No. 24-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where the government charges an elected official with bribery for accepting campaign contributions in exchange for lawful constituent services, *McCormick v. United States*, 500 U.S. 257 (1991), requires that the government prove an "explicit" *quid pro quo* agreement to exchange the contributions for an official act.

The question presented, on which (as the Second Circuit acknowledged) the lower courts have failed to provide a consistent or clear answer, is:

Does "explicit" mean a *quid pro quo* agreement of any kind, including one that is inferred or implied; or is a heightened *quid pro quo* standard necessary in light of the First Amendment principles involved in the campaign-contribution context?

LIST OF PROCEEDINGS

This case arises from the following proceedings:

United States v. Benjamin, No. 22-3091 (2d Cir. Mar. 8, 2024) (reversing dismissal).

United States v. Benjamin, No. 21-CR-706 (JPO) (S.D.N.Y. Dec. 5, 2022) (dismissing bribery counts of indictment).

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The Second Circuit's opinion (App.1a-26a) reversing the dismissal of the indictment is reported at 95 F.4th 60. The Southern District of New York's opinion and order (App.27a-74a) dismissing the bribery counts of the indictment is unreported.

JURISDICTION

The Second Circuit entered judgment on March 8, 2024. On April 12, 2024, Justice Sotomayor extended the time to file this petition until August 5, 2024. No. 23A897. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 666, 1343, and 1346 are reproduced in full at App.75a-78a.

INTRODUCTION

Time and again, this Court has intervened when government overreach threatens to chill political activity that is core to our democracy and protected by the First Amendment. This case presents an extreme example of that overreach, in an area of law that demands clarity yet has become perilously muddled.

Constituents give to candidates they hope will take actions aligned with their interests. Candidates, if elected, take actions that often further the interests of those who helped elect them. This is not bribery; it is democracy. And a great danger arises when prosecutors seek to elide the distinction between the two by casting the hallmarks of the latter as evidence of the former. Among other things, the erosion of this distinction provides to prosecutors the power to influence elections and improperly disqualify candidates for public office.

More than 30 years ago, in *McCormick v. United States*, 500 U.S. 257 (1991), this Court fashioned a rule addressed precisely to this issue. The touchstone of that standard for a prosecution based solely on campaign contributions is an "explicit" *quid pro quo* agreement. To be unlawful, an alleged agreement to exchange campaign contributions for official action must be explicit. In this case, Petitioner argues that, at a minimum, "explicit" means not inferred from ambiguous statements or a chronology of events, but rather clearly and unambiguously manifested by the parties.

Unfortunately, in the years since *McCormick*, the circuit courts have utterly failed to agree on what "explicit" means and when the standard applies. The decision below acknowledges this disagreement. App.20a. Some courts, following *McCormick*, have distinguished the campaign-contribution and non-campaign-contribution contexts, recognizing that while in the latter an implicit agreement can support bribery charges, more is required when only campaign contributions are involved. *See, e.g.*, *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936-37 (9th Cir. 2009) (in the non-campaign-contribution context, "[a]n explicit *quid pro quo* is not required; an agreement implied from the official's words and actions is sufficient to satisfy this element" (internal quotation marks and citation omitted)), *abrogated on other grounds by Skilling v. United States*, 561 U.S. 358 (2010); *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."). Others, often citing this Court's decision in *Evans v. United States*, 504 U.S. 255 (1992), have said "explicit" as used in *McCormick* can in fact mean its linguistic opposite, "implicit." *See, e.g.*, *United States v. Siegelman*, 640 F.3d 1159, 1172 (11th Cir. 2011) ("[A]n explicit agreement may be 'implied from [the official's] words and actions.'" (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring))). The result has been confusion. And the consequence of that confusion has been an erosion of the rule in *McCormick*.

In this case, a panel of the Second Circuit has gone further than any other circuit and entirely gutted the rule. In the decision below (which reversed the district court's pretrial dismissal of the bribery charges in the

indictment under *McCormick*), the Second Circuit held that there is "a single *quid pro quo* requirement that applies regardless of whether the case involves purported campaign contributions," and that the agreement "may be inferred from the official's and the payor's words and actions." App.9a.

That ruling is not only at odds with *McCormick* and the rule in other circuits, but, if allowed to stand, will work a great injustice to the defendant in this case, Brian Benjamin, who at the time of his indictment was the Lieutenant Governor of New York. The issue here is presented in stark relief: The parties agree that the "bribe" alleged in the indictment (the *quid*) consists solely of campaign contributions to Mr. Benjamin when he was a state senator preparing to run for New York City Comptroller. The official action allegedly procured (the *quo*), they likewise agree, is legitimate constituent services, namely a $50,000 state grant to a nonprofit benefiting schoolchildren in Mr. Benjamin's senate district of Harlem, which Mr. Benjamin secured and announced prior to receiving the campaign contributions alleged to constitute the bribe.

