No. 17-658

IN THE

Supreme Court of the United States

ROD BLAGOJEVICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. The First Question Presented Warrants Review.

The petition and briefs of amici from across the political spectrum explained that the circuits are divided over a question of extraordinary practical significance to our system of privately financed elections. The Government's reasons for nonetheless denying the petition are unpersuasive.

A. The Circuits Are Divided.

The Government does not deny that the circuits are divided over whether prosecutors must prove an "explicit" promise or undertaking in campaign contribution cases, but claims that petitioner "greatly overstates the degree of [the] conflict." BIO 21. Not so.

The Government does not dispute that the Sixth, Seventh, and Eleventh Circuits permit conviction upon proof of a merely *implied* promise even in campaign contribution cases, using instructions based on language from *Evans v. United States*, 504 U.S. 255, 268 (1992). Pet. 25-26. And it acknowledges that that many other circuits have concluded that *McCormick v. United States*, 500 U.S. 257 (1991), "articulated a standard of proof for cases that involve campaign contributions that differs from the standard articulated in *Evans.*" BIO 24. But it claims that "nearly all" of those cases reached that conclusion in "dicta," *id*. 21, 24, because the cases "address requirements of proof in circumstances *not* involving campaign contributions," *id.* 21. That is not correct.

In most of the cases, the courts were confronted by a defendant claiming to be entitled to a *McCormick* instruction even though he had not sought campaign contributions. *See, e.g.*, *United States v. Salahuddin*, 765 F.3d 329, 343 (3d Cir. 2014); *United States v. Ring*, 706 F.3d 460, 465 (D.C. Cir. 2013); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 936 (9th Cir. 2009); *United States v. Bradley*, 173 F.3d 225, 231 (3d Cir. 1999). The courts rejected that argument on the ground that *McCormick*'s explicit promise requirement applies only in campaign contribution cases. *See, e.g.*, *Salahuddin*, 765 F.3d at 343; *Ring*, 706 F.3d at 465-66; *Kincaid-Chauncey*, 556 F.3d at 937; *Bradley*, 173 F.3d at 231-32. That understanding of *McCormick*'s domain was essential to the result.

In *United States v. Garcia*, 992 F.2d 409 (2d Cir. 1993), the Second Circuit considered whether the jury instructions "sufficiently incorporated the substance of the *quid pro quo* requirement." *Id*. at 415. Resolving that question required deciding whether *McCormick* or *Evans* governed. *See ibid*. (finding one instruction "satisfied the *quid pro quo* requirement of *Evans*"); *ibid*. (emphasizing that "no explicit agreement . . . need have been shown" given the court's determination that *McCormick* only applies to campaign contribution cases).

Moreover, as the Government acknowledges, some of the decisions cited *were* campaign contribution cases. BIO 22-23. It nonetheless says that *United States v. Inzunza*, 638 F.3d 1006 (9th Cir. 2011), is distinguishable because it "involved a challenge to the sufficiency of the evidence, not the jury instructions." BIO 23. But the Government does not explain why the standard would be different. It also says (*ibid*.) that

the court affirmed the conviction (as if that somehow made the decision less precedential), but ignores that *Inzunza* also affirmed the district court's grant of a motion for acquittal on some counts because "the government failed to show any *explicit agreement* . . . on the part of" one of the defendants. 638 F.3d at 1025 (emphasis added). In any event, *Inzunza* was simply applying the law established in *United States v. Carpenter*, 961 F.2d 824 (9th Cir. 1992), which *reversed* a conviction in a campaign contribution case because the *jury instructions* "removed from the jury *McCormick*'s requirement of an explicit quid pro quo." *Id*. at 826; *see Inzunza*, 638 F.3d at 1013. Finally, contrary to the Government's claims (BIO 22), *Salahuddin* also involved campaign donations. *See* 765 F.3d at 343 n.9 (affirming district court's *McCormick* instruction for count arising from a donation).

Thus, it is no surprise that the alleged "dicta" is treated as binding precedent in these circuits, including by the Government. *See, e.g.*, *United States v. Donna*, 366 Fed. Appx. 441, 444 n.3 (3d Cir. 2010) (noting that the Government "acknowledges that campaign contributions cannot satisfy a quid pro quo requirement for a criminal conviction arising from the payment and receipt of the contributions unless the agreement was explicit"); *United States v. Ganim*, 510 F.3d 134, 143 (2d Cir. 2007); *see also, e.g.*, *United States v. Menendez*, --- F. Supp. 3d ----, 2018 WL 526746, at *11-12 (D.N.J. Jan. 24, 2018) (recently applying *McCormick* standard to overturn Sen. Menendez's conviction on campaign contribution counts).

