No. 21-5081

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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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PETITIONER'S REPLY

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Agreeing with one other Circuit, but rejecting the views of a half dozen more, the court below held that the evidence of *quid pro quo* was sufficient in this Hobbs Act public official extortion case (18 U.S.C. § 1951(a)), despite the absence of any proof of an express agreement by the Sheriff to exchange an official act for petitioner's campaign contributions. Moreover, the affirmance of petitioner's convictions was dependent on an interpretation of "extortion under color of official right," as used in the Hobbs Act, that was first developed in a common-law-style process of gradually expanded circuit-level precedent in the 1970s, contrary to this Court's established rules for the construction and application of federal criminal statutes.

The Brief in Opposition denies neither of these propositions, which underlie the petition's two Questions Presented. Yet the government urges rejection of the petition. Its reasons for suggesting denial of the petition are unpersuasive, and depend upon ignoring the most important aspects of petitioner's arguments. For the reasons stated, the petition should be granted.

1. **The Brief in Opposition makes no mention of the constitutional avoidance rationale that underpins this Court's strict construction of the Hobbs Act and precise holding in *McCormick*, and thus defends a reading of that opinion that cannot be squared with its reasoning. On this basis, the BIO wishes away an entrenched split, where the majority of Circuits have rejected such attempts to negate the central feature this Court's *McCormick* decision.**

This Court's construction of "extortion under color of official right" under the Hobbs Act, 18 U.S.C. § 1951(a), was announced in consecutive Terms in *McCormick v. United States*, 500 U.S. 257 (1991), and *Evans v. United States*, 504

U.S. 225 (1992). As the petition explicates in detail, these two opinions cannot be fully reconciled unless *McCormick* is understood as addressing a particular subset of such cases – those in which the "thing of value" given or promised to the public official in the required *quid pro quo* exchange takes the form of a campaign contribution. In such cases, the *McCormick* majority explained, the promise of official action by the public official must be not only "explicit" (that is, unambiguously clear) but also "express" (that is, directly articulated). Construed otherwise, the petition explains (Pet. 8–10), this Court was concerned that the statute would run afoul of First Amendment-based limiting principles for the construction of federal criminal laws. Justice White's opinion for the majority emphasizes this aspect. 500 U.S. at 272 (quoted in full, Pet. 9). This was no mere dictum; the point is essential to explain the meaning and limits of the holding that a *quid pro quo* is required to prove the offense.

The respondent asserts that the "pivotal issue in *McCormick*" was "not whether [a] *quid pro quo* had to be express rather than implied," BIO 11, but that is not really so. The issue in *McCormick* was not just "whether the jury was required to find a *quid pro quo* at all," *id*., but also what that requirement entails in the context of an elected official whose supporters have a First Amendment right to make campaign contributions and every reason to expect that the candidate will make promises to act in keeping with their common policy preferences. Justice White obviously chose his words carefully in addressing this point for the majority, and believed the Court had spoken "with sufficient clarity." 500 U.S. at 273. But a minority of Circuits, including the court below, have instead interpreted *McCormick* so as to negate, for all practical purposes, the essential limitation that ensures the constitutionality of the statutory construction this Court adopted. The split cannot be allowed to stand.

The decision by this Court the next Term in *Evans* made no further mention of this aspect of *McCormick*'s holding, but cannot be understood to have overruled the previous year's decision. The respondent's contention that "*Evans*, in contrast, did present the question of what an 'instruction' must say to 'satisf[y] the *quid pro quo* requirement of *McCormick*," BIO 11, is misleading at best. Even though one of the benefits paid to the public official there also took the form of a campaign contribution, *see* 504 U.S. at 257–58, *Evans* did not further address the key distinction between "express" and "implied," but rather only a question about whether an act of "inducement" by the official of the improper payment must be shown to establish the required *quid pro quo*. The majority rejected petitioner Evans' argument for this further limitation on the Hobbs Act. The government now emphasizes the policy point made in Justice Kennedy's solo *Evans* concurrence (BIO 11, *citing* 504 U.S. at 274). But that concern – relevant to but not determinative of the Question Presented here – was not endorsed by the *Evans* majority, and was not directly pertinent to the only question actually presented in that case. The Kennedy concurrence did not explain how allowing jury's to convict for "extortion" in the form of bribery, where the *quid pro quo* was only implicit or implied, could be reconciled with the constitutional avoidance/ *strictissimi juris* rationale of the *McCormick* majority opinion.

