No. 11-955

IN THE

Supreme Court of the United States

DON EUGENE SIEGELMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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1. The briefs of *amici curiae* – one from a bipartisan group of more than a hundred former Attorneys General, another from law professors, and another from Mr. Scruggs – confirm that the first two issues presented are important to the law and the practice of democracy; that there is disagreement in the lower courts; and that the decision below is in friction with core principles in the fields of campaign finance law, constitutional law, and criminal law.

The Government, declining even to acknowledge the briefs of the Attorneys General and of Mr. Scruggs, and making only passing reference to the professors' brief, supports the Eleventh Circuit's view: that a merely implied linkage between campaign

contribution and action can amount to crime. On this view, the existence of such linkage comes down to a jury question about state of mind, which may be proved by circumstantial evidence.

But an implied linkage is an available inference in so very many instances, in our political system, because "the implicit exchange of benefit for money 'in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures.'" *Ognibene v. Parkes*, 671 F.3d 174, 187 (2nd Cir. 2011), *quoting McCormick v. United States*, 500 U.S. 257, 272-73 (1991). Thus, if the Government and the Eleventh Circuit are correct, the range of targets for prosecution is extremely broad.

The Government asserts that the criminality of merely implied exchanges was settled in *Evans v. United States*, 504 U.S. 255 (1992). As shown in the petition and the *amicus* briefs, many disagree. Many see *Evans* as not having diluted the *McCormick* standard for campaign-contribution cases. Many see the law after *Evans* as including a distinction between campaign-contribution cases and personal enrichment cases: the *quid pro quo* must be express in campaign-contribution cases. *See*, *e.g.*, *United States v. Ganim,* 510 F.3d 134, 142-43 (2nd Cir. 2007); *United States v. Abbey,* 560 F.3d 513, 517-18 (6th Cir. 2009); *see also* Brief *Amici Curiae* of Former Attorneys General, pp. 15-17 (citing more cases). While the Government calls *Ganim* and *Abbey dicta*, this characterization fails to eliminate the need for this Court's review. Hopefully no prosecutor in, for example, the Second Circuit would indict someone for doing something that the Second Circuit has said is lawful. Ambiguity in the law remains, where there should be clarity.

This is an area of law where many of the potential criminal defendants (candidates, officials, contributors, lobbyists) actually do try to know what the law is, and (in all but rare cases) try to follow it. Potential defendants need to know what the law is, so that they can act accordingly. The *amicus* briefs, along with other commentary,[1] reflect the reality: those who are involved in the process of democracy need both certainty and protection from prosecutorial discretion that is not sufficiently cabined by clear legal rules.

Moreover, even if one accepted the Government's position that under *Evans* the jury does not have to be instructed that only "explicit" *quid pro quo* agreements involving campaign contributions are criminal, still the question remains regarding the level and nature of proof that is sufficient to take a case over the line from political participation to crime. In this case, both the jury-instruction question, and the question regarding the standard and nature of proof required, are in need of this Court's resolution. If (as the Government says) an implicit exchange is enough to make a crime, and if it can be proven circumstantially, then no one who is interested in matters of law or policy is safe *ex ante* in making a campaign contribution. And no official is ever safe in accepting a contribution. There is always the danger that, in hindsight, some "circumstantial"

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[1] *See*, *e.g.*, George Will, "Is it bribery or just politics?," *Washington Post*, February 10, 2012, <http://www.washingtonpost.com/opinions/is-it-bribery-or-just-politics/2012/02/09/gIQA4hy34Q_story.html> ("Until the court clarifies what constitutes quid pro quo political corruption, Americans engage in politics at their peril because prosecutors have dangerous discretion to criminalize politics.")

evidence will convince someone – investigators, prosecutors, then jurors – that there was a bad state of mind. That likelihood is greater, for officials or contributors who are already "suspect" in the eyes of prosecutors, investigators, and jurors; thus the danger arises that investigations, prosecutions and convictions will be driven by political intuition, leading to arbitrariness or worse.

Yet the Government calls this a "poor vehicle" for considering the *McCormick* standard and the impact of *Evans* on it, because this is not a Hobbs Act case as *McCormick* and *Evans* were. (BIO, p. 21). The Government argues that this Court should not clarify what the "explicit *quid pro quo*" standard means, because the Government will not even commit to a position on whether the "explicit *quid pro quo*" standard applies to § 666 and "honest services." The Government seeks to avoid a ruling by this Court on the details of the law, by refusing even to concede the basics of the law. The Government says that § 666 and "honest services" might not be governed by *McCormick* at all, and that it might have the power to prosecute campaign contributions as bribes without alleging or proving any *quid pro quo* in any sense.

Far from counseling against review in this case, the Government's posture – its contention that *McCormick* might not even apply to these statutes – shows how important it is for the Court to address these questions now. *See Evans*, 504 U.S. at 286 (Thomas, J., dissenting) (explaining the origin of the *McCormick* standard: "We did not purport to discern that requirement in the common law or statutory text, but imposed it to prevent the Hobbs Act from effecting a radical (and absurd) change in American

political life.") And when the Government will not even concede that the *McCormick* standard applies to these statutes which the Government so frequently uses in "public corruption" cases, the basic concept of advance fair warning about the boundaries of criminal law has been lost.