The alleged *pro* tying those two lawful acts together depends entirely on strained inferences the government seeks to draw from the timeline of events set forth in the indictment and the highly ambiguous alleged statement by Mr. Benjamin, "Let me see what I can do." The indictment alleges that Mr. Benjamin uttered that statement not simply before the grant was mentioned, promised, or made, but months before he even knew, or could have known, the grant would become available. Accordingly, the indictment fails to allege an explicit *quid pro quo* required by *McCormick* and the First Amendment, and the bribery counts were properly dismissed by the

district court. The well-reasoned decision of the district court held that *McCormick* requires that the *quid pro quo* agreement in campaign-contribution cases "be shown by something more than mere implication," and also reflect "a contemporaneous mutual understanding that a specific *quid* and a specific *quo* are conditioned upon each other." App.56a. That decision should be reinstated.

In the alternative, we ask that this Court grant certiorari, vacate the decision below, and remand for reconsideration in light of *Snyder v. United States*, 144 S. Ct. 1947 (2024), decided in this most recent Term, after the Second Circuit's decision in this case. The defendant in *Snyder* was charged under one of the same statutory provisions charged here, 18 U.S.C. § 666(a)(1)(B). This Court 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." *Snyder*, 144 S. Ct. at 1959. This is because the statute criminalizes bribes that "are promised or given before the official act," but not gratuities, which "are typically payments made to an official *after* an official act as a token of appreciation." *Id.* at 1951; *see also id.* at 1962 (Jackson, J., dissenting) ("[F]or a payment to constitute a bribe, there must be an *upfront* agreement to exchange the payment for taking an official action." (emphasis added)).

Here, as an alternative basis for dismissing the indictment, the district court held that "the explicit agreement must *precede* the official conduct," App.66a (emphasis added), and determined that the indictment, which alleges that Mr. Benjamin procured the grant before he was promised or given the campaign contributions at issue in return, did not meet this criterion.

Mr. Benjamin relied on this argument, which the Second Circuit rejected, as a basis for affirming. Mr. Benjamin also relied on the fair notice concerns raised by the district court given the uncertainty in this area of the law—concerns that played an important role in this Court's decision in *Snyder*. Accordingly, this Court's holding in *Snyder* is directly relevant to the decision below, and this case should at a minimum be remanded to permit the Second Circuit to reconsider its ruling.

STATEMENT OF THE CASE

A. Factual Background

The charges in the indictment stem from a purported bribery scheme relating to Petitioner Brian Benjamin's 2021 primary campaign for New York City Comptroller, a campaign that he ultimately lost, prior to being appointed Lieutenant Governor to fill a vacant seat in August 2021. Mr. Benjamin launched his campaign for New York City Comptroller in 2019, while serving as a New York State Senator representing Harlem and its surrounding neighborhoods. App.80a-81a.

The indictment alleges that a bribery scheme was set in motion during a meeting on March 8, 2019, when Mr. Benjamin told Gerald Migdol—a longtime supporter who was active in the Harlem community—that he planned to run for New York City Comptroller and asked him to obtain small-dollar contributions for that campaign. App.82a. Migdol allegedly advised Mr. Benjamin that (i) he "did not have experience bundling political contributions in this manner," (ii) his "fund-

raising efforts were focused" on the educational nonprofit that he is alleged to have founded and controlled, Friends of Public School Harlem ("FPSH"), and (iii) his "ability to procure" contributions for Mr. Benjamin's comptroller campaign was "limited, in part because potential donors" from whom he was "likely to solicit contributions were the same donors" from whom he had "solicited and intended to further solicit contributions" for FPSH. App.82a-83a. Mr. Benjamin allegedly responded, "Let me see what I can do." App.83a.

Nearly three months after that meeting, on May 30, 2019, Mr. Benjamin allegedly learned he had been awarded up to $50,000 in additional discretionary funding that he could allocate to educational nonprofits in his senate district (such as FPSH). App.84a. The next day, Mr. Benjamin allegedly advised Migdol that he would seek to allocate this funding to FPSH. App.84a. The indictment does not allege that Mr. Benjamin placed any conditions on his effort to obtain the grant or otherwise linked it to any campaign contributions. Nor does the indictment allege that Mr. Benjamin made any demands of Migdol when he notified him weeks later, on June 20, 2019, that the Senate had approved a resolution relating to the grant. App.85a.

The indictment alleges that two weeks later, on or about July 8, 2019, Migdol provided Mr. Benjamin with three checks totaling $25,000 for his senate campaign—*not* the comptroller campaign that had been the subject of their March meeting. App.85a. During their meeting, Mr. Benjamin allegedly "reminded" Migdol about the grant to FPSH, and that he "still expected" Migdol "to procure numerous small contributions for his Comptroller Campaign." App.85a-86a.

