No. 11-955

IN THE

Supreme Court of the United States

DON EUGENE SIEGELMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF *AMICI CURIAE* OF FORMER ATTORNEYS GENERAL IN SUPPORT OF PETITIONER

BURTON N. LIPSHIE
Counsel of Record
ROBERT ABRAMS
JOSEPH E. STRAUSS
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
212-806-5400

GRANT WOODS
Of Counsel
1726 North 7th Street
Phoenix, Arizona 85006
602-957-1500

JEFFREY A. MODISETT
Of Counsel
SNR DENTON
601 South Figueroa Street
Los Angeles, California 90017
213-892-2802

ROBERT T. STEPHAN
Of Counsel
12548 West 123rd Street
Overland Park, Kansas 66213
913-685-1953

Counsel for Amici Curiae

March 1, 2012

LIST OF *AMICI*

1. Abrams, Robert, former Attorney General for the State of New York
2. Anzai, Earl, former Attorney General for the State of Hawaii
3. Armstrong, David, former Attorney General for the Commonwealth of Kentucky
4. Baily, Douglas B., former Attorney General for the State of Alaska
5. Baker, Thurbert, former Attorney General for the State of Georgia
6. Ballentine, Rosalie Simmonds, former Attorney General for Virgin Islands
7. Bardacke, Paul, former Attorney General for the State of New Mexico
8. Bellotti, Francis X., former Attorney General for the Commonwealth of Massachusetts
9. Botelho, Bruce, former Attorney General for the State of Alaska
10. Bronster, Margery, former Attorney General for the State of Hawaii
11. Brown, Charles G., former Attorney General for the State of West Virginia
12. Bryant, Winston, former Attorney General for the State of Arkansas
13. Burson, Charles, former Attorney General for the State of Tennessee
14. Butterworth, Robert A., former Attorney General for the State of Florida
15. Campbell, Bonnie J., former Attorney General for the State of Iowa

16. Carter, Pamela L., former Attorney General for the State of Indiana
17. Clark, Steve, former Attorney General for the State of Arkansas
18. Cody, W.J. Michael, former Attorney General for the State of Tennessee
19. Cohen, Walter W., former Attorney General for the Commonwealth of Pennsylvania
20. Curran, Joseph, former Attorney General for the State of Maryland
21. Del Papa, Frankie Sue, former Attorney General for the State of Nevada
22. Del Tufo, Robert J., former Attorney General for the State of New Jersey
23. Diamond, M. Jerome, former Attorney General for the State of Vermont
24. Doran, Richard E., former Attorney General for the State of Florida
25. Doyle, Honorable James E., former Attorney General for the State of Wisconsin
26. Easton, John J., former Attorney General for the State of Vermont
27. EchoHawk, Larry, former Attorney General for the State of Idaho
28. Edmisten, Rufus, former Attorney General for the State of North Carolina
29. Edmondson, Drew, former Attorney General for the State of Oklahoma
30. Eikenberry, Ken, former Attorney General for the State of Washington
31. Fahner, Ty, former Attorney General for the State of Illinois

32. Farber, Zulima V., former Attorney General for the State of New Jersey
33. Farmer, John, former Attorney General for the State of New Jersey
34. Fisher, Lee, former Attorney General for the State of Ohio
35. Frohnmayer, David, former Attorney General for the State of Oregon
36. Gebelein, Richard, former Attorney General for the State of Delaware
37. Goddard, Terry, former Attorney General for the State of Arizona
38. Gorman, Chris, former Attorney General for the Commonwealth of Kentucky
39. Graham, Jan, former Attorney General for the State of Utah
40. Granholm, Jennifer M., former Attorney General for the State of Michigan
41. Greely, Mike, former Attorney General for the State of Montana
42. Gregoire, Honorable Christine, former Attorney General for the State of Washington
43. Harshbarger, Scott, former Attorney General for the Commonwealth of Massachusetts
44. Hartigan, Neil F., former Attorney General for the State of Illinois
45. Harvey, Peter C., former Attorney General for the State of New Jersey
46. Hatch, Mike, former Attorney General for the State of Minnesota
47. Heed, Peter W., former Attorney General for the State of New Hampshire

