping with the statutory construction doctrine of "constitutional avoidance" or "constitutional doubt." See, *e.g.*, *Gomez v. United States*, 490 U.S. 858, 864 (1989). The decision must therefore be interpreted and applied with these same constitutional values kept firmly in mind.

The *McCormick* majority concluded its discussion of the heightened *quid pro quo* requirement for campaign contribution cases with an optimistic comment: "This formulation defines the forbidden zone of conduct with sufficient clarity." 500 U.S. at 273. Unfortunately, this prediction was not to be. In the ensuing years, a circuit conflict has arisen over whether "explicit," as used in this Court's *McCormick* opinion, necessarily means "express." This petition should be granted to resolve that conflict.

a. There is an entrenched conflict in the Circuits on the meaning of *McCormick*'s holding that the *quid pro quo* promise of official action in a bribery case based on Hobbs Act extortion must be "explicit," if the benefit is in the form of a campaign contribution.

The decision of the court below finds support in an Eleventh Circuit decision and in the language of early Sixth and Ninth Circuit opinions. But it conflicts with the leading Circuit decision, authored by Justice Sotomayor when she sat on the

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[7] *Noto* involved a prosecution under a part of the Smith Act that made it illegal to, *inter alia*, teach and advocate the violent overthrow of the government. This Court emphasized that the rules of law governing such prosecutions must be judged *strictissimi juris* to avoid the "danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes." *Noto*, 367 U.S. at 299–300.

Second Circuit, and decisions of the District of Columbia, First, Sixth, Seventh and Ninth Circuits that follow it. Granting this petition would serve to resolve that conflict.

In *United States v. Ganim*, the Second Circuit quoted *McCormick*'s "explicit" and "asserts" language and stated, "That is, proof of an *express* promise is necessary when the payments are made in the form of campaign contributions." 510 F.3d 134, 142 (2d Cir. 2007) (emphasis added, citations omitted). This is exactly what the court below held was *not* required in petitioner's case. See also *United States v. Rosen*, 716 F.3d 691, 701 (2d Cir. 2013) (reaffirming that the court "required proof of an express promise" in campaign-contribution cases, while explaining that the promise need not be tried to a specific official act). Other circuits have stated their support for *Ganim*'s position. See *United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013) (favorably quoting *Ganim*'s "express promise" requirement).

The First and Seventh Circuits have explained their views without using the word "express," but with explanations that appear to align with the *Ganim* analysis. Thus, in *United States v. Turner*, 684 F.3d 244, 253 (1st Cir. 2012), the court articulated that Hobbs Act extortion cases "fall into two categories: campaign contributions and other payments," such that benefits the jury finds to be contributions cannot be held to establish an illegal *quid pro quo* unless they satisfy the words of the *McCormick* decision.[8] And in *United States v. Allen*, 10 F.3d 405, 411–12 (7th Cir. 1993), the panel reasoned, "[I]t would seem that courts should exercise the same

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[8] *Turner* was not a campaign contributions case. There, the court held that "[o]utside the campaign contribution context, the Supreme Court set the requirement in *Evans v. United States*,504 U.S. 255, 268 (1992) (in such cases, "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts").

restraint in interpreting bribery statutes as the *McCormick* Court did in interpreting the Hobbs Act: absent some fairly explicit language otherwise, accepting a campaign contribution does not equal taking a bribe unless the payment is made in exchange for an explicit promise to perform or not perform an official act.").

The court below cited opinions from three other circuits to support its position that *McCormick* used "explicit" to mean *clear* rather than *express*, but this overstated the support for that position. Only one circuit, the Eleventh, has a *holding* matching that of the Third in this case. See *United States v. Siegelman*, 640 F.3d 1159, 1171–72 (11th Cir. 2011) (per curiam). In that decision, the court of appeals ruled that the centerpiece of the holding in *McCormick* – the requirement of an explicit *quid pro quo* to prevent criminalization of protected political activity – was eviscerated (*sub silentio*) just a year later by this Court's opinion in *Evans v. United States*, 504 U.S. 225 (1992), allowing campaign contributions to be criminalized as bribery (or "official right" extortion) so long as they were given in exchange for an implicit assurance of taking some specific official act.