B. Whether *McCormick* Or *Evans* Applies To Campaign Donation Cases Is A Question Of Profound Importance.

The Government also suggests that the circuit split is unimportant because there is no meaningful difference between the *McCormick* and *Evans* standards. BIO 18-19, 24. Notably, virtually *no* court takes that view – circuits either find a separate domain for each rule or conclude that *Evans* modified *McCormick*. Pet. 20-26.

There are two fundamental differences between what *McCormick* and *Evans* require.

First, simply requiring the jury to find that the defendant knew a donation was given in return for an official favor *at best* just restates the requirement that there be an intentional *quid pro quo*; it omits entirely that the *quid pro quo* be "explicit." Unless *McCormick*'s requirement of an "explicit" *quid pro quo* means nothing at all, [1] omitting that requirement materially reduces the Government's burden. That, no doubt, is why the Government strenuously objected to petitioner's request for an explicitness instruction in this case.

Second, the *Evans* instruction focuses the jury's attention on the *donor*'s expectations, and the candidate's knowledge of those expectations, without making clear that the jury must go one step further and decide whether the candidate actually *agreed* to the deal the donor anticipated. *See* Pet. 30.

These features of the *Evans* instruction make vast numbers of ordinary donations vulnerable to plausible

[1] *But see infra* pp. 8-9.

charges of criminal conduct. For example, a constituent tells the mayor that she is inclined to make a donation but wants to know his position on a particular road construction project she strongly opposes. The mayor says that he shares her view, the constituent makes a donation, and the mayor later opposes the project. The objective, observable facts are consistent with either a very common form of innocent fundraising that *McCormick* called "unavoidable so long as election campaigns are financed by private contributions or expenditures," 500 U.S. at 272, or the kind of implicit agreement *Evans* would forbid. Add to that the possibility (illustrated by this case) of arresting the parties before any donation is actually made and charging them with attempt or conspiracy based on speculation that the donation *would have* been made in exchange for the mayor's opposition to the project. The result is an invitation for arbitrary (even discriminatory) treatment that will inevitably "cast a pall of potential prosecution" over common fundraising interactions. *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016); *see* Elected Officials Br. 8-11; IACDL Br. 8-11.

C. The Government's Vehicle Objections Are Meritless.

The Government's vehicle objections, BIO 16-18, are baseless.

1. The Government says that petitioner "offers no reason to think" that an instruction requiring an explicit promise "would have made a difference to the outcome." BIO 24. Not so.

Even with an *Evans* instruction, the initial jury in this case hung on the corruption counts. Pet. App. 7a.

It is easy to see why. For example, the Government does not dispute that racetrack owner John Johnston had pledged $100,000 to petitioner's re-election campaign months before the alleged extortion. The Government doesn't contend that there was any *quid pro quo* for that pledge. And although the much-touted recorded calls show that petitioner worried that Johnston might not follow through on his pledge once certain legislation was signed, and made efforts to collect the pledge before that happened, there is nothing unlawful about that, unless he conditioned timely signing the bill on payment of the pledge. But the recordings show that petitioner specifically instructed his associate, Lon Monk, to make clear that the request to fulfill the pledge had "'nothing to do'" with the pending legislation. Pet. 12.

So the prosecution's case on this count came down to this: "Both the associate and Johnston understood that petitioner was delaying signing the bill to pressure Johnston to make the contribution." BIO 4. That is, the Government asked the jury to find an agreement based the professed beliefs of third parties (testifying pursuant to deals with the Government, *see* Pet. 12-13) about what petitioner *really* meant by his statements and their suppositions about why he had not immediately signed the legislation.

The Government's emphasis on Johnston's understanding is consistent with the focus of the *Evans* instruction. But had jurors been told that Johnson's beliefs were insufficient, and that they needed to find that petitioner explicitly conditioned his signing of the bill on payment of the pledge, there is every reason to think the Government's second prosecution would have ended no better than the first.