The truth is, as then-Judge Sotomayor explained for the Second Circuit in *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) – and the great majority of the Circuits have since recognized and followed – that the Court's articulations of its holdings in *McCormick* and *Evans* (even if not the holdings themselves) are in tension with one another. They can only be reconciled by acknowledging the requirement, however inconvenient for public corruption prosecutors, that the *quid pro quo* must be "express" in political contribution cases. This is not a

requirement that the corrupt agreement have been reduced to writing, *cf.* BIO 12 ("verbally spelled out"), or reached in the presence of an uninvolved witness, *cf.* BIO 11, only that it be direct, unambiguous and clear as a shared understanding of payor and payee. The defendant-petitioner's own requested jury instruction recognized this flexibility (*see* BIO 15), but that reasonable position was not a waiver of the issue now presented. He never conceded the *quid pro quo* could be other than "express," just that the government could go about proving it was "express" by any sort of admissible evidence that might persuade a jury of that essential fact beyond a reasonable doubt.

What a court may not do under *McCormick*, however, is what the court below did, that is, uphold a conviction that the jury may have based on campaign contributions without evidence (of some sort) sufficient to establish an express *quid pro quo*. Anything less allows the statute to be applied in a manner that fails to give *strictissimi juris* protection to First Amendment rights, as this Court required and explained in *McCormick*. The respondent never so much as mentions the constitutional foundation for this rule, treating it instead solely as a question of efficiency in prosecutions. BIO 11–12. The great majority of circuits, on the other hand, following Justice Sotomayor's lead, have not missed this critical point. The Constitution was not designed to facilitate criminal prosecutions but rather to protect the exercise of the people's rights from governmental restriction and punishment.

That the issue arises in the present case as a matter of evidentiary sufficiency rather than as a challenge to jury instructions in no way makes the present case "a poor vehicle for addressing it." BIO 15. This Court has long recognized that it can authoritatively explain the elements of a federal criminal offense under either framework. See, *e.g.*, *Clyatt v. United States*, 197 U.S. 207,

220–21 (1905); *Wiborg v. United States*, 163 U.S. 632, 658–60 (1896) (construing elements of criminal offenses and then, on that basis, reversing for insufficient evidence to prove those requirements, on plain error review). The difference is that to prevail on such an issue through an insufficiency approach a defendant-appellant must establish that no reasonable jury could have found the element, properly defined, from evidence in the record. In a challenge to an instruction, on the other hand, the defendant-appellant need only show that a properly instructed jury might have ruled in their favor. The respondent has no valid complaint that the petitioner here has elected the more demanding approach. *Cf.* BIO 15–16.

Where, as here, the jury instructions allowed the jury to convict based either on campaign contributions or on other "benefits" provided to the Sheriff, and the instruction was wrong on one of those theories, then evidentiary insufficiency to prove the erroneously explained theory requires reversal of the general verdict. *Griffin v. United States,* 502 U.S. 46, 56 (1991); *Yates v. United States,* 354 U.S. 298, 312 (1957); *see* Pet. 14. The respondent does not dispute that proposition. And notably, the government points to nothing in the record from which a jury *could* have found an express *quid pro quo*, if petitioner is right on the merits.

The respondent's effort to justify denying the petition falls short. To the contrary, for the reasons elaborated by petitioner, the Court should grant the petition in this case to explicate and reinforce the critical holding of *McCormick* that only an "express" *quid pro quo* could justify an "official right" extortion conviction based on the payment and receipt of campaign contributions.

2. This is an appropriate vehicle for the Court to overrule its 1992 decision in *Evans*, so as to correct the Court's misinterpretation in that case, since recognized by several Justices, of the scope of "extortion under color of official right" as used in the Hobbs Act.