The court below also referenced older opinions from the Sixth and Ninth Circuits. *See* Appx. A, at 7–8, citing *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994), and *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992). But later decisions of those circuits, in the course of distinguishing non-campaign contributions cases, recognize that the *McCormick* test calls for an "express" promise given in exchange for the donation, thus suggesting that those circuits are not aligned with the Eleventh. See *United States v. Abbey*, 560 F.3d 513, 518 (6th Cir. 2009) (explaining that "outside the campaign context – rather than require an *explicit* quid-pro-quo promise ... the official and the payor need not state the *quid pro quo* in express terms") (cleaned up)); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 937 (9th Cir.

2009) (favorably citing *Ganim*'s express-promise standard, and emphasizing that "express" promises are not required in non-campaign official-right extortion cases).

Siegelman was decided three years after *Ganim*, but unlike the other circuits' leading cases does not cite it. It was decided ten years after *McCormick* but does not grapple with the other circuits' cases that have all found then-Judge Sotomayor's reading of *McCormick* to be more persuasive. The Eleventh Circuit has not disavowed its precedent, nor had any other circuit in the last five years followed it until the appellate decision in petitioner's case. The time has come to resolve this conflict and affirm the proper reading and meaning of *McCormick*.

b. This case offers a clean vehicle for decision of the question.

The present case turns on a precise legal question presented. The trial court held as a matter of law that the jury did not have to find what petitioner argues the *McCormick* case requires a jury to find in order to convict. The Third Circuit agreed the jury did not have to find this fact (an "express" promise) and on that basis ruled the evidence to be sufficient and therefore affirmed. It is undisputed that there is literally no evidence of the critical fact. No material facts are disputed. And every count that supports the ten-year sentence is affected by this issue.[9]

Although there was also substantial evidence of non-campaign contribution payments, recognition of the cited error would require a new trial under this Court's cases concerning appeals from general verdicts that have alternate bases. The governing doctrine regulating the disposition of appeals in this posture was well-explained by the late Third Circuit Chief Judge Edward R. Becker:

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[9] Any sentence imposed for the tax counts alone would be much less.

> When a criminal defendant appeals a conviction in which the prosecution presented more than one theory of guilt and the jury returned a general verdict, we apply the holding of *Griffin v. United States,* 502 U.S. 46 (1991). *Griffin* restated the longstanding rule that if the evidence is insufficient to support a conviction on one alternative theory in a count but sufficient to convict on another alternative theory that was charged to the jury in the same count, then a reviewing court should assume that the jury convicted on the factually sufficient theory and should let the jury verdict stand. *Id.* at 49–50. However, under *Griffin*, if one of two or more alternative theories supporting a count of conviction is either (1) unconstitutional, or (2) legally invalid, then the reviewing court should vacate the jury verdict and remand for a new trial without the invalid or unconstitutional theory. *Id.* at 56 (citing *Stromberg v. California,* 283 U.S. 359, 367–68 (1931) (reversing a conviction where one of the alternative guilt theories was unconstitutional), and *Yates v. United States,* 354 U.S. 298, 312 (1957) (reversing a conviction where one of the possible grounds was legally invalid because it was time-barred)).
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> The rationale for this distinction is that a jury is presumed to be able to distinguish factually sufficient evidence from factually insufficient evidence. That function is central to its role as fact finder. The jury is not presumed, however, to be able to distinguish accurate statements of law from inaccurate statements. *Id.* at 59 .... And *Griffin* made it clear that claims regarding the insufficiency of evidence do not fall into the categories of a legally invalid or an unconstitutional basis for conviction. The Court explained:
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> > ... [T]he term "legal error" means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence.... [W]e are using "legal error" in the latter sense.
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> 502 U.S. at 58–59. ... *Griffin*, in addition to referencing a claim that was time barred as an example of a legally inadequate ground for conviction, also cited the example of a theory of conviction that "fails to come within the statutory definition of a crime." 502 U.S. at 59. Again, this situation presents a strictly legal question – the interpretation of whether the scope of a statutory definition of a crime extends to acts alleged in an indictment.

United States v. Syme, 276 F.3d 131, 144–46 (3d Cir. 2002). For this reason, that petitioner Davis was charged with conspiring with Sheriff Green to commit extortion

not only with campaign contributions but also with other personal benefits in no way muddies the waters for deciding the question presented in this case.

c. The opinion of the court below is incorrect.