But the indictment does not allege that Mr. Benjamin connected the two or threatened to withhold or cancel the grant if Migdol did not secure the contributions.

On September 12, 2019, Mr. Benjamin publicly presented Migdol and the nonprofit organization FPSH with "an oversized novelty check in the amount of $50,000." App.86a-87a. The indictment does not allege either individual said anything about campaign contributions, or that the grant to FPSH was ever discussed again.

From October 2019 to January 2021, Migdol allegedly made numerous contributions to the comptroller campaign, many of which were fraudulently given as part of a straw donor scheme perpetrated by, and separately charged against, Migdol. App.87a. The indictment does not charge Mr. Benjamin as part of that scheme. The $50,000 grant was never disbursed to FPSH. App.88a.

B. District Court Proceedings

On April 11, 2022, the government charged Mr. Benjamin with, among other things, conspiracy to commit bribery and honest-services wire fraud (Count One—18 U.S.C. § 371), bribery (Count Two—18 U.S.C. § 666), and honest-services wire fraud (Count Three—18 U.S.C. §§ 1343, 1346). The charges, which were set forth in a 14-page speaking indictment that the government confirmed "lays out clearly the prosecution's theory," were based on the government's core allegation that Mr. Benjamin accepted a bribe in the form of campaign contributions from Migdol. Letter from U.S. Attorney's Office to Barry Berke at 1, *United States v. Benjamin*, No. 21-CR-706 (JPO) (S.D.N.Y. July 14, 2022), ECF No. 52.5. Mr. Benjamin moved to dismiss

these counts on the ground that the indictment did not sufficiently allege an explicit *quid pro quo* agreement as required by *McCormick*.

On December 7, 2022, the district court granted Mr. Benjamin's motion to dismiss these counts. Relying on *McCormick* and this Court's concern in that case over the risk of "criminalizing common political conduct," it held that an explicit *quid pro quo* is required in campaign-contribution cases. App.28a, 37a-39a. The court rejected the government's argument that *McCormick* was overruled or modified by this Court's subsequent decision in *Evans v. United States*, 504 U.S. 255 (1992). App.44a-45a. Under *Evans*, the district court concluded, a *quid pro quo* could be "proven inferentially" in *non*-campaign-contribution cases, App.40a, but this Court in *Evans* "did not purport to overrule or alter the standard in *McCormick* for campaign contribution cases" requiring proof of an "explicit" *quid pro quo*, App.44a.

The district court analyzed the meaning of "explicit," concluding that "an 'explicit' promise cannot be satisfied by implication, as it would be contradictory to hold that a *quid pro quo* agreement could be simultaneously 'explicit' and 'implicit.'" App.47a-48a. The court described the explicit *quid pro quo* requirement as follows:

> [T]here must be a *quid pro quo* that is clear and unambiguous, meaning that (1) the link between the official act and the payment or benefit—the *pro*—must be shown by something more than mere implication, and (2) there must be a contemporaneous mutual understanding that a specific *quid* and a specific *quo* are conditioned upon each other.

App.55-56a. The district court explained that *McCormick*'s key point was that the "*pro* itself"—that is, the actual agreement—"must be clear and unambiguous, and characterized by more than temporal proximity, winks and nods, and vague phrases like 'let me see what I can do.'" App.51a. The court clarified that did not mean the agreement had to be verbally "stated or transcribed" to be explicit, but instead could be shown through non-verbal communication, such as a smile and a handshake in acceptance of an explicit offer. App.53a.

The district court concluded that the *McCormick* standard must be alleged in the indictment. App.60a. The government's use of the phrase "in exchange for" in the indictment—the same formulation used in non-campaign-contribution cases—did not satisfy this standard, as the phrase was "not synonymous" with an "explicit or express" agreement. App.62a. Accordingly, the indictment did not charge an essential element, requiring dismissal of the bribery counts. App.64a.

The district court further held that "there is confusion among the courts" regarding what "explicit" means under *McCormick*, and thus "the governing precedents were not clear enough to give Benjamin fair notice of what behavior was criminal at the time he acted." App.59a (citations and alterations omitted). In its view, this consideration "weigh[ed] in favor of a stricter interpretation of the 'explicit' *quid pro quo* requirement." App.59a.

As a separate ground for dismissal, the district court held that the facts alleged in the indictment, even if true, failed to establish criminal liability under the applicable standard. App.64a. A corrupt agreement under *McCormick* is one in which an official "asserts

that his official conduct *will be controlled* by the terms of the promise or undertaking." App.66a (emphasis in original) (quoting *McCormick*, 500 U.S. at 273). The district court held that "the explicit agreement must *precede* the official conduct." App.66a (emphasis added). At no point in the indictment's timeline of events—which the court found drew "a clear picture of the government's theory," App.69a—did the government allege that Mr. Benjamin and Migdol entered into an explicit agreement before Mr. Benjamin took official action, and thus there was no promise that allegedly "controlled" his actions. App.66a-67a.

