No. 09-182

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

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INTEREST OF *AMICI CURIAE*

Amici, who are listed on the inside cover, are former state Attorneys General of the United States who have all at one time served as the chief legal officer and/or law enforcement officer of their respective states.[1] This nonpartisan group of former elected and appointed state officials share an interest in the manner in which the laws of the United States are enforced throughout the country. Of particular importance to this case, *Amici* are concerned that public officials may be prosecuted and convicted for conduct at the core of the First Amendment—contributions to electoral or issue-advocacy campaigns—based on an "implicit" *quid pro quo* standard that has been unequivocally rejected by this Court in such circumstances. The Eleventh Circuit's decision here permits the government to impose criminal penalties upon conduct that has never been defined as criminal, based on circumstantial evidence of a public official's unspoken state of mind. Because this unprecedented decision sharply conflicts with the stringent protections that this Court has afforded the giving and

[1] The parties have consented to the filing of this brief. Letters of consent of all parties are being filed with the Clerk of the Court together with this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amici Curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae* or their counsel made a monetary contribution to its preparation or submission.

receiving of political contributions, *Amici* respectfully submit this brief in support of the petition for a writ of certiorari.

SUMMARY OF THE ARGUMENT

This case concerns the criminalization of conduct protected by the First Amendment—the giving and receiving of campaign contributions—based on a vague and indefinite standard that will significantly alter two vital underpinnings of our democracy: the desire of individual citizens to run for political office in a system that largely depends upon private contributions and the liberty of constituents to contribute to political campaigns without fear of criminal liability. The Eleventh Circuit adopted an extraordinarily expansive and unprecedented 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), ruling that criminal liability may be imposed whenever the prosecution presents evidence that a public official understood that a contribution made to an issue-advocacy campaign was motivated by the donor's desire for the official to take certain actions, and such actions were ultimately taken by the official. In reaching this conclusion, the Eleventh Circuit paid lip service to *McCormick v. United States*, 500 U.S. 257, 273 (1991), in which this Court held that the prosecution must demonstrate

an explicit *quid pro quo* connection between a payment and an official act in campaign contribution cases, *to wit*, an explicit promise or agreement made in return for a contribution, but paradoxically held that such an explicit *quid pro quo* may be *implied* from circumstantial evidence that a public official understood that a political donor made a contribution with the expectation that certain acts would be performed in return. In this way, the Eleventh Circuit's approach treats campaign contributions exactly the same as garden-variety cash payoffs. This Court's ruling in *McCormick*, which explicitly distinguished campaign contributions from all other types of payments because of their significance to the democratic process, does not support that outcome.

The thin reed 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 supported by Governor Siegelman. In July 1999, Governor Siegelman reappointed Mr. Scrushy to Alabama's "CON" Board, just as the three prior governors of Alabama had done. Although the prosecution presented no evidence of an explicit *quid pro quo* linking Mr. Scrushy's reappointment to the contributions, the Eleventh Circuit affirmed Governor Siegelman's conviction based on an implicit *quid pro quo* standard. This decision stands alone in nullifying the explicit *quid pro quo* requirement in campaign contribution cases, the purpose of which was to pre-

vent the criminal law from unduly impinging on the campaign finance system by criminalizing conduct that has always been believed to be legally protected and essentially unavoidable as long as election campaigns are financed by private contributions. Even outside the criminal realm, this Court has subjected restrictions on political campaign contributions to strict scrutiny as infringements upon the First Amendment rights to engage in free speech and political association. The *criminalization* of the giving or receiving of campaign contributions requires that the government satisfy even a greater burden, which was not satisfied in this case.

As former state Attorneys General, we understand the importance of clearly defining the legal duties that criminal defendants are accused of violating, which not only protects against uncertain liability, but also minimizes the risk of politically-motivated prosecutions. The explicit *quid pro quo* requirement established by this Court in *McCormick* was intended to clearly define and delimit the type of conduct that may be criminalized in the campaign contribution context. 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 appoints a contributor to an Ambassadorship could be subject to prosecution under the Eleventh Circuit's reasoning. Any United States Senator who supports a

cause favored by a contributor is at risk. And, every contributor who has ever been the beneficiary of sought-after political actions runs the same risk of being prosecuted. Assuming this would not destroy the political fundraising mechanisms inherent in our political system, it would nevertheless give unwarranted latitude to prosecutors in selecting, for whatever reasons, those politicians and contributors whom they desire to silence. As many of us have previously run for political office, we are acutely aware that allowing prosecutors to cast such a wide net in the campaign contribution context will stifle the ability of campaigns to legitimately raise needed funds for fear of politically-motivated prosecution. Simply stated, that is an untenable result.