48. Heitkamp, Heidi, former Attorney General for the State of North Dakota
49. Hyland, William F., former Attorney General for the State of New Jersey
50. Ieyoub, Richard, former Attorney General for the State of Louisiana
51. Kelley, Frank J., former Attorney General for the State of Michigan
52. Ketterer, Andrew, former Attorney General for the State of Maine
53. Kilgore, Jerry, former Attorney General for the Commonwealth of Virginia
54. Koppell, Oliver, former Attorney General for the State of New York
55. LaFollette, Bronson, former Attorney General for the State of Wisconsin
56. Lautenschlager, Peg, former Attorney General for the State of Wisconsin
57. Leroy, David H., former Attorney General for the State of Idaho
58. Lilly, Michael, former Attorney General for the State of Hawaii
59. Lockyer, Bill, former Attorney General for the State of California
60. Lynch, Patrick, former Attorney General for the State of Rhode Island
61. MacFarlane, J.D., former Attorney General for the State of Colorado
62. Madrid, Patricia, former Attorney General for the State of New Mexico
63. Marks, Robert A., former Attorney General for the State of Hawaii

64. Mazurek, Joseph P., former Attorney General for the State of Montana
65. McCollum, Bill, former Attorney General for the State of Florida
66. McKay, Brian, former Attorney General for the State of Nevada
67. Medlock, Travis, former Attorney General for the State of South Carolina
68. Mendocino, Frank V., former Attorney General for the State of Wyoming
69. Meyer, Joseph, former Attorney General for the State of Wyoming
70. Miller, Andrew P., former Attorney General for the Commonwealth of Virginia
71. Mills, Janet T., former Attorney General for the State of Maine
72. Modisett, Jeffrey A., former Attorney General for the State of Indiana
73. Moore, Mike, former Attorney General for the State of Mississippi
74. Myers, Hardy, former Attorney General for the State of Oregon
75. O'Neil, James, former Attorney General for the State of Rhode Island
76. Opper, Richard, former Attorney General for the Territory of Guam
77. Pappert, Jerry, former Attorney General for the Commonwealth of Pennsylvania
78. Park, W. Anthony, former Attorney General for the State of Idaho
79. Petro, Jim, former Attorney General for the State of Ohio

80. Pittman, Edwin L., former Attorney General for the State of Mississippi
81. Poritz, Deborah T., former Attorney General for the State of New Jersey
82. Preate, Ernest, former Attorney General for the Commonwealth of Pennsylvania
83. Price, III, Warren, former Attorney General for the State of Hawaii
84. Quinn, Robert H., former Attorney General for the Commonwealth of Massachusetts
85. Reichard, Hector Jr., former Attorney General for Puerto Rico
86. Reilly, Tom, former Attorney General for the Commonwealth of Massachusetts
87. Roberts, Dennis J., former Attorney General for the State of Rhode Island
88. Rosenthal, Stephen D., former Attorney General for the Commonwealth of Virginia
89. Rowe, Steven, former Attorney General for the State of Maine
90. Shannon, James M., former Attorney General for the Commonwealth of Massachusetts
91. Six, Steve, former Attorney General for the State of Kansas
92. Smith, Greg, former Attorney General for the State of New Hampshire
93. Smith, Jim, former Attorney General for the State of Florida
94. Spaeth, Nicholas, former Attorney General for the State of North Dakota
95. Spagnoletti, Robert, former Attorney General for the District of Columbia

96. Spannaus, Warren, former Attorney General for the State of Minnesota
97. Stephan, Robert T., former Attorney General for the State of Kansas
98. Summers, Paul, former Attorney General for the State of Tennessee
99. Tellinghuisen, Roger A., former Attorney General for the State of South Dakota
100. Terry, Mary Sue, former Attorney General for the Commonwealth of Virginia
101. Tierney, James, former Attorney General for the State of Maine
102. Troy, Anthony F., former Attorney General for the Commonwealth of Virginia
103. Turpen, Michael C., former Attorney General for the State of Oklahoma
104. Ullrich, C. William, former Attorney General for the Territory of Guam
105. Van Dam, R. Paul, former Attorney General for the State of Utah
106. Van de Kamp, John K., former Attorney General for the State of California
107. Walkup, J. Knox, former Attorney General for the State of Tennessee
108. Wefald, Robert O., former Attorney General for the State of North Dakota
109. White, Mark, former Attorney General for the State of Texas
110. Wier, Richard Jr., former Attorney General for the State of Delaware

111. Woodard, Duane, former Attorney General for the State of Colorado
112. Woods, Grant, former Attorney General for the State of Arizona
113. Zazzali, James, former Attorney General for the State of New Jersey

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INTEREST OF *AMICI CURIAE*

Amici, who are listed on the inside cover, are prior Attorneys General of States, Commonwealths and Territories of the United States who at one time each served as the chief legal officer and/or law enforcement officer of his or her jurisdiction.[1] This bipartisan group of former officials share a continuing interest in the manner in which the criminal laws of the United States are enforced, and are sensitive to the arbitrary and abusive enforcement of those laws if prohibited conduct is not clearly defined. Of particular importance to this case, *amici* are concerned that public officials generally may be targeted, prosecuted and convicted for conduct at the heart of the political process—contributions to issue-advocacy campaigns—based on an "implicit" *quid pro quo* standard. This test has been rejected by this Court in such circumstances as insufficient to protect against expansive and unjustified criminal liability. Because the Eleventh Circuit's unprecedented decision sharply conflicts with the stringent "explicit" *quid pro quo* standard established by this Court in the campaign contribution context, *amici* respectfully submit this brief in support of the petition for a writ of certiorari.