C. Second Circuit Decision

On March 8, 2024, a Second Circuit panel reversed the judgment of the district court dismissing the bribery charges. App.3a. Its decision relied on the premise that *McCormick* and *Evans* "apply the same rather than different standards for establishing a *quid pro quo*," App.14a, and that this single standard applies whether or not the alleged bribe consists solely of campaign contributions. The panel purported to accept that the *quid pro quo* must be "explicit"—meaning, "clear and unambiguous" or "plainly evident"—pursuant to *McCormick*. App.12a. However, the panel held that *Evans* had "clarified" that the *quid pro quo* may be *inferred* "based on evidence of the official's 'implicit promise to use his official position to serve the interests of the bribegiver.'" App.17-18a (quoting *Evans*, 504 U.S. at 257).

The panel acknowledged that its holding conflicted with statements in previous Second Circuit decisions distinguishing *McCormick*'s "explicit" *quid pro quo* standard governing campaign-contribution cases from *Evans*'s lesser standard governing ordinary bribery

cases, characterizing those statements as "dicta." *See* App.21a (citing *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007) (Sotomayor, J.); *United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993); *United States v. Silver*, 948 F.3d 538, 548 (2d Cir. 2020); *United States v. Rosen*, 716 F.3d 691, 701 (2d Cir. 2013)). The panel also noted that the Sixth Circuit "has offered contradictory interpretations" of *McCormick* and *Evans*, the Ninth Circuit "has indicated that *Evans* might be limited to the non-campaign-contribution context," and that "[s]ome statements from the First and Eighth Circuits also suggest an alternative view." App.20a nn.3-4.

The panel dismissed the First Amendment concerns raised by Mr. Benjamin, saying that they did not alter its conclusion that campaign contributions are subject to the same *quid pro quo* standard as any other type of alleged bribe. App.22a-23a. The panel reasoned that "[i]t is the corrupt *agreement* that transforms the exchange from a First Amendment protected campaign contribution . . . into an unprotected crime," which "alleviates the First Amendment concern." App.22a-23a (emphasis and omission in original) (internal citation omitted).

The panel concluded that the indictment's use of the phrase "in exchange for" satisfied the explicit *quid pro quo* requirement. App.24a. The panel determined that "the existence of the agreement, and the clarity of its terms to Migdol and Benjamin, could be inferred" from their ongoing course of conduct. App.24a. Its holding focused on the timeline of events set forth in the indictment, together with Benjamin's alleged statement, "Let me see what I can do." App.25a. The panel disagreed with the district court that the bribery counts should be dismissed on the ground that it failed to

allege a *quid pro quo* agreement was made before Mr. Benjamin took official action. App.24a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S INTERVENTION IS NECESSARY TO RESOLVE A SPLIT IN THE CIRCUITS

Since *McCormick*, this Court has repeatedly said that the "line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 308 (2022) (quoting *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 209 (2014)). Yet application of that key distinction in the context of bribery prosecutions has become increasingly muddled and the subject of conflicting views in the circuit courts. This Court's intervention is necessary to provide clear guidance to elected officials and their constituents as to what is lawful and what is not, and protect our elections from prosecutorial overreach. Such overreach is exemplified in this case, where Mr. Benjamin is being prosecuted, based purely on inference, for receiving campaign contributions after obtaining a grant benefiting schoolchildren in his district. The Second Circuit's decision allows prosecutors to use the magic words "in exchange for," and little else, to ruin the careers, if not the lives, of political candidates and affect the outcome of elections.

A. *McCormick* Requires an "Explicit" Agreement in the Campaign-Contribution Context

In *McCormick*, the Court reversed the conviction of a state legislator based on ambiguous statements and the timing of campaign contributions from a lobbyist, holding that the receipt of campaign contributions violates the statute "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." 500 U.S. at 273 (emphasis added). Although the case was decided under the extortion statute, courts (including the courts below in this matter) have universally applied its rule in the context of bribery (including the statutes charged here), and the government has never argued otherwise. App.10a-11a, 36a n.4.

The point of the rule was to provide clear guidance separating lawful campaign contributions essential to our political system from criminal payments intended to corrupt our political system. As this Court explained, the "everyday business of a legislator" is "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein," but "[i]t is also true that campaigns must be run and financed." *McCormick*, 500 U.S. at 272. Therefore, "[m]oney 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." *Id.*

This Court held that, in light of this core characteristic of our political system, elected officials do not commit a crime simply "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." *Id*. And it warned:

> 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.