ARGUMENT

The Eleventh Circuit's decision creates extreme uncertainty regarding the breadth of criminal liability in campaign contribution cases, and the potential for the arbitrary and discriminatory enforcement of anti-corruption statutes raises serious First Amendment concerns. This Court should grant certiorari and reverse the Eleventh Circuit's erosion of the level of proof that the government must introduce to establish the explicit *quid pro quo* requirement in campaign contribution cases.

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

Despite the Eleventh Circuit's assertions to the contrary, its interpretation of the government's evidentiary burden frustrates rather than furthers this Court's ruling in *McCormick*. In *McCormick*, this Court held that for criminal prosecutions involving campaign contributions, the government must establish an explicit *quid pro quo* connection between the contribution and an official act—in which "payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act"—so that there is no possible doubt that the challenged transaction was corrupt. *McCormick*, 500 U.S. at 273. But the jury instruction approved by the Eleventh Circuit permitted Governor Siegelman's conviction based on an implicit *quid pro quo* standard that impermissibly treats campaign contributions exactly the same as traditional payoffs. This approach sows confusion as to what conduct constitutes a crime in these circumstances and destroys the protections that this Court has established in campaign contribution cases. We respectfully submit that this Court should clearly require that prosecutors prove the existence of an explicit promise or agreement by a public official that he will perform an official act

in exchange for a contribution, and that jurors are charged that the existence of an explicit promise or agreement must be found, before criminal liability will attach for either: (a) making a political contribution with the hope or expectation of a subsequent official action; or (b) taking an official action after receiving a political contribution from a known donor.

A. Under *McCormick*, Political Contributions May Not Give Rise To Criminal Liability In The Absence Of An Explicit *Quid Pro Quo* Connection Between The Contribution And The Official Act

In *McCormick*, a West Virginia state legislator, Robert McCormick, advocated a legislative program allowing foreign medical school graduates to practice under a temporary permit while studying for state licensing exams. *McCormick*, 500 U.S. at 259. After McCormick sponsored successful legislation extending the expiration date of the temporary permit program, a lobbyist on behalf of the temporarily licensed doctors discussed with McCormick the possibility of introducing legislation that would grant the doctors a permanent medical license by virtue of their years of experience. *Id.* at 259-60. During his 1984 reelection bid, McCormick advised the lobbyist that his campaign was expensive, that he had expended considerable sums out of his own pocket, and that he had heard nothing from the group of doctors. *Id.* at 260. Thereafter, the lobbyist made a series of cash pay-

ments to McCormick. McCormick did not list the payments as campaign contributions or report them on his federal income tax return for that year. *Id.* The payments were also not reflected in the books of the doctors' organization as campaign contributions; the books simply stated that the payments were for McCormick. *Id.* In 1985, McCormick sponsored the legislation that he and the lobbyist had discussed the previous year, speaking at length in favor of the bill during floor debate. *Id.* Two weeks after the bill had been passed and signed into law, McCormick received a final cash payment from the doctors. *Id.*

The government prosecuted McCormick on five counts of violating the Hobbs Act,[2] and one count of filing a false income tax return. *Id.* at 261. The trial judge's supplemental 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.

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[2] 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."

> 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. The jury convicted McCormick on the tax evasion count and the first Hobbs Act count. *Id.*

The Court of Appeals for the Fourth Circuit rejected McCormick's claim that a conviction of an elected official under the Hobbs Act required proof of an explicit *quid pro quo*, *to wit*, an explicit promise of official action or inaction in exchange for any payment or property received. *Id.* at 265-66. Instead, the court concluded that no such showing was needed where the parties never intended the payments to be "legitimate" campaign contributions. *Id.* at 266. 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." *Id.* at 267 n.5 (emphasis added).

