No. 21-605

IN THE

# Supreme Court of the United States

DAVID LYNN ROBERSON,

*Petitioner*,

v.

UNITED STATES,

*Respondent*.

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

## REPLY TO BRIEF IN OPPOSITION


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Reading the Government's opposition, one would have no idea that David Roberson is now languishing in federal prison for the "crime" of hiring a part-time state legislator to mobilize his community against the federal EPA's "environmental justice" campaign. This Court's precedents in *McCormick v. United States*, 500 U.S. 257 (1991), and *McDonnell v. United States*, 136 S. Ct. 2355 (2016), should have stopped that injustice. But the Eleventh Circuit panel arbitrarily limited both holdings, turning every part-time state or local official who engages in public-relations, lobbying, or advocacy work into an exposed target. And the Government's stunningly audacious response—maintaining that *McCormick* means nothing, and juries need not even be *told* about *McDonnell*'s basic dichotomy between lawful and unlawful conduct—only confirms that this Court's intervention is again necessary to ensure the clarity of the law in this highly sensitive arena.

## I. THE COURT SHOULD GRANT REVIEW TO CLARIFY AND ENFORCE *MCCORMICK*.

*McCormick*'s requirement of an "explicit" *quid pro quo* in cases involving campaign contributions is all that prevents federal prosecutors from indicting every official who takes action to benefit a donor. Without that heightened standard, First Amendment activity would be severely chilled and democratic engagement would wither. Yet the panel below narrowed that heightened standard to electoral campaign donations, excluding other protected expenditures like the issue advocacy here. That indefensible limitation puts in legal jeopardy scores of part-time state officials who earn a living from private advocacy work. It warrants this Court's review.

**A.** The Government does not defend the Eleventh Circuit's rationale for limiting *McCormick*. The panel reasoned that "campaign donations" implicate "First Amendment concerns" that are "not at issue" in the context of "community grassroots organization of a political nature." Pet.App.21a-22a. As Roberson has explained, that is backwards. Issue advocacy garners *more* constitutional protection than donations to an electoral campaign. *See* Pet. 17-18. And none of the panel's other, arbitrary factual distinctions makes any common or constitutional sense either. Pet. 18.

Ignoring everything the panel said, the Government denies that *McCormick* actually adopted an "explicit" requirement beyond the ordinary bribery standard. BIO.11-12. The Government apparently believes that prosecutors *can* pursue any official who takes action that benefits a campaign donor, simply by asking the jury to draw an inference of corruption. Contradicting itself, it then argues that any special *McCormick* rule had nothing to do with the Constitution and therefore can be limited to campaign donations. BIO.12.

These are remarkable positions that underscore the need for this Court to clarify the meaning and scope of *McCormick*. The Government denies that the decision below conflicts with authority from other circuits, but the Government's understanding of *McCormick* runs counter to decades of lower-court precedent. *See, e.g.*, *United States v. Ring*, 706 F.3d 460, 465-66 (D.C. Cir. 2013) (accepting that *McCormick* requires "an explicit *quid pro quo* agreement" for campaign contributions, and declining to extend that "higher bar" to gifts that implicate "First Amendment speech ... rights" in only "de minimis" way); *United States v. Siegelman*, 640 F.3d 1159, 1169-71 (11th Cir. 2011) (explaining that

*McCormick* "require[s] more for conviction" when "the First Amendment's core values" are impacted, and so mere inference from "close-in-time relationship ... will not suffice"); *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (to avoid "making commonly accepted political behavior criminal," *McCormick* holds that "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"); *United States v. Donagher*, 520 F. Supp. 3d 1034, 1043 (N.D. Ill. 2021) ("*McCormick* requires the government to allege an explicit *quid pro quo* when charging a defendant under § 666(a)(2) for providing campaign contributions"); *United States v. Menendez*, 291 F. Supp. 3d 606, 613, 632 (D.N.J. 2018) (noting that *McCormick* requires the prosecution to "prove an explicit *quid pro quo*" due to "First Amendment concerns," and refusing to permit inference of explicit *quid pro quo* from "concealment" because that itself "raises significant First Amendment concerns"); *United States v. McGregor*, 879 F. Supp. 2d 1308, 1312 (M.D. Ala. 2012) ("Because campaign contributions implicate significant First Amendment rights, courts have fashioned heightened standards of proof to ensure that protected political activity is not criminalized or unduly chilled.").