Since *McCormick*, the Court has repeatedly emphasized that First Amendment principles require that the government tread carefully when it seeks to prosecute elected officials for accepting allegedly corrupt payments. In *McDonnell v. United States*, the Court overturned the bribery convictions of the former governor of Virginia and his wife. 579 U.S. 550, 580-81 (2016). That case turned on what constitutes an "official act" under the bribery statute, but the Court spoke directly to what the government is trying to do in this prosecution, and to the same danger of chilling lawful political activity central to our democratic system:

> The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the home-

> owners invited the official to join them on their annual outing to the ballgame.

Id. at 575 (emphasis in original). The Court made clear the far-reaching implications of criminalizing routine political interactions: "Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *Id.*

In *Federal Election Commission v. Cruz*, the Court reiterated that "influence and access 'embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.'" 596 U.S. at 308 (quoting *McCutcheon*, 572 U.S. at 192). The Court reaffirmed the importance of distinguishing that influence and access from unlawful conduct:

> To be sure, the "line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights." And in drawing that line, "the First Amendment requires us to err on the side of protecting political speech rather than suppressing it."

Id. (quoting *McCutcheon*, 572 U.S. at 209).

As all of these decisions recognize, it is not a crime when elected officials take actions that are supported by or benefit those who have contributed to their campaigns and advocated for those actions. Absent a clear rule applying a heightened standard erring on the side of protecting free speech, bribery prosecutions

in this context threaten to elide the distinction between legitimate political activity and truly corrupt bargains.

The impact of how the courts interpret and apply the rule in *McCormick* is enormous: There are over half a million elected officials in the United States at the state and local level potentially subject to § 666, which covers officials in state and local governments that have received over $10,000 in funding the prior year. *See* Jennifer Lawless, BECOMING A CANDIDATE: POLITICAL AMBITION AND THE DECISION TO RUN FOR OFFICE, 33 tbl.3.1 (2011). Still more officials and candidates are covered by 18 U.S.C. §§ 1343 and 1346, which apply to federal, state, and local officials alike. Every day, political officials solicit contributions from the constituents they serve. It is not uncommon—or improper—for there to be a substantial correlation between the policy pursuits of elected officials and the desires and requests of those who have contributed to their campaigns. *See, e.g.*, Michael J. Barber, Brandice Canes-Wrone & Sharece Thrower, *Ideologically Sophisticated Donors: Which Candidates Do Individual Contributors Finance?*, 61 AM. J. POL. SCI. 271, 277 (2017) (study finding that "as policy agreement between a potential donor and a senator increases, the individual is more likely to give to that campaign"). As a result, a "breathtaking amount" of ordinary political activity is at risk of being criminalized. *Cf. Van Buren v. United States*, 593 U.S. 374, 393-94 (2021) (rejecting interpretation of criminal statute that would "attach criminal penalties to a breathtaking amount of commonplace computer activity" and "turn millions of otherwise law-abiding citizens [into] criminals").

Nor can the government on its own be trusted to distinguish between lawful and corrupt conduct in this context. Addressing § 666, this Court very recently stated that courts "cannot construe a criminal statute on the assumption that the Government will use it responsibly." *Snyder*, 144 S. Ct. at 1958 (quoting *McDonnell*, 579 U.S. at 576). This principle is particularly relevant in this context, where the potential defendants are our elected officials, and the risk of unchecked prosecutorial power is at its highest. No prosecutor should be permitted to effectively remove an elected official by charging him or her with bribery based on mere inferences drawn from the timing of campaign contributions and constituent services. *See Marinello v. United States*, 584 U.S. 1, 11 (2018) (recognizing that where courts "rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope" of a criminal statute, prosecutors may be empowered "to pursue their personal predilections" (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974))).

B. The Circuits Are Split on the Meaning of "Explicit" as Used in *McCormick*

While this Court has steadfastly upheld the principles underlying *McCormick*, there has been growing disagreement among the circuit courts concerning what *McCormick* held and how to apply its rule. The intervention of this Court is necessary to resolve the disagreement and clarify the rule in this critically important area of the law.

In its decision below, the Second Circuit recognized the conflict among circuit courts interpreting *McCormick*, App.20a & nn.3-4, as did the district court, App.59a ("[T]here is confusion among the courts about whether

the *McCormick* standard applies to campaign-contribution cases and about what its 'explicit' standard means."). Other courts have noted the same. *See, e.g.*, *United States v. Ring*, 706 F.3d 460, 466 (D.C. Cir. 2013) ("The *McCormick* Court failed to clarify what it meant by 'explicit,' and subsequent courts have struggled to pin down the definition of an explicit quid pro quo in various contexts."); *United States v. McGregor*, 879 F. Supp. 2d 1308, 1314 (M.D. Ala. 2012) ("The *McCormick* Court, however, did not expand on what constitutes an 'explicit promise or undertaking.' The definition of 'explicit' remains hotly contested.").