This Court rejected the Fourth Circuit's analysis, recognizing that applying the same standard to prosecute public officials for receiving campaign

contributions as traditional payoffs would jeopardize our democratic system because the financing of political campaigns depends upon officials accepting contributions from people expecting some kind of benefit in return. As this Court held:

> 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.

To prevent the Hobbs Act from unduly infringing upon legitimate political activity, this Court held that the prosecution is required to prove an explicit *quid pro quo* where campaign contributions are at issue:

> 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 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.* 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). The explicit *quid pro quo* requirement effectively limits the ability of anti-corruption statutes to reach the giving or receiving of campaign contributions except in cases where the prosecution proves beyond a reasonable doubt that such payments were made in return for an "explicit promise" or agreement by a public offi-

cial to take official action in exchange for a contribution, as manifested by the official's actual assertion that his conduct will be guided by that promise. The standard articulated by the Eleventh Circuit is a significant departure from this Court's view.

B. The Eleventh Circuit's Ruling Departs From This Court's Holding In *McCormick* By Redefining The Explicit *Quid Pro Quo* Requirement As Satisfied By An Inference Of The Public Official's Unspoken State Of Mind Linking A Contribution With An Official Act

The core problem with the Eleventh Circuit's ruling is that, instead of applying the ordinary meaning of "explicit promise or undertaking" linking an official act to a campaign contribution, the court stripped the word "explicit" of any real meaning, holding that "the agreement must be explicit, but there is no requirement that it be express." *United States v. Siegelman*, 561 F.3d 1215, 1226 (11th Cir. 2009). Further compounding this error, the court added that "an explicit agreement may be 'implied from [the official's] words and actions.'" *Id.* (quoting *Evans v. United States*, 504 U.S. 255, 274 (1992)). This strained interpretation of what an explicit *quid pro quo* requires is surely not what this Court had in mind in *McCormick*.

The Eleventh Circuit's holding that "explicit" does not mean "express" ignores the ordinary meaning of "explicit" as "[e]xpressed without vagueness

or ambiguity." Webster's II New Riverside University Dictionary 455 (3d ed. 1994). As a matter of plain language, an "explicit promise or undertaking by the official to perform or not to perform an official act" in return for a campaign contribution cannot be based on an unspoken, merely implied, exchange of the official act for the contribution. Yet under the Eleventh Circuit's interpretation, an official can violate the "honest services" or "bribery" statutes whenever he performs an official act and the prosecution presents evidence that he accepted a contribution from a donor who desired that such act take place.

The Eleventh Circuit's approach is based on its desire to graft 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*, 561 F.3d at 1226 (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*, the appellant was caught in a Federal Bureau of Investigation sting operation, accepting a bribe to vote for a rezoning application. 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 the *quid pro quo* requirement in *McCormick* "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. In so holding, the 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 an explicit *quid pro quo* in campaign contribution cases was never 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 reliance on *Evans* to support the application of an implicit *quid pro quo* standard in campaign contribution cases cannot be squared with this Court's mandate in *McCormick* that "it would require statutory language more explicit than the Hobbs Act contains to justify" criminalizing the giving or receiving of campaign contributions upon anything less than proof of an "explicit promise or undertaking to perform or not

to perform an official act," whereby "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *McCormick*, 500 U.S. at 272. Like the Hobbs Act, neither the text of the "honest services" nor the "bribery" statute contains language suggesting that a crime occurs when an official accepts a campaign contribution that he understands is motivated by the donor's desire for the official to take certain actions, which are thereafter taken. In the absence of a specific directive by Congress, proof of an explicit *quid pro quo* is required.

