No. 18-6566

In the Supreme Court of the United States

JARA MEOTTA ISHON FLOWERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE AND BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE SUPPORTING PETITIONER

CLARK M. NEILY III
JAY R. SCHWEIKERT
CATO INSTITUTE
1000 MASS. AVE. N.W.
WASHINGTON, D.C. 20001
(202) 842-0200
jschweikert@cato.org

BRIAN D. BOONE
Counsel of Record
MICHAEL R. HOERNLEIN
BRANDON C.E. SPRINGER*
ALSTON & BIRD LLP
101 S. TRYON STREET
CHARLOTTE, NC 28280
(704) 444-1000
brian.boone@alston.com

Attorneys for Amicus Curiae

**Admitted to practice in New York only.*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

MOTION OF THE CATO INSTITUTE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

In accordance with Supreme Court Rule 37.2(b), *amicus curiae* the Cato Institute respectfully requests leave of the Court to file the following brief supporting Petitioner Jara Meotta Ishon Flowers in the above-captioned matter. In support of the motion, Cato states as follows:

1. In accordance with Supreme Court Rule 37.2(a), on November 26, 2018, Cato timely provided notice of its intent to file this brief and requested the parties' consent.

2. Petitioner consents to the proposed *amicus curiae* brief.

3. Respondent never responded to Petitioner's request for consent.

4. On December 4, 2018, Cato again requested Respondent's consent.

5. Respondent has not responded to Cato's additional request.

6. Cato has an interest in protecting the traditional federal-state balance of power and traditional principles of criminal justice and has filed numerous briefs in this Court defending those interests.

7. Cato has submitted a full statement of interest outlining its interests in this case.

Amicus curiae the Cato Institute respectfully requests leave to file the following brief.

Respectfully submitted,

CLARK M. NEILY III
JAY R. SCHWEIKERT
CATO INSTITUTE
1000 MASS. AVE. N.W.
WASHINGTON, D.C.
20001
(202) 842-0200
jschweikert@cato.org

BRIAN D. BOONE
Counsel of Record
MICHAEL R. HOERNLEIN
BRANDON C.E. SPRINGER*
ALSTON & BIRD LLP
101 S. TRYON STREET
CHARLOTTE, NC 28280
(704) 444-1000
brian.boone@alston.com

Attorneys for Amicus Curiae

**Admitted to practice in New York only.*

December 6, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

Amicus curiae the Cato Institute submits this brief supporting Petitioner Jara Meotta Ishon Flowers.[1]

STATEMENT OF INTEREST

The Cato Institute is a nonprofit, nonpartisan public policy research foundation established to advance the principles of individual liberty, free markets, and limited government. Founded in 1999, Cato's Project on Criminal Justice focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Cato agrees with the arguments in Flowers's brief but writes separately to address its strong interest in protecting the traditional federal-state balance of power. This Court's decision in *Evans v. United States*, 504 U.S. 255 (1992)—long derided for defining the federal crime of extortion to cover simple bribery—expanded federal criminal power at the expense of

---

[1] In accordance with Supreme Court Rule 37.6, Cato certifies that no counsel for a party authored this brief in whole or in part and that no party or counsel for a party helped fund the preparation or submission of the brief. No person other than Cato or its counsel funded work on the brief.

On November 26, 2018, and in accordance with Supreme Court Rule 37.2, Cato notified the parties of its intent to file this brief. Flowers consents to the filing. The Government never responded.

state police power. In doing so, the *Evans* Court dealt an unnecessary blow to federalism principles in an area of traditional state concern. It is time for this Court to correct its mistake.

INTRODUCTION AND SUMMARY OF ARGUMENT

While working as a state correctional officer in Polkton, North Carolina, Flowers smuggled contraband (synthetic marijuana and other items) into the prison and delivered it to inmates in exchange for cash—as little as $300. Federal prosecutors charged Flowers—a state official working in a state prison—with extortion under the federal Hobbs Act. Flowers faced a maximum sentence of 20 years in prison, a $250,000 fine, or both.

Charging Flowers with extortion is like filing chemical-weapons charges against a jilted wife for inflicting a minor burn on her rival's thumb. *See Bond v. United States*, 572 U.S. 844, 848 (2014). The "extortion" label far exceeds Flowers's alleged crime—both as an historical matter and as a matter of common sense. But in *Evans v. United States*, 504 U.S. 255 (1992), this Court redefined "extortion" under the Hobbs Act in such a way that headscratcher outcomes are almost inevitable. According to *Evans*, federal "extortion" means run-of-the-mill bribery—even though extortion and bribery have been distinct crimes since the Founding (*see* 4 W. Blackstone Ch. 10, *Commentaries on the Laws of England* 138–39 (1769) (describing the offense of "bribery"); *id.* at 141 (describing the offense of "extortion")), and even though States have traditionally regulated conduct like presented here.

The time has come for this Court to retire *Evans*—an unprincipled and anti-textual expansion of federal criminal law into an area of traditional state concern.