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[1] Pursuant to Rule 37.2(a), letters of consent of all parties are being filed with the Clerk of the Court. Counsel of record for all parties received timely notice of *amici's* intent to file this brief. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case is about the criminalization of First Amendment freedoms—the giving and receiving of campaign contributions—based on an indefinite standard that will significantly alter the liberty of constituents to contribute to political campaigns without fear of criminal liability and the desire of citizens to run for political office in a system that largely depends on private contributions.

The Eleventh Circuit adopted an extraordinarily expansive and erroneous interpretation of the "explicit" *quid pro quo* standard necessary to sustain a conviction in the campaign contribution context for "honest services" mail fraud under 18 U.S.C. §§ 2, 1341 & 1346, conspiracy to commit "honest services" mail fraud under 18 U.S.C. § 371, and bribery under 18 U.S.C. § 666(a)(1)(B),[2] ruling that criminal liability may be imposed whenever the prosecution presents evidence merely that a contribution is made to an issue-advocacy campaign which a public official understands is motivated by the donor's desire for the official to take a certain act, and such act is ultimately taken by the official.

In *McCormick v. United States*, 500 U.S. 257 (1991), this Court held that the government must demonstrate an "explicit" *quid pro quo* connection between the contribution and official act, *to wit*, a

[2] The Eleventh Circuit properly held that the explicit *quid pro quo* requirement applies to the bribery and "honest services" fraud statutes. *United States v. Siegelman*, 640 F.3d 1159, 1170, n.14 (11th Cir. 2011).

public official's explicit promise to perform an act in return for the contribution. *Id.* at 273. The Eleventh Circuit's holding that a "corrupt" agreement may be inferred from circumstantial evidence of the official's unspoken state of mind eviscerates *McCormick*'s "explicit" *quid pro quo* requirement, which was intended to severely restrict the government's ability to criminalize campaign contributions because of their ubiquity and significance to the democratic process.

The Eleventh Circuit's holding is even more problematic after *Skilling v. United States*, 561 U.S. ___, 130 S. Ct. 2896 (2010), where this Court, citing due process principles of fair notice and prevention of arbitrary or discriminatory prosecutions, limited the "honest services" fraud statute to "paradigmic cases of bribes and kickbacks" within the "hard core" of the statute. *Id.* at 2934. In ruling that there was no "*Skilling* error" in this case, the Eleventh Circuit disregarded the essential point of that decision. *Siegelman*, 640 F.3d at 1173. The "explicit" *quid pro quo* standard was intended to prevent expansive criminal liability because campaign contributions—especially when made to issue-advocacy campaigns—result in no personal gain or enrichment and therefore do not constitute a "core" bribery violation as defined in *Skilling*. Thus, even if campaign contributions in specific instances may still be criminalized after *Skilling*, they may not be subject to the same "implicit" *quid pro quo* standard that applies to common bribes.

The thin reed of evidence on which the conviction of Governor Siegelman was based reveals the dangers of the Eleventh Circuit's ruling. In July 1999 and May 2000, Richard Scrushy donated money to a campaign for a lottery initiative that Governor Siegelman supported. In July 1999, Governor Siegelman reappointed Mr. Scrushy to Alabama's "CON" Board, just as the three previous governors of Alabama had done. The prosecution presented no evidence of an "explicit" *quid pro quo* linking Mr. Scrushy's reappointment to the contributions, *to wit*, that Governor Siegelman *promised* to reappoint Mr. Scrushy to the CON Board in return for the contributions and *asserted* that his conduct would be controlled by that promise. The Eleventh Circuit, in effect applying an "implicit" *quid pro quo* standard, nevertheless held that Governor Siegelman's understanding that Mr. Scrushy expected to be reappointed to the CON Board in return for the contributions was sufficient to sustain a conviction. This ruling clearly contravenes this Court's intent in *McCormick* to protect campaign contributions from expansive and uncertain liability.