The Eleventh Circuit's ruling also departs from the decisions of numerous Circuits, which, in ruling that *McCormick's* explicit *quid pro quo* standard applies in campaign contribution cases, have correctly recognized that applying an implicit *quid pro quo* standard in *both* campaign contribution and traditional payoff cases disregards the critical distinction between these types of cases. For example, in *United States v. Blandford*, the Sixth Circuit held:

> Indeed, a strong argument could be advanced for treating campaign contribution cases and non-campaign contribution cases disparately. Campaign contributions, as the *McCormick* Court noted, enjoy what might be labeled a presumption of legitimacy. Although legitimate campaign contributions, not unlike Hobbs Act extortion payments, are given with the hope, and perhaps expectation, that the payment will make the official more likely to

> support the payor's interests, we punish neither the giving nor the taking presumably because we have decided that the alternative of financing campaigns with public funds is even less attractive than the current arrangement. Conversely, if any presumption is to be accorded to payments that occur outside of the campaign contribution context, the presumption would be the antithesis of the one described above. Stated another way, where, as in this case, a public official's primary justification for receiving, with relative impunity, cash payments from private sources, *i.e.*, our present campaign financing system, is not available, that public official is left with few other means of rationalizing his actions.

33 F.3d 685, 697 (6th Cir. 1994). The Sixth Circuit recently held in *United States v. Abbey* that unlike campaign contribution cases, the government need not demonstrate an explicit *quid pro quo* outside the political realm, 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." 560 F.3d 513, 517 (6th Cir. 2009). Other Circuits have similarly distinguished campaign contributions from traditional payoffs for the purposes of criminal liability. *See United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) ("[P]roof of an express promise is neces-

sary when the payments are made in the form of campaign contributions"); *United States v. Antico*, 275 F.3d 245, 257 (3d Cir. 2001) (declining to extend *McCormick's* explicit *quid pro quo* standard to non-campaign contribution cases because "[o]utside the campaign contribution context, where Amico's case falls, the line between legal and illegal acceptance of money is not so nuanced"); *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 in other cases, "an agreement implied from the official's words and actions is sufficient to satisfy this element").

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 felt 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 three prior 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 promised Mr. Scrushy that he would reappoint him to the CON Board in return for a campaign contribution or ever asserted that he was bound to appoint Mr. Scrushy to the CON Board by the terms of any such 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 when combined with the official's knowledge of that expectation, does not rise to the level of "explicit" under *McCormick*. Indeed, this Court has made clear that a mere expectation of a favorable action following a contribution does not give rise to criminal liability—in fact, it was just such an interpretation of the Hobbs Act that 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.

Redefining the explicit *quid pro quo* standard as satisfied by circumstantial evidence of an implicit promise or agreement thwarts this Court's intent in *McCormick* to define "the forbidden zone of conduct with sufficient clarity" in campaign contribution cases. *Id.* at 273. Indeed, muddling the clear dividing line between lawful and unlawful conduct grants prosecutors the unbridled power to potentially indict and convict any public official and any contributor whenever a campaign contribution was made with the expectation that the official would be influenced for the contributor's benefit, and the official, with knowledge that the contribution was made with that expectation, ultimately took an action consistent thereof. That is precisely the expansive result that this Court tried to prevent in *McCormick*. *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.

To be perfectly clear, *if* there was sufficient admissible evidence to prove beyond a reasonable doubt that Governor Siegelman and Mr. Scrushy entered into an agreement whereby Governor Siegelman explicitly promised that he would reappoint Mr. Scrushy to the CON Board in exchange for a political contribution, and *if* the jury was

properly instructed that it must find the existence of such an explicit *quid pro quo* agreement based upon the admissible evidence before it, then a conviction could properly stand. But conversely, allowing a conviction based upon an "agreement" merely inferred from circumstantial evidence of an unspoken state of mind cannot be what this Court intended in *McCormick*.

II. THE ELEVENTH CIRCUIT'S DECISION CREATES AN UNDUE CHILLING EFFECT ON A FIRST AMENDMENT RIGHT

Criminalizing the giving and receiving of campaign contributions under either "bribery" or "honest services" statutes without proof of an explicit *quid pro quo* promise or agreement would have strong repercussions that go beyond the conviction of Governor Siegelman. The Eleventh Circuit's approach puts at risk every candidate who accepts a campaign contribution with the knowledge that the donor hopes to influence that candidate, and every donor who contributes to a campaign with the hope or expectation of receiving a benefit who goes on to receive such a benefit. An interpretation that criminalizes activities that fall far short of an explicit *quid pro quo* can only lead to an impermissible chilling effect on the First Amendment right to contribute to political campaigns.