Much of the disagreement turns on the impact of *Evans* on *McCormick*, an issue that was a central focus of both the district court and Second Circuit opinions below. *Evans*, which unlike *McCormick* involved a personal cash payment in addition to campaign contributions, was decided one year after *McCormick*, to resolve a question different from that at issue in *McCormick*: "whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right,' prohibited by the Hobbs Act.'" *Evans*, 504 U.S. at 255. The Court held that it was not. In so doing, it explained that the extortion statute required only "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." *Id.* at 268.

Some circuits have read *Evans*, together with the concurring opinion filed by Justice Kennedy in that case, as providing that the government can satisfy *McCormick's* explicit *quid pro quo* standard—even in campaign-contribution cases—by relying on an *implicit* agreement between an official and constituent. The

Second Circuit relied on decisions of the Third, Fifth, Seventh, and Eleventh Circuits as supporting its view of *Evans* in this regard.[1] App.19a.

The Sixth Circuit, as the Second Circuit noted, has "offered contradictory interpretations" of *Evans*'s effect. App.20a n.3. In *United States v. Blandford*, it concluded that *Evans* is "*limited* to the campaign contribution context"—an interpretation that no other circuit has followed. 33 F.3d 685, 696 (6th Cir. 1994) (emphasis added). It has also said, however, that "*Evans* modified the [*quid pro quo*] standard in *non-campaign contribution cases* . . . ." *United States v. Abbey*, 560 F.3d 513, 517-18 (6th Cir. 2009) (emphasis added), *abrogated on other grounds by Snyder v. United States*, 144 S. Ct. 1947 (2024).

Other circuits have similarly read *Evans* as creating a lesser, "implicit" *quid pro quo* standard that applies only in non-campaign-contribution cases, to be distinguished from the rule in *McCormick*. The First, Fourth, Eighth, and Ninth Circuits have taken this view. *See United States v. McDonough*, 727 F.3d 143, 155 n.4 (1st Cir. 2013) (applying *Evans* in non-campaign-contribution case; "[W]e have held that

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[1] While the Second Circuit also cited *United States v. Taylor*, 993 F.2d 382 (4th Cir. 1993), as supporting its view, App.19a-20a, in *Taylor* the court in fact held that the lesser standard in *Evans* does not apply to campaign-contribution cases, 993 F.2d at 385 ("It is necessary for the prosecution to prove under the *Evans* standard that a public official has obtained a payment to which he is not entitled, knowing that the payment was made in return for official acts. 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." (internal quotation marks and citations omitted)).

McCormick applies only in the context of campaign contributions."); *United States v. Taylor*, 993 F.2d 382 (4th Cir. 1993) (*see supra* note 1); *United States v. Chastain*, 979 F.3d 586, 591 (8th Cir. 2020) (applying *Evans* in non-campaign-contribution case; "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) ("[I]t is well established that to 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) (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring))).

Indeed, until its decision below, the Second Circuit took this position. In *United States v. Ganim*, then-Judge Sotomayor, writing for the court, explained that the court had "harmonized" *McCormick* and *Evans* by finding that *McCormick*'s explicit standard applied in campaign-contribution cases, while *Evans*'s implicit standard applied in non-campaign-contribution cases. 510 F.3d at 143. The court in fact went even further, describing *McCormick* as requiring proof of an "express" *quid pro quo*. *Id*. at 142. In this case, however, the Second Circuit flip-flopped, explaining away its prior conclusion as dicta, holding that *Evans* applies to both campaign- and non-campaign-contribution cases, and finding that, even in the latter, the requisite *quid pro quo* "may be based on inference." App.18a.

The conflict and confusion in the law has allowed the government to speak out of both sides of its mouth, creating further uncertainty. In this case, it has argued for a watered-down, "implicit" standard based on *Evans*. Yet last Term, at oral argument in *Snyder*, the Solicitor

General sought to minimize concerns about the breadth of the statute by referring to "the First Amendment protection that says that under *McCormick* we understand that to mean that there really has to be an *express* quid pro quo when we're dealing with a bona fide campaign contribution." Transcript of Oral Argument at 92, *Snyder v. United States*, 144 S. Ct. 1947 (2024) (No. 23-108) (emphasis added).

This understanding of *McCormick*—that it requires a heightened standard in campaign-contribution cases necessary to protect free speech—is one that the government has, until this case, expressed repeatedly in public filings. *See, e.g.*, Government's Omnibus Memorandum of Law in Opposition to Defendants' Pretrial Motions at 73, *United States v. Mangano*, No. 16-cr-540 (JMA) (E.D.N.Y. Nov. 14, 2017) ("[I]n the context of campaign or similar political contributions, *the quid pro quo must be express as opposed to implied*"; "[T]he law as it relates to a quid pro quo involving political contributions is *different and much more stringent* than when the quid pro quo involves bribes that personally benefit the public official." (emphasis added)); Brief for the United States of America at 34, *United States v. Silver*, 948 F.3d 538 (2d. Cir. 2020) (No. 18-2380), 2018 WL 6039487, at *34 (describing *Evans* as "the seminal case framing the *quid pro quo* requirement in *the non-campaign-contribution context*." (emphasis added)).

