No. 24-142

IN THE

# Supreme Court of the United States

BRIAN BENJAMIN,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

**On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONER


Aly Cox
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036

Barry H. Berke
*Counsel of Record*
Dani R. James
Darren LaVerne
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-3860
bberke@gibsondunn.com

*Counsel for Petitioner*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes**



**Other Authorities**

## REPLY BRIEF FOR PETITIONER

## INTRODUCTION

The government's response downplays the disagreement and confusion in the circuit courts concerning the *quid pro quo* standard that applies when an alleged bribe consists solely of campaign contributions. Under *McCormick v. United States*, 500 U.S. 257, 273 (1991), only an "explicit" *quid pro quo* suffices to protect the First Amendment and ensure that lawful political speech is not chilled, and democracy not subverted, by government overreach. Yet the Second Circuit erroneously interpreted *Evans v. United States*, 504 U.S. 255 (1992), to modify the *McCormick* rule and held that an "explicit" *quid pro quo* in a pure campaign-contributions case can be entirely "implicit." Pet App. 9a, 17a. In so doing, the Court of Appeals recognized that the circuits disagree regarding *Evans*' impact on *McCormick*. Pet. App. 20a & nn.3-4.

The government's response highlights precisely why it is so important that this Court grant certiorari and bring clarity to the meaning of *McCormick*. The government disavows its assertion to the Court last term in *Snyder v. United States* that, in order to protect the First Amendment rights of candidates and constituents, *McCormick* requires an "express" *quid pro quo*. Now, ignoring this Court's repeated admonition that the government must be careful not to chill lawful political activity, the government claims that *McCormick* and the First Amendment require nothing beyond what applies in the run-of-the-mill bribery case.

The Court should not delay in hearing this case. It presents an important legal question on which the

lower courts are divided. The interlocutory posture is no impediment, as further factual development is not needed and the indictment of an elected official brings unique consequences, including loss of political office, regardless of the result at trial. Indeed, it is important that the Court clarify the relevant standard at the indictment stage so that the government cannot abuse its power to unseat elected officials or otherwise influence the political process. And this case, alleging bribery based solely on campaign contributions and a grant to a non-profit benefiting schoolchildren, presents the ideal opportunity to do so.

## ARGUMENT

### I. THE LAW REGARDING *MCCORMICK* IS DANGEROUSLY MUDDLED.

A. Last term, in *Snyder*, the government assured this Court at oral argument that, under *McCormick*, "the First Amendment" requires that there "be an *express* quid pro quo" for a "bona fide campaign contribution" to violate the law. Transcript of Oral Argument at 93, *Snyder v. United States*, 144 S. Ct. 1947 (2024) (No. 23-108) (emphasis added). Now, the government argues (at 7)—without addressing its statement in *Snyder* or numerous others where it took a similar position, *see* Pet. 22—that it is error to say the *quid pro quo* must be express. The government's mixed signals and the conflicting statements in the case law leave elected officials and their constituents to guess whether their conduct will subject them to prosecution. *See* Amicus Br. of Due Process Institute at 6-13, 15-16. This "is not how federal criminal law works." *Snyder*, 144 S. Ct. at 1958.

The government's position now (at 10) is that a "'clear and unambiguous'" *quid pro quo* can be "inferred" from the circumstances. In other words, "explicit" can mean "implicit." The absurdity of this position is laid bare by this case, where the government alleges bribery based on the timing of campaign contributions, a grant to a non-profit, and the vague statement "let me see what I can do," which Mr. Benjamin is alleged to have made months before he even knew the grant would be available. If this series of events can constitute a "clear and unambiguous," explicit *quid pro quo*, *McCormick* truly is a dead letter and the Court's First Amendment jurisprudence in this context, cited at length in the petition, Pet. 13-18, has been dealt a serious blow.