These problems in the current state of the law are not theoretical; troubling prosecutorial discretion is current and ongoing. In Alabama, the Justice Department's Public Integrity Section recently spent enormous resources prosecuting several state legislators, two of the state's most respected lobbyists, and others in a case that was largely (though not entirely) premised on the allegation that campaign contributions were offered or solicited in order to influence votes on a then-pending bill related to gaming.[2] This effort ended just after the filing of the certiorari petition in this case. All defendants who went to trial were acquitted on all counts, but only after two lengthy trials (with the first jury having hung on some charges), with all the financial, professional and emotional burdens that such trials entail.

The Alabama experience shows the awesome power that the Department of Justice is now wielding, in this field of enormous discretion: even beyond the power to prosecute, it has the power to affect legislation and to affect elections. The Department interjected itself into the state lawmaking process, intentionally acting to derail a pending bill, because (according to the testimony of an FBI agent) the

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[2] *United States v. McGregor*, 2:10cr186-MHT (M.D. Ala.). Some of the counsel for Governor Siegelman were also counsel in *McGregor*.

Department decided the bill was tainted.[3] Then just a few months after the alleged events, and mere weeks before the November 2010 election, the Department announced an unusually speedy indictment; this is widely recognized in Alabama as part of the reason for the election results, in which one indicted (later acquitted) legislator was defeated and in which legislative power shifted from one party to the other. These worrisome effects of expansive federal prosecutorial power are made even more worrisome by the District Court's finding: that certain legislators, who had a large hand in stirring up the federal investigation, were doing so for reasons that mixed partisanship and racism.[4] The

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[3] There was a concern within the United States Department of Justice that we could not knowingly, willfully allow tainted legislation to progress through the Alabama Legislature, potentially tainted information or legislation to progress. As a result, representatives from the United States Department of Justice as well as the F. B. I. were going to approach the … the leadership of the Legislature, to let them know that we had grave concerns or some sort of concerns about the ethical practices surrounding this legislation.

Transcript of July 19, 2011, Doc. 1810, pp. 93-94, in *McGregor*.

[4] Beason and Lewis had ulterior motives rooted in naked political ambition and pure racial bias. … [Their] motive for cooperating with F.B.I. investigators was not to clean up corruption but to increase Republican political fortunes by reducing African-American voter turnout. Second, they lack credibility because the record establishes their purposeful, racist intent.

Beason, Lewis, and their political allies sought to defeat SB380 partly because they believed the absence of the referendum on the ballot would lower African-American voter turnout during the 2010 elections.

McGregor, 2011 U.S. Dist. LEXIS 121794, *9 (M.D. Ala. 2011).

District Court, we recognize, did not find that the Government shared this partisan and racist motivation. Still, the Government found itself used by those who did have improper motivation. If the law allows charge and conviction based on states of mind rather than express *quid pro quo* exchanges, there is continued danger that prosecutors and investigators will similarly find themselves used by political operatives in the future.

Yet on the other hand there are situations like that in New York, where the *New York Times* reports that wealthy financiers offered substantial campaign support to state legislators if they voted for a pending gay marriage bill.[5] Was that a crime, or constitutionally protected political expression? Does the fact

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> By preventing SB380 from appearing on the 2010 ballot, Beason and Lewis believed that black voters would stay home on election day, thereby increasing Republican chances to take control of the state legislature. The evidence indicates that Beason and Lewis sought to inculpate the defendants primarily to neutralize a potential political threat.

Id., *12.

[5] "A Campaign Windfall for 4 Republicans Who Voted for Same-Sex Marriage," *New York Times*, October 13, 2011, p. A-23, <http://www.nytimes.com/2011/10/13/nyregion/4-republicans-who-voted-for-gay-marriage-set-to-receive-aid.html?_r=1&hp>:

> As the State Legislature this year debated the legalization of same-sex marriage, a group of wealthy financiers who support both gay rights and Republican causes offered a reassurance to Republican lawmakers: Stand with us now, and we will stand with you later.
>
> This week, the four Republican state senators who provided the decisive votes to pass the marriage bill are to get a big financial boost from those donors, including Mayor Michael R. Bloomberg.

that it took place in the Second Circuit, rather than the Eleventh, make a difference? Does the subject matter of the bill in question, or the identity of the contributors or the legislators, make any difference to the intuitions of prosecutors and FBI agents as they decide whether to start investigating? Should the contributors or legislators worry that the Presidential election might bring new prosecutors who have a different view? Those involved in the political process should not have to wonder about such things – but they will have to wonder, as long as there is enormous prosecutorial discretion and a lack of legal clarity in this constitutionally-sensitive area.

2. The remaining issue pertains to 18 U.S.C. § 1512(b)(3), which requires proof of "intent to … hinder, delay, or prevent" communication to law enforcement.