The *McCormick* Court believed it had "define[d] … with sufficient clarity" that the political speech considerations at play in the context of campaign contributions require narrowing the "forbidden zone of conduct" to a *quid pro quo* that included "an explicit promise or undertaking by the official" to act as the payor wishes. . "In such situations," Justice White explained, "the *official asserts* that his conduct will be controlled" by that promise or undertaking. The interpretation of this phrase by the court below, following the Eleventh Circuit's outlier view, is utterly implausible. If the "explicit promise" is unexpressed, then it is implied or implicit—the opposite of explicit. It is impossible to imagine Justice White using the word "assert" to describe and underscore what officials do when they make an "explicit" promise if the Court did not mean to exclude cases where no "assertion" was made, as distinct from cases in which a promise may be inferred. A promise that is not "express" falls outside the "forbidden zone" the Court, for important reasons, narrowly defined.

This Court did not abandon – and would not *sub silentio* have abrogated – so central a feature of *McCormick*'s rationale when it decided *Evans* just a year later. *Evans* did not reconsider the question presented in *McCormick*; it simply rejected a defense argument to enforce the "extortion" definition in the Hobbs Act (18 U.S.C. § 1951(b)(2)) by requiring proof of "inducement" (of the payor to make the payment) as an *actus reus* element that would be necessary to convict the public official. *Evans* was written by the author of the *McCormick* dissent, but joined fully by most of the same majority, including Justice White (the author of *McCormick*). It is perhaps unsurprising that the *Evans* does not fully embrace or restate all of *McCormick*'s

language, but it does not overrule, disavow or even undermine it. (If it had, surely Justice White, at least, would have written separately.)

Justice Kennedy's separate concurrence in *Evans* is often quoted[10] as a basis for permitting a *quid pro quo* to be established without proof of any express promise. But in that opinion Justice Kennedy wrote for himself only. And – more important – the one-Justice concurrence made no reference to campaign contributions cases as a special subset subject to its own "narrow" rule, as carefully discussed by Justice White in *McCormick* just a year earlier, in a majority opinion Justice Kennedy had fully joined.[11]

Siegelman's interpretation of the term "explicit," as used by this Court in *McCormick*, was wrong when the Eleventh Circuit decided it in 2011, in the decade since it has grown even shakier. The court below therefore erred in following it. Since *Siegelman*, this Court decided *McDonnell v. United States*, 579 U.S. 550, 136 S.Ct. 2355 (2016), and *Kelly v. United States*, 590 U.S. —, 140 S. Ct. 1565 (2020). Each of these decisions speaks in the strongest terms about the sharply limited federal role in enforcing standards of good government for local officials. *Kelly*, 140 S. Ct. at 1574; *McDonnell*, 136 S. Ct. at 2373. It is not surprising then, that – until the decision of the court below in petitioner's case – no circuit since *McDonnell* had embraced *Siegelman*'s outlier interpretation. Indeed, since *McDonnell* only one circuit opinion has

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[10] "The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it." 504 U.S. at 274.

[11] Indeed, Justice Kennedy contributed the fifth vote for the part of the *Evans* decision that requires that in exchange for the promise of payment, the public official have undertaken to perform "specific official acts." 504 U.S. at 268. It is not enough, under this precise formulation, that the official merely agree to perform to the payor's wishes as occasions may arise.

even cited *Siegelman*: the Third Circuit's decision affirming petitioner's convictions. The reason is clear and simple: What *McCormick* meant by "explicit" is "express," just as Justice Sotomayor explained when writing for the Second Circuit in *Ganim*. Petitioner's case was wrongly decided by the court below, and upon the writ's being granted, after full consideration, should be reversed.

2. This Court should reconsider and overrule its erroneous 1992 decision in *Evans* interpreting "under color of official right" in the Hobbs Act's definition of extortion to mean only "on account of the bribe-recipient's office" rather than "under a false assertion of official entitlement."

In *Evans v. United States*, 504 U.S. 225 (1992), this Court interpreted the Hobbs Act's color-of-official-right provision, 18 U.S.C. § 1951(b)(2),[12] to cover "the rough equivalent of what we would now describe as 'taking a bribe.'" 504 U.S. at 260. The question presented in *Evans* was whether an act of inducement by the public official was an element of such extortion, with the majority holding it was not. In a second holding, a different five-justice majority[13] discussed the scope of § 1951's extortion provision more broadly. The interpretation it reached was based not on an analysis of the text of the statute, but upon approval of a gradual common-law-like development in federal criminal case law during the 1970s. See *McCormick*, 500 U.S. at 277–80 (Scalia, J., concurring) (recounting history of the "local government bribery" application of the Hobbs Act extortion clause).[14] The interpretation embraced

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[12] *See* Statutes Involved, *ante*.