The disagreement among the circuits and the government's own vacillating view on when and how *McCormick* applies have resulted in great unfairness to federal, state, and local candidates, officeholders, and constituents, who deserve fair notice of what constitutes criminal conduct. As the district court below

held, "[a]t a minimum, the governing precedents were not clear enough to give Benjamin fair notice of what behavior was criminal." App.59a (internal quotation marks and citation omitted). This is the same concern that informed the Court's decision last term in *Snyder* to reject the government's broader reading of § 666, so as not to "create traps for unwary state and local officials." *Snyder*, 144 S. Ct. at 1957; *see also id.* at 1960 (Gorsuch, J., concurring) ("[J]udges are bound by the ancient rule of lenity to decide the case as the Court does today, not for the prosecutor but for the presumptively free individual.").

The only way to remediate this unfairness and prevent it from ensnaring future candidates and their constituents (or dissuading them from engaging in lawful political activity) is for the Court to grant certiorari and resolve the issue.

II. THE DECISION BELOW IS INCORRECT

In the decision below, the Second Circuit went further than any other court has gone to date in dismantling the *McCormick* rule, holding that there is no distinct standard for bribery prosecutions in the campaign-contribution context. In the Second Circuit's view, all that the government must allege and prove is a *quid pro quo* between elected official and constituent, which can include an agreement based entirely on inferences drawn from the timing of contributions and official acts. This cannot be the law, as it disregards entirely *McCormick*'s direction that only proof that "payments are made in return for an *explicit* promise or undertaking by the official to perform or not to perform the official act" will suffice to safeguard the First Amendment. 500 U.S. at 273 (emphasis added).

The Second Circuit's decision turned in substantial part on its erroneous interpretation of *Evans*, which it claimed "clarified" *McCormick* by holding that an explicit *quid pro quo* "may be inferred from words and actions," and that this same rule applies in both campaign- and non-campaign-contribution cases. App. 17a. This reads far too much into *Evans*, which did not purport to "clarify," much less modify or overrule, what this Court had held just a year earlier in *McCormick*.

While the significance of the distinction was not appreciated by the Second Circuit, *Evans* involved a *personal cash payment* in addition to campaign contributions, and thus did not raise the same First Amendment concerns as did *McCormick*. An undercover FBI agent, posing as a real estate developer, recorded a series of conversations in which the agent sought assistance from the defendant, a county official, in rezoning a tract of land. *Evans*, 504 U.S. at 257. The FBI agent handed the defendant a $1,000 check made out to the defendant's campaign and $7,000 in cash. *Id.* The defendant was convicted of Hobbs Act extortion and of failing to report the $7,000 as income. *Id.* The jury therefore found that the $7,000 cash payment was not a campaign contribution, but rather personal income that should have been reported as such. *Id.* at 257-58.

The Court's opinion in *Evans* focused on the cash payment. At the outset of the opinion, the Court wrote:

> Viewing the evidence in the light most favorable to the Government, as we must in light of the verdict, we assume that the jury found that petitioner *accepted the cash* knowing that it was intended to ensure that he would vote in favor of the rezoning application and

> that he would try to persuade his fellow commissions to do likewise.

Id. at 257 (emphasis added) (citation omitted). Later in the opinion, the Court also noted that the defendant had instructed the agent on the form of payment, saying "[w]hat you do, is make me out one, ahh, for a thousand . . . . And, and that means we gonna record it and report it and then the rest would be cash." *Id.* at 266 n.17.

A case involving both personal cash payments and campaign contributions does not implicate the same concerns as one where the purported bribe consists solely of campaign contributions. If an official has accepted a personal payment in connection with government business, that official has crossed a line, and the fact that the payment was accompanied by a campaign contribution does not change the analysis or implicate the rule in *McCormick*.

Because such a payment was made in *Evans*, the concerns addressed in *McCormick*—about prosecutions based solely on campaign contributions as in this case—were not present. There was no need to prove an explicit *quid pro quo* so as to distinguish legitimate campaign contributions from illicit bribes.

And critically, as the district court noted, App.44a, *Evans* did not state that it was overruling, modifying, or even "clarifying" *McCormick*, decided just one year and three days earlier. Aside from the implausibility of a *sub silentio* overruling in those circumstances, all Supreme Court decisions "remain binding precedent until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524

U.S. 236, 252-53 (1998). The prerogative of declaring a Supreme Court decision to have been superseded by a later decision belongs exclusively to the Supreme Court. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *accord Agostini v. Felton*, 521 U.S. 203, 237 (1997). The Second Circuit panel improperly assumed that prerogative in concluding that *Evans* held that *McCormick*'s "explicit" standard included an implicit *quid pro quo*, and applied the same in campaign- and non-campaign-contribution cases.