After all, the Government doesn't contest that petitioner told Monk on December 4, 2008, he would be signing the bill the following week even though Johnston had not yet fulfilled his pledge. That didn't happen, but only because the Government arrested petitioner before the planned signing could occur. *See* Pet. 12-13.

2. The Government acknowledges that "petitioner has consistently maintained that extortion requires an 'explicit' quid pro quo," but insists that review of that question is prevented by his alleged failure to be "consistent about what that term means." BIO 17. In particular, the Government accuses petitioner of waffling over whether "'explicit' means 'express.'" *Id.* 16.

That claim is unfounded. While petitioner's trial counsel occasionally used the words "explicit" and "express" interchangeably, he never asked that the jury be instructed it must find an express agreement. *See* Dist. Ct. Doc. 715, at 29 (May 23, 2011) (defendant's proposed jury instruction, requiring only an "explicit promise or undertaking"). The Government's claim that petitioner's brief in the first appeal "did not further define that term," BIO 16, is inexplicable. As the petition clearly explained (and the Government just ignores), the brief embraced Judge Thompson's description of what an explicit promise requires, allowing that it could be proven through circumstantial evidence and need not be express. *See* Pet. 17.

Accordingly, there is no basis for the Government's suggestion that the Seventh Circuit misunderstood petitioner's argument. Instead, the court took the view, shared by the Government, that

there is no material distinction between the *McCormick* and *Evans* standards, such that the instructions in this case (which the Government admits track *Evans* nearly verbatim, *see* BIO 18) also "track *McCormick*." Pet. App. 18a. Nor is the court's reference to nudges and winks rejecting an "express" promise argument petitioner never made. It is a reference to Justice Kennedy's concurrence in *Evans*, which concluded that the statute reaches both explicit and implicit promises. *See* 504 U.S. at 274 (Kennedy, J., concurring); *see also United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001) (reaching same conclusion).

Moreover, on appeal after re-sentencing, petitioner asked the court of appeals to reconsider its prior ruling on the jury instructions, making clear again that "'explicit' is not synonymous with 'express'" and that an explicit promise "can be inferred from circumstantial evidence." 16-3254 Petr. C.A. Br. 38. The court did not treat this as a new argument, but simply stated that it "d[id] not see a need to elaborate on or depart from what that [prior] decision said about the merits." Pet. App. 6a.

D. The Government's Merits Argument Provides No Reason To Allow The Circuit Conflict To Persist.

That the Government defends the judgment below is never a reason to let a circuit conflict endure, but here the defense is particularly unconvincing.

The Government's basic argument is that *McCormick* adopted no explicitness requirement and that *Evans* made clear that, even in campaign contribution cases, an implicit *quid pro quo* will do. BIO 19-21. But we know that the Court's inclusion of

an explicitness requirement in *McCormick* was intentional and important – it was a principal point of departure between the majority and dissenting opinions in the case. *See* 500 U.S. at 283 (Stevens, J., dissenting) (agreeing that "the crime does require a '*quid pro quo*'"); *id*. at 282 ("As I understand its opinion, the Court would agree that these facts would constitute a violation of the Hobbs Act if the understanding . . . had been explicit rather than implicit"); *id*. at 282-83 (disagreeing with that rule). At the same time, the Government provides no response to petitioner's demonstration that *Evans* had no occasion to revisit *McCormick*'s explicitness requirement because Evans raised no explicitness objection. *See* Pet. 30-31; BIO 19-21.

The Government also makes no attempt to square its position with *McCormick*'s concerns about construing the statute in a way that subjects ordinary fundraising interactions to the risk of federal criminal prosecution.

II. The Second Question Presented Warrants Review.

The Government's briefing on the second Question Presented is most remarkable for what it does *not* say. The Government does not dispute that the Seventh Circuit has a categorical rule that district courts need not even consider (much less address) an unwarranted disparities argument if they issue a within-Guidelines sentence.[2] The opposition doesn't

[2] The Government's passing claim that petitioner's sentence was "below the *actual* Guidelines range," BIO 25, is baseless. *See* Pet. App. 2a, 29a-30a.

dispute that the Tenth Circuit has the same rule, or that the rule conflicts with the law of numerous other circuits. It doesn't deny that the issue is important and recurring. And the Solicitor General does not defend the Seventh Circuit's rule on the merits.