[13] Justice Stevens's majority opinion as to the first holding in *Evans* was joined by Justices White, Blackmun, Souter and O'Connor, but not Justice Kennedy. As to the second holding, the majority includes Justice Kennedy but not Justice O'Connor.

[14] Justice Scalia outlined, but did not opine on the merits of, the argument, which was not embraced by the Question Presented in McCormick's petition even though advanced in his brief. *See* 500 U.S. at 268 n.8 (majority, refusing to address the point because outside the Question Presented).

in *Evans* ran counter to the common law heritage of "extortion" – the actual statutory term employed by Congress in 1946 and thus adopted into the statute when enacting the provision.[15] The *Evans* decision helped launch "a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws – acts of public corruption by state and local officials." *Id.* 290 (Thomas, J. dissenting). It is time to revisit that decision, which runs counter to numerous precepts that are essential to this Court's interpretation of federal criminal laws.

In *Evans*, the defendant was an elected official who had accepted cash payments, one of which was a check to his campaign, in return for favorable official action. 504 U.S. at 257. In deciding whether the public official must have "induced" payment to commit Hobbs Act extortion, the Court "assume[d] that the jury found that [the defendant] accepted the cash knowing that it was intended to ensure" his favorable vote. *Id.* The Court concluded that "his acceptance of the bribe constituted an implicit promise to use his official position to serve the interests of the bribegiver." *Id.* The Court thus held that the public-official defendant could commit extortion by passively accepting bribes – he need not have "induced" or otherwise demanded payment – because "the coercive element [of extortion under color of official right] is provided by the public office itself." *Id.* 266.

Three justices dissented. Writing for himself, Justice Scalia and Chief Justice Rehnquist, Justice Thomas explained that when Congress enacted the Hobbs Act, it adopted "the meaning of common-law extortion" as understood by legally-educated Americans in 1946. *Id.* 278 (Thomas, J., dissenting). And that common-law crime did not include simple bribery. Instead, "[a]t common law it was essential that the money

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[15] The original target of the Hobbs Act was the use of coercive violence and other illegitimate forms of "racketeering" in labor-management disputes. See *United States v. Enmons*, 410 U.S. 396, 407 (1973). It was not an anti-corruption measure.

or property be obtained under color of office, *that is, under the pretense that the officer was entitled thereto by virtue of his office*." *Id.* 279. In other words, the "money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority." *Id.* Nineteenth- and early twentieth-century cases involving state extortion statutes made "plain that the offense was understood to involve not merely a wrongful taking by a public official, but a wrongful taking *under a false pretense of official right*." *Id.* 281–82. When an official takes a bribe, the wrong is to the state, not necessarily to the payor. Because of that, bribery is not automatically punishable as extortion. For extortion, "[p]rivate and public wrong must concur." *Id.*

Five years ago, Justice Breyer recognized that *Evans* "may well have been wrongly decided." *Ocasio v. United States*, 578 U.S. 282, ___, 136 S. Ct. 1423, 1437 (2016) (Breyer, J., concurring). And Justice Thomas has adhered to his position. *Id.* 1437–38 (Thomas, J., dissenting) (reiterating that *Evans* "wrongly equated extortion with bribery"). More recently, Justice Gorsuch (again joined by Justice Thomas) referenced these views and dissented from a cert denial, stating "I would have granted this case to reconsider *Evans* in light of these thoughtful criticisms." *Silver v. United States*, 592 U.S. — (No. 20-60, Jan. 25, 2021). In *Ocasio*, both the majority and the other dissenters noted that the continuing validity of *Evans* was an open question, to be addressed when and if properly raised. 136 S.Ct. at 1434 (majority opinion) ("Petitioner does not ask us to overturn *Evans*, and we have no occasion to do so."); *id.* 1440 n.1 (Sotomayor, J., dissenting, joined by Roberts, C.J.) ("No party asks us to overrule *Evans* in this case and so that question is not considered here.").

In this light, it is time for this Court to grant review of the question. When the question presented is whether to overrule prior precedent, the fact that multiple

Justices have questioned the precedent's correctness has apparently been a significant factor in the grant of certiorari. *See, e.g.*, *Gamble v. United States*, 587 U.S. —, 139 S.Ct. 1960 (2019); *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446 (2015). The Court should do the same here.