As former Attorneys General, we understand the importance of clearly defining criminal conduct, which not only protects defendants from uncertain liability but also minimizes the risk of politically-motivated prosecutions. The Eleventh Circuit's "implicit" *quid pro quo* standard exposes every government official who acts to the benefit of a contributor, knowing that the contributor desired such

an act to take place, to criminal prosecution. Every President of the United States who nominates a contributor to an Ambassadorship could be subject to prosecution. Any United States Senator who publicly endorses a cause advocated by a contributor is at risk. Any Governor or Mayor who appoints a contributor to a board or commission might be faced with a charge of corruption. And, every donor who has ever been the beneficiary of sought-after political actions runs the same threat of being prosecuted. On the unlikely assumption that this would not upend the political fundraising mechanisms inherent in our political system, it would nevertheless give unwarranted latitude to prosecutors in targeting, for whatever reasons, those politicians and contributors whose lives and careers they desire to imperil. Because most of us have previously run for political office as candidates aligned with a major party, we are acutely aware that allowing prosecutors to cast a wide net in campaign contribution cases will stifle the legal ability of campaigns to raise needed funds for fear of politically-motivated prosecution of themselves and their donors. It will also discourage worthy people concerned about their reputation from participating in the political process either by standing for public office or by providing contributions to political campaigns and possibly gaining an appointment thereafter. That is precisely the untenable result which this Court intended to avoid by its holding in *McCormick*.

ARGUMENT

The Eleventh Circuit's decision injects unacceptable and counterproductive ambiguity into the definition of criminal liability in campaign contribution cases. In addition, the potential for arbitrary and discriminatory enforcement of anti-corruption statutes raises serious due process concerns under *Skilling*. This Court should grant certiorari and reverse the Eleventh Circuit's misguided erosion of the level of proof required to establish the explicit *quid pro quo* requirement.

I. A PUBLIC OFFICIAL MAY NOT BE PROSECUTED FOR RECEIVING A CAMPAIGN CONTRIBUTION IN THE ABSENCE OF AN EXPLICIT *QUID PRO QUO* CONNECTION BETWEEN THE CONTRIBUTION AND AN OFFICIAL ACT

The "explicit" *quid pro quo* standard established in *McCormick* was intended to clearly define prohibited criminal conduct in campaign contribution cases. The jury instructions approved by the Eleventh Circuit, however, permitted Governor Siegelman's conviction based on a lesser standard that sows confusion as to what conduct constitutes a crime in these circumstances. We respectfully submit that this Court should grant the petition for writ of certiorari and reaffirm that prosecutors are required to prove the existence of an "explicit" *quid pro quo*, *to wit*, an explicit promise or undertaking in which the public official *expressly asserts* that

he will perform an official act in exchange for the contribution, and that jurors must be charged that the existence of an "explicit" *quid pro quo* must be found, before criminal liability will attach for either: (a) making a campaign contribution with the hope or expectation of a subsequent official action; or (b) taking an official action after receiving a campaign contribution from a known donor.[3]

A. Under *McCormick*, Campaign Contributions May Not Give Rise To Criminal Liability In The Absence Of An "Explicit" *Quid Pro Quo* Agreement

In *McCormick*, a West Virginia state legislator, Robert L. McCormick, was prosecuted under the Hobbs Act for sponsoring certain legislation after receiving a series of cash payments from a lobbyist during his reelection campaign.[4] In prior discussions regarding the proposed legislation, McCormick

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[3] The Eleventh Circuit admitted that the "honest services" fraud instruction was "deficient," *Siegelman*, 640 F.3d at 1177 n.26, but held that this error was "harmless" because the instruction benefited from the "spill over" of the bribery instruction, which was based on the erroneous "implicit" *quid pro quo* standard. *Id.* at 1173-74.

[4] The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part: "(a) Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. (b) As used in this section . . . . (2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

informed the lobbyist "that his campaign was expensive, that he had paid considerable sums out of his own pocket, and that he had not heard anything" from the lobbyist's constituents. *McCormick*, 500 U.S. at 260. The cash payments were not listed as campaign contributions. *Id.*

The trial judge's jury instructions on the Hobbs Act claims included the following statement:

> It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation.
>
> In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and *with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.*

Id. at 265 (emphasis added). Based on this instruction, McCormick was convicted on one of the Hobbs Act counts. *Id.*

The Fourth Circuit rejected McCormick's argument that proof of an explicit promise in exchange for a campaign contribution was required, and held that "the circumstances surrounding money given to elected officials may be sufficient, without proof

of an explicit *quid pro quo* exchange, to prove that the payments were never intended to be legitimate campaign contributions." *United States v. McCormick*, 896 F.2d 61, 66 (4th Cir. 1990), *rev'd*, 500 U.S. 257 (1991). As this Court described the lower courts' rulings, "[t]he trial court and the Court of Appeals were of the view that it was unnecessary to prove that, in exchange for a campaign contribution, the official *specifically promised* to perform or not to perform an act incident to his office." *McCormick*, 500 U.S. at 267 n.5 (emphasis added).