Instead, the Government raises two vehicle arguments against certiorari, neither of which has merit.

A. The Government's Waiver Arguments Are Waived And Baseless.

The Government argues that petitioner's disparities argument is waived for two different reasons, neither of which was raised below and both of which are meritless.

1. The Government asserts that petitioner made no disparity argument at resentencing. BIO 27. But it did not make that claim in the Seventh Circuit, *see* 16-3254 U.S. C.A. Br. § I, so the objection is waived here. *See, e.g.*, *Steagald v. United States*, 451 U.S. 204, 209 (1981).[3]

In fact, the Government's brief in the Seventh Circuit repeatedly acknowledged that petitioner had pressed a disparity argument at resentencing. *See, e.g.*, 16-3254 U.S. C.A. Br. 31 (stating that petitioner's resentencing argument "was that, because the crimes of conviction involved only solicitat[i]ons of campaign contributions, his case was different and less egregious than most official corruption cases, and

[3] Moreover, the Government does not dispute that the second Question Presented was pressed and passed upon in the court of appeals, BIO 11-12, which is enough, *see McCormick*, 500 U.S. at 271 n.9.

therefore the imposition of a similar (or higher) sentence *would create unwarranted disparity*.") (emphasis added); *id*. 15 (describing petitioner's trial court sentencing memo as making an "unwarranted disparities" argument); *id*. 31 (arguing that district court adequately addressed argument, not that petitioner failed to preserve it). Those concessions were well founded. *See* Pet. 18-19.

2. Likewise, the Government never argued below that petitioner was required to lodge an exception to the district court's ruling after it was handed down. *See* 16-3254 U.S. C.A. Br. § I; *id*. 13 (stating that sentencing issue was subject to *de novo* review, not plain error). Moreover, in asserting that duty for the first time in this Court, the Government does not claim that the Seventh Circuit requires such exceptions, citing only cases from other circuits and acknowledging a circuit conflict. BIO 28.

B. The Government's Alternative Ground For Affirmance Provides No Basis To Deny Certiorari.

The Government also says this case is a poor vehicle because even if the district court was required to address the disparity argument, it did. BIO 27-28. But as the Government frequently explains in its own petitions, "when an issue resolved by a court of appeals warrants review, the existence of a potential alternative ground to defend the judgment is not a barrier to review—particularly where, as here, that ground . . . was not addressed by the court of appeals." Gov't Pet. Reply, *Comm'r v. Estate of Jelke*, No. 07-1582 (Sept. 3, 2008), 2008 WL 4066478, at *9.

The argument is meritless as well. The Government points to the district court's rejection of petitioner's argument that he was less culpable than other extortion defendants because he sought only campaign donations, not money or other gifts for self-enrichment. BIO 26-27; *see also* Pet. App. 75a-78a. Rejecting that argument was responsive to petitioner's claim that his conduct fell outside the heartland of the relevant Guidelines. *See* BIO 26. But finding that petitioner was no *less* culpable than prior corruption defendants did not even arguably address petitioner's unwarranted disparities argument that those other defendants received vastly shorter sentences.

C. At The Very Least, The Petition Should Be Held For *Chavez-Meza v. United States*.

Since this petition was filed, the Court granted certiorari on a related question in *Chavez-Meza v. United States*, No. 17-5639. Because the Court's decision in that case could shed substantial light on the correctness of the Seventh Circuit's sentencing rule, the Court should at the very least hold this petition pending its decision in *Chavez-Meza*.

Chavez-Meza presents the question whether sentencing courts must address defendants' non-frivolous arguments under 18 U.S.C. § 3553(a) when deciding whether to grant a proportional sentence reduction under 18 U.S.C. § 3582(c)(2). *See* Pet. i, *Chavez-Meza*, No. 17-5639 (Aug. 14, 2017). While the case arises in a somewhat different context, sentencing courts in both settings are required to consider the Section 3553(a) sentencing factors. *See* 18 U.S.C. § 3582(c)(2). Moreover, the reasons for

requiring courts to address defendants' arguments substantially overlap in both contexts. *Compare* Pet. 37-39, *with* Petr. Br. 10-16, 31-32, *Chavez-Meza*, No. 17-5639 (Feb. 26, 2018).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted or held for *Chavez-Meza*.

Respectfully submitted,

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