As Justice Thomas's research and writing have shown, *Evans* was wrong when it was decided for at least three reasons.

First, the Court's interpretation was divorced from the statute's text. Instead (as had been pointed out in Justice Scalia's *McCormick* concurrence), it embraced an interpretation reached in the circuits by case-law accretion and gradual expansion. Yet that methodology for construing federal criminal statutes had been authoritatively rejected by this Court five years earlier in *McNally v. United States*, 483 U.S. 350 (1987), with little or no deviation since.

The Hobbs Act criminalizes "extortion," which it defines as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Despite the existence of a specific definition, *Evans* said "extortion" also included "the rough equivalent of what we would now describe as 'taking a bribe.'" 504 U.S. at 260. Had Congress intended to cover bribery, however, it easily could and would have said so. *See McCormick*, 500 U.S. at 279–80 (Scalia, J., concurring) ("where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion"). Indeed, other provisions of the U.S. Code explicitly criminalize certain instances of "bribery." *See, e.g.*, 18 U.S.C. § 201 ("Bribery of public officials and witnesses"); 18 U.S.C. § 666 ("Theft or bribery concerning programs receiving Federal funds"). See also *Skilling* v. *United States,* 561 U. S. 358, 412–13 (2010) (incorporating the meaning of "bribery," as defined in

those statutes as of the time of the 1988 enactment of § 1346, into the construction of a statute that used a term ("honest services fraud") found in case law that addressed acts of bribery).

In the Hobbs Act, "under color of official right" appears in a series with (and is thus equated with) "the wrongful use of actual or threatened force, violence, or fear." The *Evans* interpretation eliminates any equivalency to the Congressional emphasis on wrongfulness that the statute invokes in cases of "violence" and "fear," for example, from the extortionist's misuse of office. See *Evans*, 504 U.S. at 287 (Thomas, J., dissenting) (explaining that the majority disregarded "well-established principles of statutory construction"). This is a significant weakening of the required proof, particularly when coupled with the *Evans* majority's rejection of an *actus reus* interpretation of "induced."

Second, *Evans* contravened the common law, which infused the term "extortion" with a particular legal meaning. Extortion at common law was different from bribery. *See* 4 W. Blackstone, COMMENTARIES *139 (1769) (describing the offense of "bribery"); *id.* *141 (describing the offense of "extortion"). Extortion under color of official right required, in particular, that the official have obtained the property "*under the pretense that the officer was entitled thereto by virtue of his office*." *Evans*, 504 U.S. at 279 (Thomas, J., dissenting). But *Evans* eliminated the pretense requirement, leading to the inevitable but surprising proposition that the person extorted, that is, the victim of the extortionist's wrongful behavior, is also guilty. *See Ocasio*, 136 S. Ct. at 1437 (Breyer, J., concurring) ("The present case underscores some of the problems that *Evans* raises."). That is not the statute Congress intended when it enacted the Hobbs Act in 1946, employing the common law term "extortion."

And "the overwhelming weight of authority in 1946 – the [state-level] case law, the treatises, the official commentary of the [New York] Field Code[, from which the Hobbs Act's language was copied], and scholarly commentary – distinguished official extortion from bribery by the existence [of] an element [of] coercion, duress, or inducement. It was this understanding of official extortion that Congress enacted into law through the Hobbs Act in 1946." Dan K. Webb *et al.*, *Limiting Public Corruption Under the Hobbs Act: Will* United States v. Evans *be the Next* McNally*?*, 67 CHI.-KENT L. REV. 29, 45 (1991). See also *United States v. Cerilli*, 603 F.2d 415, 426–37 (3d Cir. 1979) (Aldisert, J., dissenting).

Third, *Evans* contributed mightily to a dramatic undermining of federalism. *Evans*, 504 U.S. at 290 (Thomas, J. dissenting). States and localities have a keen interest in protecting their citizens from bribery of local officials. "Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014). But *Evans* supplants those state and local efforts with a cudgel wielded by federal prosecutors seeking to enforce their own views of good government and of proper campaign fundraising for local elections. This Court has repeatedly rejected such constructions of federal criminal statutes. See *Kelly*, 140 S. Ct. at 1574; *McDonnell*, 136 S. Ct. at 2373; *McNally*, 483 U.S. at 360. If Congress intended such a disruption in the federal/state balance, it surely would have said so much more clearly than by indirect usage of inapt terminology in an anti-violence labor law.