This Court reversed the Fourth Circuit's holding that criminal intent may be inferred from the "circumstances" of the contribution. *Id.* at 271. This Court made clear that campaign contributions are unique:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money 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. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion 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, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." 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. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

Id. at 272-73.

Thus, an "explicit" *quid pro quo* agreement is required to prevent the expansive criminalization of campaign contributions:

> This is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign. Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, *but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to per-*

> *form an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.* This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

Id. at 273 (emphasis added). This Court concluded that the "explicit" *quid pro quo* requirement "defines the forbidden zone of conduct with sufficient clarity." *Id.* (citing *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982) ("[A] public official may not *demand payment* as inducement for the promise to perform (or not to perform) an official act.") (emphasis added)).

B. The Eleventh Circuit's Ruling Radically Redefines *McCormick*'s "Explicit" *Quid Pro Quo* Requirement

In its decision, the Eleventh Circuit stripped the phrase "explicit promise or undertaking" of its intended meaning, holding that, "[s]ince the agreement is for some specific action or inaction, the agreement must be *explicit*, but there is no requirement that it be *express*." *Siegelman*, 640 F.3d at 1171. Further compounding this error, the court held that "an explicit agreement may be 'implied from [the official's] words and actions.'" *Id.* at 1172 (quoting *Evans v. United States*, 504 U.S. 255, 274 (1992)).[5] This strained interpretation of what an

[5] As a matter of plain language, an "explicit promise or undertaking" cannot be satisfied by an undeclared, merely implied, exchange of the official act for the contribution.

"explicit" *quid pro quo* requires is surely not what this Court intended in *McCormick*.

Under the Eleventh Circuit's "implicit" *quid pro quo* standard, a "corrupt" agreement may be found whenever a public official accepts a campaign contribution with the understanding that it was made in return for a "specific" official act, which is ultimately taken by the official. *Id.* at 1171. But that interpretation of the Hobbs Act led to the flawed jury instructions *rejected* by this Court in *McCormick*:

> [T]he jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's official action would be influenced for their benefit, and *if McCormick knew that the payment was made with that expectation.*

McCormick, 500 U.S. at 274 (emphasis added). Contrary to the Eleventh Circuit's holding, whether an official act is "specific" is not determinative of whether an agreement is "corrupt." In *McCormick*,

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"Explicit" means "characterized by full clear expression : being without vagueness or ambiguity : leaving nothing implied . . . unreserved and unambiguous in expression : speaking fully and clearly." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 801 (1993). Notably, "express" is a synonym for "explicit," which "stresses the idea that whatever is under consideration has been expressed and not left to tacit understanding . . . ." *Id.* "Promise" means "a declaration that one will do or refrain from doing something specified." *Id.* at 1815.

a "specific" act was contemplated and this Court reversed the conviction because an "explicit promise or undertaking" was not shown. *Id.* at 273. The issue is whether the *same* level of proof to demonstrate the required *quid pro quo* applies in both bribery and campaign contribution cases.

All forms of bribery require a *quid pro quo*. *See United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999) ("The distinguishing feature" of bribery is "its intent element," requiring a "*quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act."); *United States v. Bahel*, 662 F.3d 610, 636 (2d Cir. 2011) ("'The corrupt intent necessary to a bribery conviction is in the *nature* of a *quid pro quo* requirement; that is, there must be a specific intent to give . . . something of value *in exchange for* an official act.'") (quoting *United States v. Alfisi*, 308 F.3d 144, 149 (2d Cir. 2002)); *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) ("It is [the] element of *quid pro quo* that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple mens rea required for violation of the gratuity sections."). In common bribery cases, however, "evidence of a '*quid pro quo* can be *implicit*, that is, a conviction can occur if the Government shows that [the defendant] accepted payments or other consideration with the *implied understanding* that he would perform or not perform an act in his official capacity.'" *United States v. Kemp*, 500 F.3d 257, 284 (3d Cir. 2007) (emphasis added) (quoting

United States v. Antico, 275 F.3d 245, 257 (3d Cir. 2001)). In *McCormick*, this Court rejected this "implicit" *quid pro quo* standard precisely because campaign contributions may not be treated like common bribes.

The Eleventh Circuit grafted into the definition of "explicit promise or undertaking" this Court's statement in *Evans* that "the Government need only show 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." *Siegelman*, 640 F.3d at 1159 (quoting *Evans*, 504 U.S. at 268). But *Evans* was a completely different case, and expanding its reach to radically redefine the explicit *quid pro quo* requirement in campaign contribution cases is unjustifiable.