The government's position guts the *McCormick* standard and eliminates any distinction between campaign-contribution and non-campaign contribution cases. The government previously conceded that *McCormick* required greater specificity when an alleged bribe consists solely of campaign contributions (arguing, for example, that the "as opportunities arise" theory of bribery did not apply in campaign-contribution cases, Pet. App. 51a), but it has now dropped even this distinction. The government (at 9) now argues that "[p]etitioner errs in contending … that courts must apply a 'heightened standard in campaign-contribution cases.'" Its asserted basis for this statement is *Evans*, but *Evans* (decided just one year after *McCormick*, and heard by eight of the same justices), addressed a different issue (whether an affirmative act of inducement is an element of extortion), did not state that it was modifying or clarifying, much less overruling *McCormick*, and involved a cash payment

in addition to a campaign contribution. Pet. 19-22, 24-26. The government (at 9) also cites *McDonnell v. United States* for the proposition that a *quid pro quo* agreement "need not be explicit." 579 U.S. 550, 572 (2016). But *McDonnell* was not a campaign-contribution case at all—it involved personal loans and gifts, and concerned the meaning of an "official act." *Id.* at 555-56.

Contrary to what the government says (at 9), Petitioner does not argue that under *McCormick*, the *quid pro quo* must be "verbally spelled out." Nor is this what the district court found in dismissing the bribery counts. The district court held that to be "explicit" under *McCormick*, (i) the link between the official act and the payment or benefit "*must be shown by something more than mere implication*," and (ii) "there must be a contemporaneous mutual understanding that a specific *quid* and a specific *quo* are conditioned upon each other." Pet. App. 55a-56a (emphasis added). The court did not find that the *quid pro quo* must be "expressly stated" in the sense that the government now suggests.

B. The government fails to explain away the confusion in the circuit courts—acknowledged by both the Court of Appeals and district court below (Pet. App. 20a & nn.3-4, 59a)—concerning the meaning of "explicit" and the impact of *Evans* on *McCormick*. The government (at 11-12) dismisses the decisions of the First, Fourth, Sixth, Eighth, and Ninth Circuits cited in our petition because the courts in these cases "considered the *quid pro quo* arrangements outside the campaign-contribution context." But in each of these cases, the courts needed to make a threshold decision

as to what standard applied: what they described as the stricter, explicit *quid pro quo* standard set forth under *McCormick*, or the ordinary *quid pro quo* standard applicable in every bribery case. And rather than simply finding that the latter applies in every case (as the Second Circuit held and the government urges here), these courts determined that that the stricter standard applies *only* in campaign-contribution cases. Pet. 20-21 (citing *United States v. McDonough*, 727 F.3d 143, 155 n.4 (1st Cir. 2013) ("[W]e have held that *McCormick* applies only in the context of campaign contributions."); *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993) ("Or, if the jury finds the payment to be a campaign contribution, then, under *McCormick*, it must find that the 'payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act.'"); *United States v. Abbey*, 560 F.3d 513, 517-18 (6th Cir. 2009), *abrogated on other grounds by Snyder v. United States*, 144 S. Ct. 1947 (2024) ("*Evans* modified the [*quid pro quo*] standard in non-campaign contribution cases."); *United States v. Chastain*, 979 F.3d 586, 591 (8th Cir. 2020) ("Outside of the campaign contribution context, an explicit quid pro quo is not required."); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 937 (9th Cir. 2009), *abrogated on other grounds by Skilling v. United States*, 561 U.S. 358 (2010) ("[T]o convict a public official of Hobbs Act extortion for receipt of property *other than* campaign contributions, '[t]he official and the payor need not state the *quid pro quo* in express terms' …." (emphasis added))).

It is not true (at 11) that other decisions by certain of these courts reached contrary conclusions in pure

campaign-contribution cases. *United States v. Correia*, 55 F.4th 12, 21-25 (1st Cir. 2022), involved personal cash payments, among other bribes, and *United States v. Terry*, 707 F.3d 607, 615 (6th Cir. 2013), involved "financial [and] staff support" in addition to campaign contributions. The other case cited by the government, *United States v. Carpenter*, was decided seventeen years prior to *Kincaid-Chauncey*, and in fact held that under *McCormick*, the *quid pro quo* must be "clear and unambiguous, leaving no uncertainty about the terms of the bargain." 961 F.2d 824, 827 (9th Cir. 1992). That is a far cry from what is alleged in this case.