If these courts are right about *McCormick*'s import and constitutional foundation, then there is no basis for the artificial limits imposed below. And if instead the Government is correct and lower courts have been misconstruing *McCormick* since it was decided, that is hardly a reason to *deny* review. Either way, this is an important and recurring legal issue that deserves the Court's consideration.

**B.** Alternatively, the Government argues that this case is a poor vehicle to elucidate *McCormick*. BIO.15-16. Neither of its two reasons withstands scrutiny.

*First*, the Government says the application of the heightened *McCormick* standard to issue advocacy is not presented here, because it was "reasonable for the jury to have found" that the payments from Balch were not "genuinely meant to fund a protected advocacy campaign." BIO.15. But that is obviously circular. The whole point of *McCormick* is to impose a "higher bar," *Ring*, 706 F.3d at 466, before a jury can find that expenditures presumptively protected under the First Amendment were *really* bribes. There was no dispute at trial that Robinson's "grassroots organization of a political nature" had conducted a broad "community outreach campaign" opposing the EPA's agenda. Pet.App.5a n.4, 22a. The jury was asked to determine whether the contract to engage in that issue advocacy functioned as a bribe. And the dispute over the scope of *McCormick* concerns the *standard* governing that jury determination. Since the jury was told that it did not need to find an "explicit" agreement (BIO.5-6), the Government's argument from the jury's verdict wrongly assumes its own conclusion.

*Second*, the Government suggests that any error in the jury instruction was "harmless" in light of Oliver Robinson's testimony. BIO.15-16. But the panel did not treat harmlessness as an alternative basis to affirm, and the Government forfeited that argument in the district court. *See* Doc.269 at 35-36. For good reason. Robinson's testimony was discredited by his admitted perjuries on 20 tax returns (Tr. 1985-88), and his contradictions at trial about whether he did anything he "would not have done" without the issue-

advocacy contract (Tr. 2080-82). Nor could Robinson identify, at trial, when any corrupt deal was reached or explain its terms. Tr. 2011-14. And his testimony confirmed that Defendants just wanted him "to talk to neighborhood presidents, local politicians, state politicians, church leaders—anybody that would be in favor of opposing the EPA." Tr. 1692. That recounts a lawful advocacy campaign, not an illicit bribery conspiracy—and certainly not an "explicit" trade for official action. At minimum, a properly instructed jury undoubtedly could have acquitted on this record.

* * *

This case squarely presents the question whether *McCormick*'s heightened standard applies to all First Amendment expenditures. And the facts here vividly illustrate why the answer must be yes, with the lower courts' contrary approach resulting in imprisonment of an innocent man for daring to fight back against federal regulatory overreach. Nor will he be the last, if the panel's decision is permitted to stand.

## II. THE COURT SHOULD GRANT REVIEW TO CLARIFY AND ENFORCE *MCDONNELL*.

This Court's other important constraint on federal bribery prosecutions is *McDonnell*, which ensures that public officials cannot be indicted over routine political favors or constituent services. When an official does not himself exercise sovereign power, he takes "official action" only by using his office to "advise" or "pressure" *other* officials to do so. 136 S. Ct. at 2370-72. But that does not mean that merely "expressing support" for an action crosses the line; this Court made clear just the opposite. *Id.* at 2371.

In the decision below, however, the panel reasoned that the jury did not need to be told the latter rule—it was enough to explain what was *unlawful* without also specifying what was *lawful*. That holding, which will affect every bribery case in the Eleventh Circuit going forward, eviscerates *McDonnell* and conflicts with rulings from two other Circuits. It also threatens to revive the constitutional overbreadth concerns that *McDonnell* sought to assuage. On this issue too, the Court's attention is warranted.

**A.** The Government argues that the panel's decision does not merit review because the jury instructions present only a "factbound, case-specific dispute" over whether particular language "adequately covered the issue." BIO.18-19. That undersells the matter.