Moreover, using the Hobbs Act to target state and local bribery makes little sense. Violating the Hobbs Act can net the defendant twenty years in prison, as might be expected for a law aimed principally at violent interference with the free flow of interstate commerce. That maximum punishment "is considerably higher than

the penalty Congress authorized for bribery involving federal officials and state officials acting on behalf of the federal government (fifteen years) and twice the penalty Congress provided for state and local officials under the federal program-bribery statute (ten years)." Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 907 (2005). It is doubtful that Congress viewed the worst cases of bribery at the state and local level as much more serious than equivalent instances of bribery at the federal level. But even if that were true, "there is absolutely no reason to believe that Congress would have deemed state and local bribery in state and local matters to be so much worse than state and local bribery in federal programs as to warrant double the punishment." *Id.*

It is time to abandon *Evans* and return the Hobbs Act to its proper sphere. The statutory text, the common law, and principles of federalism all require it.

Beyond the fact that *Evans* was wrongly decided, two additional justifications warrant overruling it, notwithstanding the presumption in favor of *stare decisis*: *Evans* (1) was decided without full briefing and (2) has proven pernicious in practice. *First*, *Evans* decided an issue that had not been presented, "briefed or argued" by the parties. *Evans*, 504 U.S. at 272 (O'Connor, J., concurring in part and concurring in the judgment).[16] This Court is "less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998). As Justice O'Connor explained in *Evans*, the Court "would be far more assured of arriving at the correct result were we to await a case in which the issue had been addressed by the parties." 504 U.S. at 272 (O'Connor, J., concur-

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[16] Ironically, it did so as to an issue which the Court, just a year earlier (in *McCormick*), had declined to address because that issue – the one that petitioner Davis now offers for decision – had not been presented in the Question, even though it was fully briefed.

ring in part and concurring in the judgment). Indeed, determining whether Hobbs Act extortion includes bribery "requires a detailed examination of common law extortion cases, which in turn requires intensive historical research." *Id.*

Second, time has shown that *Evans* produces equally untenable offspring. One such illogical outgrowth of *Evans* was manifested in *Ocasio,* where the Court was forced to recognize an exception to the general conspiracy principle commonly known as "Wharton's rule" – that the minimum number of persons necessary to commit the substantive offense will not suffice to establish a conspiracy to commit that offense. 578 U.S. 282. This Court's experience with *Ocasio* "underscore[d] some of the problems that *Evans* raises." *Id*., 136 S.Ct. at 1437 (Breyer, J., concurring). And the confluence of *Evans* and *Ocasio* now means that "innocent victims of extortion" can be charged with "conspir[ing] with their extorter whenever they agree to pay a bribe." *Id.* 1445 (Sotomayor, J, dissenting).

The problem of mis-defined "extortion" is not a minor or unimportant defect in the realm of federal criminal law. Prosecutors often charge Hobbs Act extortion in corruption cases. In the 25 years following *Evans*, the statute "has served as the lead charge in 1,629 federal prosecutions of state and local official corruption – more than 20 percent of all federal prosecutions of such conduct by state and local officials." Note, *Who Put the* Quo *in* Quid Pro Quo*?: Why Courts Should Apply* McDonnell*'s 'Official Act' Definition Narrowly*, 85 FORDHAM L. REV. 1793, 1799 (2017).

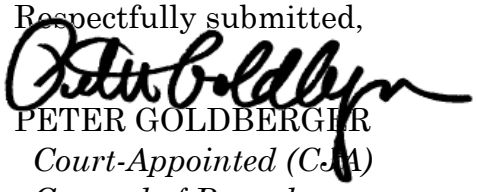
It is time, as Professor Stith dramatically put it, to "cut out" the "tumor" that is *Evans* to avoid "fouling adjacent areas of criminal-law doctrine." Kate Stith, *No Entrenchment: Thomas on the Hobbs Act, the* Ocasio *Mess, and the Vagueness Doctrine*, 127 YALE L.J. FORUM 233, 239 (2017). This case presents a suitable

opportunity to do just that. The Court should therefore grant the instant petition for a writ of certiorari and overturn *Evans*.

CONCLUSION

For the foregoing reasons, petitioner James Davis prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming his convictions.

Respectfully submitted,



PETER GOLDBERGER
Court-Appointed (CJA) Counsel of Record
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200
peter.goldberger@verizon.net

Attorneys for Petitioner

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