The Government suggests that this issue arises in an "interlocutory" posture because Governor Siegelman faces resentencing (after reversal on two unrelated counts). But this Court's jurisdiction is unquestioned, and prudential reasons militate in favor of reviewing this issue now. The Court of Appeals has given its final word on the validity of this count. The issue is now squarely presented. The Government offers no reason to believe that review would be more efficient if postponed until after a sentencing proceeding that will neither change this issue nor make it moot. If the Court grants certiorari on the first two questions presented, it should grant certiorari on the third as well, rather than requiring Governor Siegelman to file a third petition on the § 1512(b)(3) issue after resentencing. Piecemeal review of the issues in this case makes little sense for the Court or for any party. The Government is

merely placing hurdles for the sake of placing hurdles.

On the merits, the Government contends that it proved the requisite intent to "hinder, delay or prevent" communication to law enforcement, either from Bailey's lawyer or from Bailey and Young. The key issue is a legal one, concerning the proper interpretation of the statute's "intent" requirement.

The Government says that Governor Siegelman's intent was to put Bailey's lawyer in the position to tell law enforcement that the motorcycle sale transaction was legitimate. Trying to bring this within § 1512(b)(3), the Government argues that the statute covers giving incorrect exculpatory information to a person with the intent that the person will then pass it along to law enforcement, regardless of whether the person would have otherwise communicated anything to law enforcement at all.

The Government's position flouts the plain language of the statute. Congress can write statutes that broadly cover the intent to "influence" what people will say under some circumstances, if the goal is to sweep broadly and even to criminalize the creation of exculpatory statements under those circumstances. Indeed, Congress did just that in § 1512(b)(1), using the word "influence" instead of "hinder" for the matters covered there. But § 1512(b)(3), by its plain terms, is not such a statute. It covers only efforts to "hinder, delay or prevent" communications to law enforcement. An intent to make a person into a favorable witness, where absent such efforts the person would not have had anything to tell law enforcement, does not come within this scope; it doesn't constitute the intent to "hinder," to "delay," or to "prevent" the person's communications.

Those words, plainly, refer to the intent to *block*, to *get in the way of*, communications.

As to Bailey and Young, the Government contends that Governor Siegelman's intent, when getting this final check from Bailey for the remaining purchase price of the motorcycle, was to get Bailey and Young "locked in" to the narrative that Bailey had bought a motorcycle from Governor Siegelman with a loan from Young, so that they would not later give contrary and incriminating information. (BIO, p. 27).

But this story of supposed intent has no basis in the evidence, and the Court of Appeals did not even suggest it. Indeed, this story is destroyed by the undisputed fact – from testimony of the Government's star witness, Bailey himself – that it was *his* idea to portray himself as having received a loan from Young so that he could purchase the motorcycle from Governor Siegelman, and then it was *his* idea to pay Young back once he found that an investigation was ongoing. It had been Bailey who had, at the outset, suggested that Young give money to him, not to Governor Siegelman, so that he could purchase the motorcycle. [Transcript p. 459 ("I made the suggestion that Lanny [Young] give me the money and let me give it to the Governor rather than Lanny giving the money directly to the Governor. … I didn't think it was appropriate for Lanny to be in partnership with the Governor on a motorcycle …")]. And later, as Bailey further said, "I found out about the investigation that was going on with Lanny. … I wanted to repay Lanny's $9200. I did it in the form of a check." [Transcript p. 475].

So Bailey and Young were fully locked in to that version of events, by their own doing, well before the events took place that are the basis of this count of conviction. The one and only thing for which Governor Siegelman was convicted under § 1512(b)(3) was the last check that came at the tail end of this sequence: Bailey's payment of the final bit of the motorcycle's purchase price to Governor Siegelman. There is no reason to believe that Governor Siegelman had any thought, at that moment, that he needed to "lock in" Bailey and Young to anything; they had locked themselves as tightly as they could already. They were already fully committed to their account that this had been a purchase of a motorcycle by Bailey with a loan from Young. In suggesting that Governor Siegelman harbored the specific intent that he needed to lock them into that supposedly false account at the very end of the whole chain of events, the Government is offering a story with no basis in reality. It is no surprise that the Court of Appeals declined to suggest that there was the type of intent vis-à-vis Bailey and Young that the Government now alleges to save its conviction.

The Government has struggled hard to make this seem like a mere fact-bound issue. But nearly every case comes to this Court with facts, and often with disputes about them. The core of the issue at hand is a legal dispute; the Government's brief (like the decision below) shows an important misconception of the statute as a matter of law.

Too often, as in this case, "obstruction"-type statutes become the last-resort tool of prosecutors who seek a consolation prize conviction in a high-profile case. Stretching such statutes beyond their words, as here, makes that all too easy, as gut-level

disapproval of a defendant's actions comes to substitute for the question of whether he actually violated the law. By granting review of this issue along with the other questions presented, the Court would not only do justice; the Court would bring much needed clarity to the proper scope of common tools federal prosecutors use – the federal bribery and obstruction of justice statutes – in high-profile, politically-charged cases against state and local elected officials and their contributors and supporters.

Respectfully submitted,

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