Finally, the Second Circuit's decision disregarded this Court's jurisprudence during the decades that followed *McCormick*, described above, which has reiterated the importance of insulating core political fundraising activity from overzealous prosecutors. The panel brushed aside this jurisprudence, reasoning that "[i]t is the corrupt *agreement* that transforms the exchange from a First Amendment protected campaign contribution . . . into an unprotected crime." App.22a-23a (emphasis and omission in original) (internal quotation marks and citation omitted). But this formulation of the rule merely begs the question: How does one distinguish a corrupt agreement from a lawful interaction between candidate and constituent? Without a higher standard, prosecutors can characterize as corrupt *any* campaign contribution given based on the candidates' "views and what they intend to do or have done," rely on inferences based on the timing of the contribution, and bring charges on that basis. *See McCormick*, 500 U.S. at 272. Indeed, this is precisely what the government has done in this case.

III. THIS CASE PRESENTS AN IDEAL OPPORTUNITY TO RESOLVE THE ISSUE

This case presents an ideal opportunity to vindicate *McCormick* and dispel the confusion that has spread in the circuit courts surrounding what constitutes an "explicit" *quid pro quo* and when it is required. The alleged "bribes" in this case consist solely of campaign contributions—unlike other cases where personal payments, jewelry, in-kind services, or travel are also part of what was provided to the elected official. The alleged official action is precisely the kind of legitimate government services that a dutiful elected official should provide to his constituents: obtaining a state grant that will benefit schoolchildren in his district. The charges are predicated on the vague alleged statement by Mr. Benjamin—"let me see what I can do"—months before he even knew the grant at issue would become available, and the campaign contributions were made long after the official act was taken. And in the decision below, the Second Circuit held that, under *McCormick*, it was enough for the government to simply include the words "in exchange for" in the indictment—the same standard that would apply were Mr. Benjamin charged with accepting bags of cash or bars of gold for steering lucrative contracts to a corporation.

Accordingly, the allegations in the case and the ruling below tee up the key issues for this Court to resolve. Moreover, it is critical that the Court hear this case now, on an interlocutory basis, and reinstate the district court's order dismissing the bribery counts prior to trial. The threat of government overreach in this context arises not simply following conviction, but upon indictment. If the government can charge a public official or constituent with bribery based on

the kind of allegations made against Mr. Benjamin and without alleging an explicit *quid pro quo*, the damage is done—lawful fundraising interactions will be inhibited, free speech chilled, and our political process damaged. *See* Transcript of Oral Argument at 105, *Snyder v. United States*, 144 S. Ct. 1947 (2024) (No. 23-108) (Justice Kavanaugh observing that § 666's "vagueness" and "line-drawing difficulties" burden "regular . . . local official[s]" prior to trial as soon as "you're sitting in a criminal courtroom . . . you've depleted your money . . . to defend yourself . . . you've lost your job because you're *prosecuted* . . . ." (emphasis added)).

IV. AT A MINIMUM, REMAND IN LIGHT OF *SNYDER* IS WARRANTED

In the alternative, we ask that the Court grant certiorari, vacate the decision below, and remand for reconsideration in light of *Snyder v. United States*, decided in this most recent term after the Second Circuit's decision in this case. The defendant in *Snyder* was charged under one of the same statutory provisions charged here, 18 U.S.C § 666(a)(1)(B). The Court 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." *Snyder*, 144 S. Ct. at 1959. This is because the statute criminalizes bribes that "are promised or given before the official act," but not gratuities, which "are typically payments made to an official *after* an official act as a token of appreciation." *Id.* at 1951.

Here, as an alternative basis for dismissing the indictment the district court held that "the explicit agreement must *precede* the official conduct," App.66a (emphasis added), and found that the indictment, which alleges that Mr. Benjamin procured the grant

before he was promised or given the campaign contributions at issue in return, did not meet this criterion. Mr. Benjamin relied on this argument, which the Second Circuit rejected, as a basis for affirming. App.24a-25a.

Remand based on *Snyder* would also be appropriate in this case given the federalism and fair notice concerns that the Court relied on in interpreting § 666. New York specifically exempts campaign contributions from its definition of "gifts" that officials are prohibited from accepting. N.Y. Legis. Law § 1–c(j)(viii) (McKinney Supp. 2024). And, as noted, prior to its ruling below, the Second Circuit had previously stated that when a prosecution is based on campaign contributions, *McCormick* requires that the *quid pro quo* be "express," rather than implied or inferred. *Ganim*, 510 F.3d at 142. Under that standard, no reasonable person could understand that the conduct of which Mr. Benjamin stands accused constituted a crime.

Accordingly, the Court's holding in *Snyder* is directly relevant to the decision below, and this case should at a minimum be remanded to permit the Second Circuit to reconsider its ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 5, 2024