In any event, the government's parsing is cold comfort to elected officials and their constituents, who look to the courts for guidance on what is and is not permissible under the law. No person surveying the many decisions across the country purporting to apply *McCormick*'s rule could discern a clear, consistent standard as to when campaign contributions cross the line into bribes. *See* Amicus Br. of Current and Former New York Elected Government Officials at 18-22. After careful review, the district court below concluded that "there is confusion among the courts about whether the *McCormick* standard applies to campaign-contribution cases and about what its 'explicit' standard means." Pet. App. 59a. And the government's own failure to consistently interpret *McCormick* is further proof of this confusion.

## II. THE COURT SHOULD HEAR THIS CASE NOW GIVEN THE IMPORTANCE OF THE ISSUE AND THE IMPACT OF AN INDICTMENT ON THE POLITICAL PROCESS.

The indictment in this case puts the concerns raised in *McCormick* in sharpest relief, as none before it has: a sitting public official has been charged with bribery for allegedly accepting campaign contributions from a constituent in return for providing legitimate constituent services in the form of a grant to a nonprofit serving the educational needs of his district. He is charged in an indictment that does not allege an explicit *quid pro quo*, but rather depends on inferences from the timing and sequence of events. The case is thus the ideal vehicle for this Court to take up the *McCormick* question and resolve the confusion in the circuit courts.

A. The government argues (at 5) that the interlocutory posture of this petition is reason to deny it. But as evidenced by this Court's recent certiorari grant in *Fischer*, interlocutory appeals presenting clear and important questions of law are ripe for this Court's intervention. In *Fischer v. United States*, petitioner sought certiorari in a criminal case after prevailing on a motion to dismiss one count of the indictment in the district court. 144 S. Ct. 2176, 2182 (2024). As here, that decision was reversed in the Court of Appeals, and it came to this Court on an interlocutory basis. There is thus clear and very recent precedent for granting the writ in this context. *Accord Bates v. United States*, 522 U.S. 23, 28-29 (1997) (same).

Significantly, the government does not assert that further factual development is required to answer the

question presented. Nor does it contest that the question is one of great significance to our political process in an area of law where the Court has previously cautioned against government overreach. Given that the mere risk of indictment can have a chilling effect on political speech, and the fact of indictment can end a political career, it is entirely appropriate that the relevant law be clarified at the indictment stage of this case.

B. The government argues (at 6) that this case is a poor vehicle because Mr. Benjamin challenges the sufficiency of the indictment, and the indictment is sufficient here because it tracks the language of the statute. But, as the district court held, the indictment is insufficient because it fails to allege an explicit *quid pro quo*, which is an implied element of the charged statutes, not set forth in the statutory text. Pet. App. 60a. An "element" is what "the jury must find beyond a reasonable doubt to convict the defendant." *Mathis v. United States*, 579 U.S. 500, 504 (2016). And although it proposes a different definition of "explicit," the government does not contest that an explicit *quid pro quo* is an element of the charged bribery offenses that must be alleged in the indictment and proven at trial. The question presented is what does "explicit" mean, and answering that question is necessary to determining whether the government met that standard in its indictment. It is not, as the government suggests (at 7), one concerning matters of evidentiary proof or the adequacy of circumstantial evidence.

C. Finally, the government argues (at 5) that this Court has "repeatedly" denied certiorari in other cases presenting the same issue here, citing petitions from the Third, Sixth, Seventh, and Eleventh Circuits. Of

course, the frequency with which the question of *McCormick*'s meaning has arisen suggests the need for clarity and resolution, not further development in the courts below. And, in any event, none of the cases cited by the government presented the *McCormick* issue as sharply as it is posed here.

For example, *Davis*, *Blagojevich*, and *Terry* each involved alleged bribes consisting of personal benefits, in addition to campaign contributions. *United States v. Davis*, 841 F. App'x 375, 377 (3d Cir. 2021) (defendant bribed a public official by hiring his wife to work at one of his companies and buying the official a home to live in rent-free); *United States v. Blagojevich*, 794 F.3d 729, 733 (7th Cir. 2015) (defendant governor sought $10 million donation and $1.5 million "campaign contribution" despite having decided not to run for another term and the "jury was entitled to conclude that the money was for his personal benefit"); *Terry*, 707 F.3d at 610, 615 (defendant judge received "financial, campaign and staff support" in addition to campaign contributions).