Justice Scalia concurred in the *McCormick* decision "given the assumption on which this case was briefed and argued," 500 U.S. 257, 276 (1991), but pointed out that the entire unexplored premise that "extortion under color of official right," as penalized in the Hobbs Act, could be equated with bribery appeared to be wrong as a matter of proper federal statutory construction. *Id*. 276–80. He noted that a scholarly former Chief Judge of the Third Circuit had disputed the equating of extortion with bribery as early as 1979. *Id*. 278, citing *United States v. Cerilli,* 603 F.2d 415, 426–37 (Aldisert, J., dissenting). The next year, Justice Thomas, joined by Justice Scalia and Chief Justice Rehnquist, endorsed and elaborated Judge Aldisert's analysis. *Evans v. United States*, 504 U.S. 225, 278–97 (1992) (dissent). Justice Kennedy concurred in the *Evans* judgment, joining *only* Part III of Justice Stevens' majority opinion (which responded to and disagreed with Justice Thomas's dissent). 504 U.S. at 273. Justice O'Connor expressly declined to join either view, as the question (although briefed) was not within the Question Presented in the petition as granted by this Court. *Id*. 272. That was the same position the majority had taken in *McCormick*. 500 U.S. at 268 n.8. Thus, in the end, the construction of § 1951(a) challenged here was adopted in *Evans* by a 5–3 margin.

At common law, as well explained by Justice Thomas, bribery was a public wrong, involving public officials accepting payments for the exercise of their power of office to which were not entitled. Extortion, on the other hand, was a private wrong, involving the use of coercion by one person to obtain property from another, including the use of a pretense of authority by a public official to obtain

property from a private person. Yet the majority in *Evans* purported to show that "extortion," as that term was used by legally educated persons in the United States as of 1946 (the year the term was incorporated into the Hobbs Act), was merely "the rough equivalent of what we would now describe as 'taking a bribe,'" 504 U.S. at 260. Justice Thomas has adhered to his contrary position, see *Ocasio v. United States*, 578 U.S. 282, ___, 136 S. Ct. 1423, 1437–38 (2016) (dissent), and Justice Breyer has conceded that he may well be right. *Id.* 1437 (Breyer, J., concurring). Justice Gorsuch has also joined Justice Thomas to express a willingness to reconsider *Evans* in light of its doubtful correctness. *Silver v. United States*, 592 U.S. —, 141 S.Ct. 656 (Jan. 25, 2021) (dissenting from denial of certiorari). As the majority recognized in *Ocasio*, the time to reconsider *Evans* would only be when a petitioner squarely asks. 136 S.Ct. at 1434. *Silver* might have been that occasion, but this Court demurred. The present case offers another opportunity.

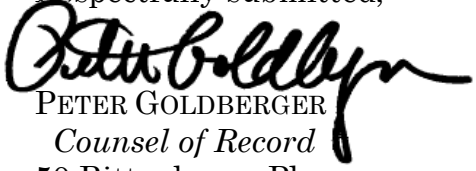
The respondent's first argument against granting the writ in this case is that it takes special justification for this Court to reconsider and overrule one of its precedents. BIO 17–18. No doubt, that is true. But there are times when it is appropriate, and this is one of them, as Justices Gorsuch, Breyer and Thomas appear to have recognized (like the late Justices Scalia and Rehnquist before them). Nor does the respondent dispute that *Evans*, after almost 30 years, continues to come under severe academic criticism. *See* Pet. 22, 24. The government's only other argument, in effect, is that *Evans* gave adequate consideration to the arguments against its conclusion, and was correctly decided. BIO 18. It points to nothing suggesting that petitioner's case is not a suitable vehicle to undertake that reconsideration, if the Court is ready.

The Brief in Opposition fails to muster any new reasons for the Court to ponder in deciding whether to consider overruling the widely contested precedent set in *Evans*. Nor does it offer any reasons why, if the Court is ready, this is not the right case. The Court should grant the petition.

CONCLUSION

The petition of James Davis for a writ of certiorari should be granted.

Respectfully submitted,



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