In *Evans*, this Court considered a limited issue: "whether an affirmative act of inducement by a public official, such as a demand," is required to violate the Hobbs Act. *Evans*, 504 U.S. at 256. Unremarkably, this Court concluded that the government need not prove that an official actually intimidated or threatened a victim to make a bribe. *Id.* at 265-66. It further held that the challenged jury instruction satisfied *McCormick*'s *quid pro quo* requirement "because the offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the *quid pro quo* is not an element of the offense." *Id.* at 268. This Court rejected petitioner's argument that an "affirmative step" in furtherance of the official act is required,

since "the Government need only show 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.* The level of proof required to demonstrate a *quid pro quo* in campaign contribution cases was not addressed. This Court only emphasized that the Hobbs Act does not require that the official induce a payment through threats, or that the parties ultimately consummate their agreement or even perform an act in furtherance of their agreement.

The Eleventh Circuit's holding departs from the decisions of numerous Circuits,[6] which have held that *McCormick's* "explicit" *quid pro quo* requirement was neither modified nor clarified by *Evans* in the campaign contribution context.[7] *See United*

[6] The Eleventh Circuit's ruling is also inconsistent with its *own* prior decisions. *See United States v. Martinez*, 14 F.3d 543, 553 (11th Cir. 1994) (explaining that *Evans* modified *McCormick*'s "explicit" *quid pro quo* standard "for *non-campaign contribution cases* in requiring the government to prove 'that a public official has obtained a payment to which he is not entitled, knowing the payment was made in return for official acts.'") (emphasis added) (quoting *Evans*, 504 U.S. at 268); *United States v. Davis*, 30 F.3d 108, 109 (11th Cir. 1994) (reversing Hobbs Act conviction where the district court failed to charge the jury "as to the necessity of finding an explicit promise" under *McCormick*).

[7] The Eleventh Circuit cited the Sixth Circuit's decision in *United States v. Blandford*, 33 F.3d 685 (6th Cir. 1994), but did not refer to the Sixth Circuit's more recent ruling in *Abbey*. *Blandford* was not a campaign contribution case and, in *Abbey*, the Sixth Circuit made clear that *Evans* did not modify *McCormick*'s "explicit" *quid pro quo* standard. *Abbey*, 560 F.3d at 517-18. The other cases cited by the court (*see*

States v. Abbey, 560 F.3d 513, 517-18 (6th Cir. 2009) ("*Evans* modified the [*quid pro quo*] standard in non-campaign contribution cases by requiring that the government show only that the official 'obtain[ed] a payment to which he was not entitled, knowing that the payment was made in return for official acts.'") (quoting *Evans*, 504 U.S. at 268); *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) (Sotomayor, J.) (under *McCormick*, "proof of an express promise is necessary when the payments are made in the form of campaign contributions" and that under *Evans* "a *quid pro quo* was required to sustain a conviction in the non-campaign contribution context, but that the agreement may be implied from the official's words and actions"); *Antico*, 275 F.3d at 257 (because the "line between what is legal campaign activity and the 'forbidden zone of conduct' . . . is so subtle, the

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Siegelman, 640 F.3d at 1171-72) do not involve campaign contributions and are therefore inapposite. *See United States v. Giles*, 246 F.3d 966, 971 (7th Cir. 2001) (holding that, after *McCormick*, it is "well-established" that an "explicit promise or undertaking" is required "to obtain a Hobbs Act conviction based on an official's acceptance of campaign contributions," and that "the issue before us is whether an extortion conviction under the Hobbs Act requires that payments which are made 'under color of official right' but which are *not campaign contributions* must also be shown to have been paid in exchange for a specific promise to perform an official act.") (emphasis added); *United States v. Tucker*, 133 F.3d 1208, 1214-15 (9th Cir. 1998) (holding that an "explicit" *quid pro quo* need not be shown where common bribes are received); *United States v. Hairston*, 46 F.3d 361, 373 (4th Cir. 1995) (applying an "implicit" *quid pro quo* standard in a common bribery case).

Supreme Court ruled in *McCormick* that an overt *quid pro quo* is a necessary proof in the context of campaign contributions," and "[o]utside the campaign contribution context, where Antico's case falls, the line between legal and illegal acceptance of money is not so nuanced"); *United States v. Donna*, 366 Fed. Appx. 441, 450 (3d Cir. 2010) ("Unless the 'gift' is a campaign contribution, the *quid pro quo* between the public official and the gift giver can be implicit."); *United States v. Taylor*, 993 F.2d 382, 385 (4th Cir. 1993) ("[I]f 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.'") (quoting *McCormick*, 500 U.S. at 273); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 937 (9th Cir. 2009) (proof of an explicit *quid pro quo* is required where the "unlawfully gained property is in the form of a campaign contribution" while "for receipt of property other than campaign contributions . . . [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").[8]

