No. 15-664

In the Supreme Court of the United States

ROD BLAGOJEVICH, PETITIONER
v.
UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. This case is, and has been from the start, fundamentally about where to draw the line between lawful political activity and crimes of extortion, bribery and honest services fraud. That is an important issue of bipartisan concern, directly impacting all candidates seeking or holding public office and their supporters, and one which this Court recently agreed to review in *McDonnell v. United States*, No. 15-474 (certiorari granted Jan. 15, 2016). Blagojevich's case is particularly important because it involves only the solicitation or attempt to obtain campaign contributions, which this Court has held are a form of protected political speech that warrants heightened scrutiny. Indeed, regardless of one's views about money in politics, a bright-line rule distinguishing lawful campaign fundraising activities from unlawful political corruption is necessary to avert a chilling effect on candidates' First Amendment right to solicit (and receive) campaign contributions, and donors' First Amendment right to respond with contributions. Clarity about where to draw that line is also essential to avoiding arbitrary and discriminatory enforcement against politicians who are outspoken, controversial, polarizing or simply unpopular. It is an issue that impacts our longstanding system of private financing of election campaigns from President of the United States to local alderman, and one that the lower courts have struggled with consistently since *Evans v. United States*, 504 U.S. 255 (1992).

2. The government's opposition does not dispute that the lower courts have expressed confusion—and signaled the need for further clarity and guidance from this Court—regarding what effect *Evans* had on *McCormick v. United States*, 500 U.S. 257 (1991), in the context of public corruption prosecutions involving the

solicitation of campaign contributions. To the contrary, the government's attempt to minimize the degree of conflict among the circuit courts on this issue (Opp. 18-21) proves the essence of Blagojevich's petition: that the lower courts have acknowledged a significant lack of clarity regarding whether *Evans* modified or relaxed *McCormick*'s "explicit promise or undertaking" requirement to prove public corruption offenses involving campaign contributions; that the confusion arises in part from uncertainty regarding whether this Court's holding in *Evans* was meant to weaken the requirement for proving extortion involving campaign contributions; and that the circuits have expressed particular confusion about what *McCormick*'s requirement that a quid pro quo be "explicit" means in light of *Evans*. The government also concedes (Opp. 20) that since *Evans* some courts of appeals have (appropriately) recognized the distinction between public corruption cases involving campaign contributions and those involving other payments, and have indicated or suggested that extortion cases involving campaign contributions require heightened proof of an "explicit" agreement under *McCormick*.

Despite these concessions, the government's opposition rests largely on its assertion that *Evans* was a campaign contributions case; that there is no distinction between public corruption prosecutions involving campaign contributions and those involving other payments; and, ultimately, that a jury may convict as long as it finds beyond a reasonable doubt the existence of a quid pro quo—that money or property was given "in return for" official action. Opp. 14-17. In other words, the government assumes that the quid pro quo requirements of *McCormick* and *Evans* are one and the same, and that *McCormick*'s "explicit promise or undertaking" language does not require anything more than *Evans* would in a campaign contributions case. In doing so the gov-

ernment necessarily assumes the answers to the very questions that have so vexed the courts of appeals since *Evans* and warrant review here.

The government also glosses over the increased risk of misunderstanding that attends cases like this that involve only the *solicitation* or *attempt* to obtain campaign contributions. As explained in the petition, such instances create a heightened risk of misunderstanding about what exactly the candidate or official has promised to do if the requested campaign contribution is made. Pet. 26, 30. This factual ambiguity will have to be unpacked and resolved by a jury, the prospect of which, absent very clear standards in such prosecutions, will surely cast a broad chilling effect on the behavior of candidates and donors as well. Indeed, in a pure campaign contribution solicitation case such as this, which the government does not dispute implicates significant First and Fifth Amendment interests of both elected officials and donors, a promise of official action must be expressed with sufficient clarity to avoid chilling the political speech of both groups and opening the door to selective prosecution. *McCormick*'s requirement of an *explicit* promise (which can be inferred from circumstantial evidence and need not be express) provides the necessary clarity by ensuring the promise of *certain* action if the requested contribution is made, which must be understood as such by both the official and the prospective donor.[1]

Notwithstanding its arguments to the contrary here, the government acknowledged in its opposition to the certiorari petition in *McDonnell* both the distinction between campaign contributions and other payments, and the need for greater clarity and certainty regarding a

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[1] The government's contention that requiring a "specific act" be the object of the exchange protects against casting a chilling effect on legitimate campaign financing activities (Opp. 21 n.4) is meritless. *See* Pet. 23-24.

promise of official action in the context of campaign contributions. Attempting to distinguish McDonnell's receipt of various gifts in exchange for what it claimed was official action from the receipt of campaign contributions, the government explained, citing *McCormick*:

> In a corruption case involving campaign contributions, the *instructions should carefully focus the jury's attention* on the difference between lawful political contributions and unlawful extortionate payments and bribes *to ensure that the jury does not infer a quid pro quo* merely because an elected official took actions favorable to a contributor.