This is not a dispute over particular language in a jury charge. It is a dispute over whether this Court's statement of law—that "[s]imply expressing support" is not official action in the absence of official advice or pressure, 136 S. Ct. at 2371—holds any independent meaning. The panel below reasoned that the jury did not need to be instructed about this principle because it merely duplicates *other* language from *McDonnell*. Pet.App.29a-30a. As Roberson has explained—and as the Government does not dispute—that is plainly and legally erroneous. Pet. 26-27. Telling the jury what *is* official action cannot substitute for telling the jury what is *not* official action. A lay jury could easily get confused about whether "expressing support" suffices to show official "advice" or "pressure." In short, this Court adopted a dichotomy to provide legal guidance, and the panel replaced that balance and nuance with a one-sided rule of inclusion. There is nothing "factbound" about that.

Moreover, because the Eleventh Circuit's model jury instructions likewise omit *McDonnell*'s exclusion of expressing support (Pet. 27-28), this error promises to be self-perpetuating. The Government's response is to point out that the district court here "went beyond" the model instructions by adding clarifying language (albeit not the *McDonnell* language Roberson sought). BIO.19. If anything, that makes the problem worse, not better. If the panel decision stands, no jury in the Eleventh Circuit will ever be advised about the critical dichotomy this Court articulated between "advice" and "support"—and the panel's logic may well be invoked to justify still *further* omissions, such as those in the palpably inadequate model bribery instruction.

**B.** The Government denies that the decision below conflicts with the Second and Third Circuits. It argues that neither *United States v. Silver*, 864 F.3d 102 (2d Cir. 2017), nor *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019), "insisted that jury instructions include specific words such as 'expressing support.'" BIO.20. That misses the forest for the trees.

In explaining why the pre-*McDonnell* instructions were prejudicial, both Courts of Appeals focused on this Court's legal ruling about "expressing support" and emphasized that a jury *properly instructed about that rule* could have acquitted the defendants. Thus, in *Silver*, the Second Circuit explained that a "properly instructed" jury possibly "would not have considered Silver's opposition to the methadone clinic an official act," because "[t]aking a public position on an issue, by itself, is not a formal exercise of governmental power," and the record did not establish that Silver "formally used his power as Speaker of the Assembly to oppose the clinic." 864 F.3d at 122.

Likewise, in *Fattah*, the Third Circuit reasoned that it could not sustain the verdict because the jury "was not instructed that they had to place Fattah's efforts on one side or the other of this divide"—between, on one hand, "permissible attempts to 'express[] support,'" and on the other, "impermissible attempts 'to pressure or advise another official.'" 914 F.3d at 156. And a "properly instructed jury" might not have found that Rep. Fattah's recommendation letter "crossed the line." *Id.* On retrial, the court explained, "the finder of fact will need to decide whether Fattah's efforts constituted permissible attempts to 'express[] support,' or impermissible attempts 'to pressure or advise another official on a pending matter.'" *Id.*

To be sure, neither court specified the precise terms for any jury instructions on remand. But it defies credulity to suggest that, after identifying the line between "support" and "advice" as the dispositive issue for a properly instructed fact-finder, either the Second or the Third Circuit would have accepted a jury charge that neglected to mention half of that dichotomy. Yet that is what the Eleventh Circuit did below.

**C.** Roberson has explained why the panel could not shield its holding from review by claiming that any instructional error was harmless. While Robinson's vote on a ceremonial resolution was technically an "official act," there is no way to tell whether the jury believed he was paid for that vote, or instead for the more proximate acts (the EPA and AEMC meetings) that a properly instructed jury could have deemed lawful expressions of support. Pet. 28-29. The presence of one official act cannot suffice to support the convictions. *See Fattah*, 914 F.3d at 154; *Silver*, 864 F.3d at 120-21; *McDonnell*, 136 S. Ct. at 2375.

The Government misunderstands the point. It says that instructional errors are subject to harmless-error review. BIO.21. True. The problem, however, is that the existence of a single "official act" does not render harmless an overbroad definition of that concept, if it is possible that the jury convicted based on *other* acts that were not truly "official."

In all events, the Government also denies that the panel adopted an "alternative holding" that any error was harmless. BIO.20-21. If that is correct, then there is no impediment to reaching the question presented.