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[8] In *United States v. Inzunza*, 638 F.3d 1006 (9th Cir. 2011), the Ninth Circuit held that *McCormick's* "requirement of explicitness refers to the promise of official action, not the connection between the contribution and the promise." *Id.* at 1014. The Ninth Circuit acknowledged that this "test may still leave grey areas where the connection between contribution and promise is sufficiently attenuated that permitting a jury to speculate on the requisite connection between contribution and promise would stretch the [Hobbs] Act beyond its

The evidence in this case demonstrates the fallacy of the Eleventh Circuit's approach. Governor Siegelman was prosecuted and convicted in the absence of any evidence of an "explicit" *quid pro quo*. Instead, the evidence showed that: (1) Governor Siegelman believed that Mr. Scrushy ought to donate more to his favored issue than Mr. Scrushy previously donated to the campaign of his competitor; (2) Mr. Scrushy was aware that Governor Siegelman expected at least a $500,000 contribution to the campaign for the lottery initiative; (3) Governor Siegelman was aware that Mr. Scrushy wanted to be reappointed to Alabama's CON Board (to which Mr. Scrushy had previously been appointed by two previously governors); (4) Governor Siegelman did not think such an appointment would raise any problems; and (5) Governor Siegelman did, in fact, reappoint Mr. Scrushy to the CON Board. There was no evidence that Governor Siegelman ever *expressly promised* Mr. Scrushy that he would appoint him to the CON Board in return for a campaign contribution or *asserted* that he was bound to appoint Mr. Scrushy to the CON Board by the terms of such a promise. At best, the evidence shows that Mr. Scrushy desired such an appointment, and Governor Siegelman was aware of this desire. A contributor's expectation of a linkage between the contribution and the action, even

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intended application." *Id.* The Ninth Circuit held that it did not need to resolve that issue because "[t]here was no absence of very explicit promises, made directly to the person delivering the contributions," regarding the actions the official would take. *Id.*

when combined with the official's knowledge of that expectation, does not rise to the level of "explicit" under *McCormick*.

McCormick instructs that a "corrupt" agreement may not be merely inferred from evidence that a public official understood that a contribution was made with the expectation of a benefit in return. A contrary holding would "open to prosecution" lawful conduct that was never intended to be criminalized. *McCormick*, 500 U.S. at 272. *Amici* have grave concerns that this opportunity for arbitrary and discriminatory enforcement of the "honest services" and "bribery" statutes has resulted in the selective and unfair prosecution and conviction of Governor Siegelman.

II. THE ELEVENTH CIRCUIT'S RULING IS CONTRARY TO THE DUE PROCESS PRINCIPLES REAFFIRMED BY THIS COURT IN *SKILLING*

The Eleventh Circuit's "implicit" *quid pro quo* standard also violates the due process concerns in *Skilling*: that a "penal statute [must] define the criminal offense with [1] sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 130 S. Ct. at 2927-28 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *see Hill v. Colorado*, 530 U.S. 703, 732 (2000).

In *Skilling*, this Court held that the "honest services" statute applies only to "bribery and kickback schemes," and that such "core" or "paradigmatic" cases were the focus when Congress reinstated the statute following *McNally v. United States*, 483 U.S. 350 (1987). *Skilling*, 130 S. Ct. at 2931. This Court defined bribery with reference to pre-*McNally* cases in which the "offender profited," *id.* at 2926, and cited representative "core" bribery cases involving personal gain that would survive its ruling, *id.* at 2927, 2930-31 (describing *McNally*, which involved personal payoffs, as "present[ing] a paradigmatic kickback fact pattern"); *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941) (acceptance of bribes in exchange for urging acts that benefitted the payors); *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942) (payment of bribes in exchange for trade secrets). Indeed, the Eleventh Circuit recognized that "[a]lthough *Skilling* refers us to the pre-*McNally* bribery cases as examples of the fact patterns that would supply notice of what constitutes an honest services bribery violation, none of these cases was a campaign donation case." *Siegelman*, 640 F.3d at 1174 n. 21.