Brief for the United States in Opposition at 27, *McDonnell v. United States*, No. 15-474 (filed Dec. 8, 2015) (internal quotation marks omitted, and emphases added). Yet here the government insists there is no distinction between prosecutions involving campaign contributions and those that do not, and that the instructions given to Blagojevich's jury were proper because they were "nearly identical to those given in *Evans*." Opp. 14-15, 17.

But the jury instructions in this case were far from clear, omitting the "explicit promise or undertaking" language of *McCormick* requested by Blagojevich at trial, and allowing the jury to infer the existence of a quid pro quo and convict him based on his belief or knowledge that a contribution would be made because of a *donor's* expectation that some future official act would be taken in return for the contribution rather than an explicit promise or undertaking by Blagojevich to perform an official act in exchange for the contribution. Pet. 23.

The government protests that this is not so because the jury was instructed that an official must receive or attempt to obtain money or property "in return for" an

official act. Opp. 16. But the instructions given at trial simply required that the soliciting official "believ[e] that [the campaign contribution] would be given in exchange for [the] specific requested exercise of his official power" and "believing that [the contribution] would be given to him in return for" the action. These instructions plainly allow conviction where an official simply *believes* (or assumes) that a donor's behavior would be motivated by anticipation of or a desire for the requested outcome, but the official has not *agreed* to execute the desired action in the event the contribution is made. In no way does this instruction demand the degree of clarity that is mandated by *McCormick*.[2]

In this case, too, the risk of ambiguity and confusion is not merely theoretical (as the government wrongly claims, Opp. 21). Blagojevich was not convicted of any of the public corruption offenses at his first trial. This case undoubtedly was a close call for the jury, and every word included in (or omitted from) the jury instructions likely mattered.

Here, the record is replete with indications of confusion and misunderstanding between Blagojevich and those individuals from whom he sought campaign contributions. For example, although horse racing executive John Johnston testified that Blagojevich's intermediary told him that a request for a $100,000 campaign contribution was "separate" and unconnected to the signing of a bill favorable to Johnston's racetrack, Johnston said he "didn't believe it." Tr. 2992, 3032. Similar ambiguity af-

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[2] The government told the jury that Blagojevich was guilty as charged if his request for a campaign contribution was "connected" to an official act. Tr. 5381, 5390. The government argued to the jury that Blagojevich was guilty of extortion if he connected the solicitation of campaign contributions with an official act by, for instance, speaking about them in the "same sentence," which plainly misstated the law and created further ambiguity. Tr. 5381.

fected the alleged schemes to exploit Jesse Jackson Jr. and Patrick Magoon. *See* Pet. 4-5, 6. In each instance the instructions clearly permitted the jury to convict Blagojevich if he believed that *the prospective donor expected* some future action would be taken in exchange for the requested contribution, even if the jury also concluded that *Blagojevich had not agreed* to execute the desired action in the event the contribution was made. Such ambiguity would not have been possible had the court accepted Blagojevich's request for an "explicit" quid pro quo instruction.

3. This case presents an ideal vehicle to address the question of whether *Evans* modified or relaxed *McCormick*'s holding that an "explicit" quid pro quo is required to prove extortion involving campaign contributions. It is an ideal vehicle because unlike many political corruption extortion cases that involve both campaign contributions and other non-contribution payments, this is a pure campaign contributions case; Blagojevich was never accused of taking a penny out of his campaign fund for personal use or accepting cash or other gifts. Nor is there any dispute that the contributions he requested were legitimate campaign contributions.[3] This is also a pure solicitation and attempt case; Blagojevich never received any of the campaign contributions that he requested. The government does not dispute the need for a clear line distinguishing lawful campaign fundraising from criminal extortion, particularly in a case like this that only involves the solicitation or attempt to obtain campaign contributions. Nor does the government dis-

[3] The government tries to cast doubt about whether this case involved legitimate campaign contributions (Opp. 13 n.3), but it effectively conceded otherwise at trial. *See* Pet. 12 n.5; 29-30 n.14.

pute that the lack of such clarity would raise serious First and Fifth Amendment concerns.

Although the government concedes that Blagojevich has consistently maintained that extortion requires an explicit quid pro quo, it argues that he has not presented a consistent position on what "explicit" means. Opp. 13, 14. But *McCormick* itself explains what "explicit" means, holding that soliciting and receiving campaign contributions constitutes extortion

> 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. In such situations the official *asserts that his official conduct will be controlled by the terms of the promise or undertaking.*

500 U.S. at 273 (emphases added). That definition is entirely consistent with Blagojevich's contention that explicit means *very clear*, leaving no room for ambiguity or room for doubt. Again, an explicit quid pro quo means there must be a promise of *certain* action if the requested contribution is made, which must be understood as such by both the official and the prospective donor—the solicitation must be in the nature of a "firm offer" in contract law, and those expectations must be communicated (by language, action, or context) clearly. Pet. 25, 27.[4]

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[4] The government claims that Blagojevich has not presented a consistent definition of "explicit" that is sufficient to facilitate this Court's review, citing two or three examples from the record where defense counsel, objecting to jury instructions proposed by the government, imprecisely used the terms "explicit" and "express" interchangeably. By cherry-picking these few references from a trial record that is thousands of pages long and suggesting that they are representative of Blagojevich's entire theory of the case until now, the government has willfully overlooked or ignored the far more