* * *

By limiting bribery to a public official's sale of true sovereign power, *McDonnell* avoids the federalism, due process, and democratic accountability concerns that would arise from treating every speech, letter, or op-ed as a bribery *quo*. Yet the decision below invites those problems by dismissing this Court's reassurance that merely "expressing support" is not enough for a conviction. The Court should grant review to ensure that *McDonnell* does the job it was intended to do.

## III. THE COURT SHOULD ALSO GRANT REVIEW TO CONFIRM THAT FEDERAL-PROGRAM BRIBERY IS NOT A PROSECUTORIAL SILVER BULLET.

Exacerbating the need for review, the panel below also held that the federal-programs bribery statute, 18 U.S.C. § 666, is exempt from the limitations imposed by *McCormick* and *McDonnell*. Those further holdings effectively create a law-free zone for prosecutors to do everything this Court said they cannot. That is wrong and conflicts with the decisions of other circuits. The Court should grant review to confirm that its seminal bribery precedents were not mere pleading rules.

**A.** The Government denies that the panel exempted § 666 from the heightened First Amendment standard recognized in *McCormick*. BIO.13-14. But there is no other way to read the panel's statement that prior circuit precedent did not "extend *McCormick*'s express *quid pro quo* requirement" to § 666. Pet.App.23a. The panel made that statement to explain why circuit precedent did not preclude it from holding as it did—*i.e.*, that *McCormick* does *not* apply to convictions under § 666.

The Government is also wrong to say that the panel's decision does not conflict with *United States v. Allen*, 10 F.3d 405 (7th Cir. 1993). The Government notes that *Allen* did not directly "involve Section 666" (BIO.14), but that misses the point. *Allen* recognized that *McCormick* "created a rule for interpreting federal statutes," based on "realities of the American political system," which cannot allow "commonly accepted" political expenditures to be deemed illicit "bribes" absent an "explicit promise to perform or not perform an official act." 10 F.3d at 411. The panel here held the opposite, allowing a conviction based on commonplace political expenditures without any explicit *quid pro quo*.

**B.** The Government fares no better in attempting to defend the panel's holding that *McDonnell* does not apply to § 666. The Government does not engage with Roberson's explanation of why the statutory text naturally limits federal-programs bribery to cases involving official action. Pet.31-33. Nor does the Government even attempt to deny that the constitutional concerns underlying *McDonnell* are just as acute (if not more so) in the context of § 666, which uniquely targets state officials. Pet.30-31.

Instead, the Government urges this Court to turn a blind eye to the panel's refusal to apply *McDonnell* to § 666 because the issue has been "repeatedly denied." BIO.22. But the government cites only four denials, and all of those petitions suffered from glaring defects. *Boyland* involved plain-error review because the defendant failed to object to the jury instructions. *See United States v. Boyland*, 862 F.3d 279, 288 (2d Cir. 2017). *Winfield* likewise involved deferential review because it arose in the posture of a habeas petition under 28 U.S.C. § 2241. *See Winfield v. U.S. Prob. & Pretrial Servs.*, 810 F. App'x 343 (5th Cir. 2020). The *Robles* case involved even more deferential review under 28 U.S.C. § 2255; the Ninth Circuit denied a certificate of appealability after previously holding that the petitioner was not entitled to a new trial when his motion was untimely and circuit authority under § 666 was not "clearly irreconcilable" with *McDonnell*. *See United States v. Robles*, No. 18-56250, 2019 WL 11662197 (9th Cir. Aug. 22, 2019); *see also* 698 F. App'x 905, 906 (9th Cir. 2017). Finally, in *Ng Lap Seng*, the district court "charged the jury that, as to the § 666 charges ... the government was required to prove that [the defendant] 'acted with the intent to obtain "an official act."'" *United States v. Ng Lap Seng*, 934 F.3d 110, 129 (2d Cir. 2019). That made the case an obviously inapt vehicle to decide whether § 666 allows conviction *without* an official-act instruction.

This case involves none of the vehicle problems that have obstructed this Court's review before, and the frequency with which this issue continues to arise only underscores that review is needed.

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Without this Court's intervention, the Government will continue to wield § 666 to bring abusive bribery prosecutions in defiance of the critical safeguards that *McDonnell* and *McCormick* established. Review is urgently needed.

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Respectfully submitted,

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