This Court has unequivocally held that governmental limitations on political contributions are subject to strict scrutiny because they impinge on the First Amendment's protection of free speech

and political association. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 14-23 (1976); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295-298 (1981). Political contributions are especially protected under the First Amendment when—as in this case—referendum or 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." *Buckley*, 424 U.S. at 14; *see also Roth v. United States*, 354 U.S. 476, 484 (1957). Contributions to issue advocacy campaigns also 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. *See, e.g., First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *F.E.C. v. Wis. Right to Life*, 127 S. Ct. 2652, 2677 (2007) (Scalia, J., concurring).

The Eleventh Circuit recognized the importance of these First Amendment concerns in this case:

> The bribery, conspiracy and honest services mail fraud convictions in this case are based upon the donation Scrushy gave to Siegelman's education lottery campaign. As such they impact the First Amendment's core values—protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of

> either of these constitutionally protected activities. In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed.

Siegelman, 561 F.3d at 1224. The court also acknowledged that restrictions upon contributions to issue-advocacy campaigns are subject to even greater scrutiny because of the greater risk of harm:

> Arguably, the potential negative impact of these statutes on issue-advocacy campaigns is even more dangerous than it is to candidate-election campaigns. Issue-advocacy campaigns are a fundamental right in a free and democratic society and contributions to them do not financially benefit the individual politician in the same way that a candidate-election contribution does.

Id. at 1224 n.13.

The Eleventh Circuit's articulation of the special care required in campaign contribution cases is consistent with this Court's ruling in *McCormick* that in the absence of an explicit *quid pro quo* requirement, the criminal law may unduly impinge on the campaign finance system. *See McCormick*, 500 U.S. at 272. But by then loosening the clear standard for criminal liability established by this Court in campaign contribution cases, the Eleventh Circuit failed to consider that "laws making crimi-

nal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action." *Buckley*, 424 U.S. at 27-28. The explicit *quid pro quo* requirement in *McCormick*, *to wit*, an "explicit promise or undertaking by the official to perform or not to perform an official act" in return for a contribution, *McCormick*, 500 U.S. at 273, was intended to exclude all but "the most blatant and specific" *quid pro quo* arrangements from prosecution in campaign contribution cases.

Public officials and political donors must understand that they will not be indicted or convicted simply because there is circumstantial evidence from which one may infer a connection between a political contribution and an official act. This Court has been especially cautious of laws that lack ascertainable standards of guilt in the sensitive First Amendment area. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 109 n.5 (1972). This same principle precludes criminal liability where the legal duties that the defendant is accused of violating are not clearly defined. *See United States v. Harris*, 347 U.S. 612, 617 (1954). Requiring an explicit *quid pro quo* for a conviction in cases involving contributions to issue-advocacy campaigns, as this Court required in *McCormick* with respect to election campaigns, would avoid the "dangerous" First Amendment implications that even the Eleventh Circuit recognized are implicated by the criminalization of such conduct. *Siegelman*, 561 F.3d at 1224 n.13. Indeed, the fear of

unfettered prosecutorial discretion afforded by a statute whose broad language permits such indictments can only have a chilling effect on free speech and political association protected by the First Amendment. 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 v. Lawson, 461 U.S. 352, 358 (1983) (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"). If the government's ability to criminalize the giving and receiving of campaign contributions is untethered by clear bright line rules, the vicissitudes of politically-motivated prosecutions will have a chilling effect on the lawful conduct of not only existing elected officials and donors, but also those persons contemplating either running for elected office or contributing to political campaigns.

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 the chief legal officers and/or law enforcement officers of our states, 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. This Court held that the explicit *quid pro quo* standard established in *McCormick* "define[d] the forbidden zone of conduct with sufficient clarity," *McCormick*, 500

U.S. at 273, but the Eleventh Circuit's ruling effectively nullified that standard. The conviction of public officials under a charge of "honest services" mail fraud, conspiracy to commit that offense, or bribery, based on an alleged agreement without the showing of an explicit *quid pro quo* linkage between the official action and the political 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,

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