Although *amici* do not argue here that campaign contributions may under no set of circumstances give rise to criminal liability under *Skilling*, campaign contributions—especially contributions to issue-advocacy campaigns—are indisputably outside the "core" of bribery as understood in *Skilling*. This Court has made clear that "laws making criminal the giving and taking of bribes deal with only

the most blatant and specific attempts of those with money to influence governmental action." *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976). In the case of such "non-core" campaign contributions, the "explicit" *quid pro quo* standard was intended to exclude all but "the most blatant and specific" arrangements from criminal prosecution. *See Antico*, 275 F.3d at 257 (because the "fine line between what is legal campaign activity and the 'forbidden zone of conduct' . . . is so subtle, the Supreme Court ruled in *McCormick* that an overt *quid pro quo* is a necessary proof in the context of campaign contributions."). Conversely, where a public official receives a personal payoff, a conviction may be based on evidence of an implicit agreement, *to wit*, "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.* (quoting *Evans*, 504 U.S. at 268); *see Abbey,* 560 F.3d at 517 (an "explicit" *quid pro quo* is not required in common bribery cases, since "if the *quid pro quo* requirement exists to ensure that an otherwise permissible activity is not unfairly criminalized, then an opposite presumption is likely appropriate when a *public official obtains cash or property outside the campaign system* because there are few legitimate explanations for such gifts.") (emphasis added).

Despite acknowledging that *Skilling* requires a stringent standard of liability in campaign contribution cases, *Siegelman*, 640 F.3d at 1174 n.21, the Eleventh Circuit upheld an "implicit" *quid pro quo* test that was justifiably understood to apply only to

conduct at the "hard core" of the anti-corruption statutes. Under these circumstances, a "vagueness problem" exists because the legal duties that Governor Siegelman was accused of violating were never sufficiently defined. *Skilling*, 130 S. Ct. at 2928. As this Court has reasoned:

> [W]e have recognized recently that the most important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender, 461 U.S. at 358 (citations omitted); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"); *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari) ("This Court has long recognized the 'basic principle that a criminal statute must give fair warning of the conduct that it makes a crime," and "[i]t is simply not fair to prosecute someone for

a crime that has not been defined until the judicial decision that sends him to jail.").

Criminalizing the giving or receiving of campaign contributions based on conduct that falls far short of an "explicit" *quid pro quo* agreement will also chill important First Amendment freedoms. The First Amendment "protects political association as well as political expression," and "the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 15. Thus, "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 14. Political contributions are especially protected under the First Amendment where issue-advocacy campaigns are at issue, since "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.*; *see also Roth v. United States*, 354 U.S. 376, 484 (1957).[9] The fear of unfettered prosecutorial discretion will have a chilling effect on free speech and free political association protected by the First

[9] While the government has a strong interest in combating corruption, *Buckley*, 424 U.S. at 26-27, contributions to issue-advocacy campaigns do not financially benefit the individual politician in the same way as a contribution to an elected official's campaign, and thus there is a reduced likelihood that such donations could lead to corruption. *Siegelman*, 640 F.3d at 1170 n.13; *see First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978); *F.E.C. v. Wis. Right to Life*, 127 S. Ct. 2652, 2677 (2007) (Scalia, J., concurring).

Amendment. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972); *Dombrowski v. Pfister*, 380 U.S. 479, 492 (1965).

The dangers of the Eleventh Circuit's implicit *quid pro quo* standard are many: first, it subjects public officials to the unreasonable burden of having to reject campaign contributions if there is any reason to believe that such contributions were made by donors desiring that the officials take certain actions; second, if public officials choose to actually accept campaign contributions with that same belief, they now must take pains to *not do* what the donors desire or else face the threat of criminal recriminations; third, donors may fear that their conduct will be subject to retrospective determinations of corruption by unguided juries any time public officials act consistent with their interests; and finally, it exposes public officials and donors alike to politically motivated prosecutions based on an indefinite and potentially all-encompassing standard that may be invoked to justify the prosecution of all sorts of legitimate conduct. This approach cannot be what Congress intended.

Having served as chief legal officers and/or law enforcement officers, we do not urge any action that might remove a valuable law enforcement tool in the battle to rid government of corruption. At the same time, however, clear legal standards are required to protect individuals from politically-motivated prosecutions based on conduct that is ingrained in our campaign finance system and has always been considered legal. The conviction of

public officials under a charge of "honest services" mail fraud, conspiracy to commit that offense, or bribery, based on an allegedly "corrupt" agreement without the showing of an "explicit" *quid pro quo* linkage between the official action and the campaign contribution, will have an impermissible chilling effect on how political campaigns are run throughout the country. This Court should take action now to clarify the standards under which this critical aspect of the democratic process may be subject to the criminal laws.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

BURTON N. LIPSHIE
Counsel of Record
ROBERT ABRAMS
JOSEPH E. STRAUSS
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
212-806-5400

JEFFREY A. MODISETT
Of Counsel
SNR DENTON
601 S. Figueroa Street
Los Angeles, California 90017
213-892-2802

ROBERT T. STEPHAN
Of Counsel
12548 West 123rd Street
Overland Park, Kansas 66213
913-685-1953

GRANT WOODS
Of Counsel
1726 North 7th Street
Phoenix, Arizona 85006
602-957-1500

Attorneys for Amici Curiae