The lower courts have also addressed what is meant by the "explicit" quid pro quo requirement in numerous cases since *Evans*. *See* Pet. 25 (citing cases). Indeed, what is important for purposes of this case, and warrants the Court's intervention and review, is the fact—undisputed by the government—that the lower courts have struggled to understand what *McCormick* meant by "explicit" particularly in light of *Evans*. *See* Pet. 19 (citing cases). Further percolation among the lower courts is more likely to extend the confusion rather than clarify it. The relative rarity of political corruption prosecutions involving campaign contributions means this case presents an uncommon opportunity for this Court's intervention to clarify the state of the law for donors and candidates alike.

4. The government further misconstrues the important issue raised by Blagojevich's good faith defense argument in two ways. Opp. 21-22.

First, the government does not dispute that the lower court's decision to bar a valid good faith defense to the specific intent crimes of extortion, bribery and honest services fraud was based on its confusion about the *McCormick* issue. The government also does not dispute Blagojevich's contention that the trial court amended the pattern good faith jury instructions to include an instruction that, "[i]n the context of this case, good faith means that the defendant acted without intending to exchange official acts for personal benefits." App. 26a, 28a, 30a.

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numerous instances throughout the record where the defense clearly and forcefully raised the explicit quid pro quo issue, preserving it for appeal. *See, e.g.*, Tr. 3263-65 (trial court defines "explicit agreement" as one "clear to both sides"); Tr. 5217-20 (defense counsel explains "our position on [explicit agreement] is that . . . there needs to be the intention to seek or accept something of value, but that that intention . . . needs to be intentionally communicated.").

This instruction was not included in the first trial, which resulted in a hung jury, and it improperly allowed the jury to convict Blagojevich of each offense without concluding that he had a guilty mind or believed he was breaking the law, contrary to *Elonis v. United States*, 135 S. Ct. 2001 (2015).

Second, the government attacks a straw man, arguing that ignorance of the law is no defense to the specific intent crimes of which Blagojevich was convicted. Blagojevich has never attempted to present an ignorance-of-the-law defense. His contention is, and always has been, that he knew the law—he knew *McCormick*—and that he honestly believed his actions complied with the explicit quid pro quo requirement of *McCormick*. The government does not address this argument, which, at minimum, should be remanded to the court of appeals in light of *Elonis*.

5. Finally, although Blagojevich has been in federal prison for nearly four years, serving a lengthy sentence for convictions that have a fair chance of being reversed if the Court grants review on either of the questions presented, the government attempts to avoid and defer review of these important issues on the ground that the case is still in an interlocutory posture. Opp. 9-10. This Court has the unquestioned power to review the decisions of federal courts whether "before or after rendition of judgment." 28 U.S.C. 1254(1). Interlocutory review of important issues essential to a case is only disfavored when it might result in piecemeal review. But nothing in this case's present posture indicates piecemeal review is in any way likely to occur. Retrial on the five counts where conviction was vacated by the Seventh Circuit would be barred by the Speedy Trial Act, 18 U.S.C. 3161(e), because more than 70 days elapsed between issuance of the mandate (August 27, 2015) and the date on

which Blagojevich petitioned for a writ of certiorari (November 17, 2015), and that initial period was not extended by the trial court or otherwise tolled for any reason. *See United States v. Fountain*, 840 F.2d 509, 510-12 (7th Cir. 1988) (Easterbrook, J.).

Nor does the fact that Blagojevich faces resentencing on the affirmed counts justify deferring consideration of his petition. Indeed, in denying a stay of its mandate, the Seventh Circuit noted "[t]here is no reason to delay the remand because neither another trial nor a resentencing would affect the issues on which Blagojevich intends to ask the Supreme Court for review." Order, *United States v. Blagojevich*, Dkt. 127, Case No. 11-3853 (7th Cir. Aug. 24, 2015).

This Court has reviewed criminal cases on an interlocutory basis when the issues presented are sufficiently important. *See, e.g.*, *Bates v. United States*, 522 U.S. 23 (1997), *Solorio v. United States*, 483 U.S. 435 (1987). Putting to one side the significance of the questions presented for both candidates and donors in the current election cycle, delaying review is unwarranted given that Blagojevich will remain imprisoned during the delay. *See* App. 22a-23a. This Court has not hesitated to review cases on an interlocutory basis where petitioners would otherwise suffer far lesser harms. *See, e.g.*, *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 346-48 (2011); *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 22 (2004).

Alternatively, the Court should hold Blagojevich's petition pending dismissal of the remanded charges and resentencing, which would speed the reassertion of these issues before the Court. Holding the petition would also allow for consideration of any decision in *McDonnell*, scheduled to be argued this term, which similarly involves a jury instruction that permits conviction based on a public official's belief that a donor expects some fu-

ture action even if the official has not agreed to do it. *See* Brief for the Petitioner at 52, *McDonnell v. United States*, No. 15-474 (filed Feb. 29, 2016).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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