Moreover, *Siegelman, Scrushy*, and *Allinson* alleged corrupt agreements based on far more than vague statements or temporal proximity, clearly distinguishing the charged conduct from what has been alleged here. In *Siegelman* and *Scrushy,* the governor of Alabama told a lobbyist that if Scrushy, a healthcare executive, wanted a seat on the state board with authority over his business, he would need to "'do' at least $500,000 in order to 'make it right' with the Siegelman campaign" after Scrushy had previously supported Siegelman's opponent. *United States v. Siegelman*, 640 F.3d 1159, 1165-66 (11th Cir. 2011). After Scrushy coordinated a $250,000 donation, Siegelman stated that Scrushy was "halfway there."

*Id.* at 1166-67. Similarly, *Allinson* involved recorded conversations between Allinson and the mayor's staff whereby Allinson's law firm would receive a contract for services in exchange for donations to the mayor's campaign. *United States v. Allinson*, 27 F.4th 913, 917-19 (3d Cir. 2022). In one such call, Allinson complained that because the mayor had diverted a legal-services contract away from his firm, Allinson was unable to "rally [his] troops with their checks." *Id.* at 917. He lamented that his firm had been "unbelievably supportive in the past and now, you know, the work's going everywhere … but to our shop." *Id.* And on another, Allinson advised the mayor's consultants of "sore feelings" at the firm and stated that a previously discussed contract would "get the checkbooks back out." *Id.* at 918.

## III. IN THE ALTERNATIVE, THE COURT SHOULD VACATE AND REMAND IN LIGHT OF *SNYDER*.

This Court's recent decision in *Snyder* is directly relevant to this case, and at a minimum warrants vacatur and remand. *Snyder* held that "a state or local official does not violate § 666 if the official has taken the official act before any reward is agreed to, much less given." 144 S. Ct. at 1959. The government (at 12-13) mischaracterizes the indictment here, claiming that it "alleges that petitioner and Migdol ['CC-1' in the indictment] agreed beforehand to exchange campaign contributions for a state grant." This is demonstrably false: the indictment alleges that Mr. Benjamin did not become aware that funds for a state grant (the alleged *quo*) would be available until nearly three months after the alleged March 8, 2019 meeting where Mr. Benjamin is alleged to have spoken with Migdol about contributions (the alleged *quid*). Pet. App. 82a-84a. If Mr. Benjamin was not aware of the

grant, he of course could not have promised to procure it in return for campaign contributions. The indictment accordingly alleges no basis to conclude that such an agreement was struck before Mr. Benjamin took the alleged official action of obtaining the grant. This is precisely what the district court concluded as an alternative basis for dismissing the indictment. Pet. App. 66a-67a.

The district court did not conclude, as the government claims (at 13), that the indictment was insufficient because "the state grant 'had not yet been disbursed' when petitioner accepted Migdol's campaign contributions." Rather, the district court found the indictment insufficient because it did not allege, prior to Mr. Benjamin procuring the grant, any "explicit promise that Benjamin would obtain the grant money only if Migdol would later pay him campaign contributions." Pet. App. 66a. The government says (at 13) that "[b]ribery consists of *agreeing* to exchange an official act for a thing of value; the official need not actually perform the act." (Emphasis in original). The district court was under no misunderstanding on this point: it made clear that its alternative ground for dismissal was based on the rule that "the explicit *agreement* must precede the official conduct." Pet. App. 66a (emphasis added).

Accordingly, the government's assertion (at 12) that there is "[n]o sound basis" for vacatur and remand is wrong. Moreover, denying the petition so that the issue can be raised upon remand to the district court (as the government proposes (at 13)) would simply prolong these proceedings at the expense of Mr. Benjamin, who will remain under a cloud until

the bribery charges are dismissed, and that of countless other public officials and candidates for office, who deserve clear rules in this area of the law without further delay.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Aly Cox
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036

Barry H. Berke
*Counsel of Record*
Dani R. James
Darren LaVerne
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-3860
bberke@gibsondunn.com

*Counsel for Petitioner*

November 25, 2024