ARGUMENT

I. *EVANS* ERODED STATE POLICE POWER.

Flowers's alleged crime would qualify as simple bribery in North Carolina—punishable by no more than five years in jail. *See* N.C. Gen. Stat. § 14-217 (bribery of officials is a Class F felony); *id.* § 15A-1340.17 (defining sentencing ranges). Yet she faced a federal charge carrying a 20-year maximum sentence because the Government used *Evans*'s boundless definition of extortion to overcharge Flowers under federal law. *See* 18 U.S.C. § 1951.

That result would have surprised the Founders. By their view, States retain primary authority over criminal regulation. *See* The Federalist No. 17 (Alexander Hamilton) ("There is one transcendent advantage belonging to the province of the State governments . . . , I mean the ordinary administration of criminal and civil justice."). Using a federal extortion statute to criminalize simple bribery is also at odds with "the well-established principle" that if Congress wants to unseat state law in an area of traditional state responsibility, it must not mince words. *Bond*, 572 U.S. at 858.

A corollary to that well-established principle is that Congress, not the courts, possesses the power to alter the "sensitive relation between federal and state criminal jurisdiction" (*United States v. Bass*, 404 U.S. 336, 349 (1971))—and then only within constitutional

limits. "'[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond*, 572 U.S. at 858 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

A. Policing local corruption is an area of traditional state concern.

"Perhaps the clearest example of traditional state authority is the punishment of local criminal activity." *Bond*, 572 U.S. at 858; *see also Kelly v. Robinson*, 479 U.S. 36, 47 (1986) ("The right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the States."). Consistent with the Tenth Amendment's reservation of rights to the States, "the primary responsibility for ferreting out [local] political corruption must rest, until Congress [properly] directs otherwise, with the State, the political unit most directly involved." *United States v. Craig*, 528 F.2d 773, 779 (7th Cir. 1976).

States have shouldered that responsibility since the Founding. In fact, by the late nineteenth century, most States had passed statutes regulating gifts to public officials or criminalizing bribery of local officials. *See, e.g.*, Thomas Herty, *A Digest of the Laws of Maryland Being an Abridgement, Alphabetically Arranged, of All the Public Acts of Assembly Now in Force, and of General Use* 101 (Bribery), 406–08 (Office and Officer) (1799); *A Collection of All Such Acts of the General Assembly of Virginia of a Public and Permanent Nature as are in Force*, ch. 59 ("An Act to punish Bribery and

Extortion, passed the 19th of October 1792") (1803).[2] Punishing state corruption was a state prerogative; public officials usually faced prosecution in state court. With the passage of the Hobbs Act in 1946 (an amendment to the 1934 Anti-Racketeering Act), that changed somewhat as Congress created federal criminal jurisdiction over acts of "robbery or extortion" affecting interstate commerce, but the police power principally remained with the States. *See* 18 U.S.C. § 1951.

And because the power to regulate local corruption resides principally with the States, Congress must leave no doubt if it attempts to displace state power in that arena. When acting within the scope of its enumerated powers, Congress may increase federal oversight over state officials, but "it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will v. Mich. Dep't of State Police*, 491

---

[2] *See also* 2 William Charles White, *A Compendium and Digest of the Laws of Massachusetts*, tit. XXX Bribery, Embracery, and Extortion (1809); *Laws of the State of New Jersey* § 24 at 249 (1821); William A. Hotchkiss, *A Codification of the Statute Law of Georgia*, ch. XXIX, §§ 26–28 (1845); *The Code of West Virginia Comprising Legislation to Year* 1870, ch. 147, §§ 4–7 (Bribery) (1868); *William H. Battle's Revisal of the Public Statutes of North Carolina Adopted by the General Assembly at Session of 1872–73*, ch. 32, §§ 130–32 (Bribery) (1873); 1 Frederick C. Brightly, *A Digest of the Laws of Pennsylvania* § 77 at 330 (1873); 3 George W. Cothran, *Revised Statutes of New York*, tit. IV, § 9 at 957 (6th ed. 1875); *The General Statutes and the Code of Civil Procedure of the State of South Carolina Adopted by the General Assembly of 1881*, ch. 103, §§ 2536–41 (Bribery) (1882); William M. Chase and Arthur H. Chase, *The Public Statutes of the State of New Hampshire*, ch. 280, § 20–21 (1900); *The General Statutes of Connecticut Revision of 1902* § 1260 at 366–67 (1902).

U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

B. *Evans* stripped States of their traditional power over local corruption in favor of an anti-textual definition of "extortion" that maximizes federal criminal power.

Concerns over intruding on an area of traditional state authority should have led the *Evans* Court to take special care in maintaining the distinctions between federal extortion on the one hand and bribery on the other. Instead, the *Evans* Court essentially federalized the law of public corruption.

But if Congress wanted to federalize the law of public corruption (assuming that Congress even had that constitutional authority), it would not have done so through a strained definition of "extortion." It would have said so clearly in a statute that applied on its face to state officials. *See Bond*, 572 U.S. at 858; *Gregory*, 501 U.S. at 460–61; *Bass*, 404 U.S. at 349. By adopting a definition of "extortion" that alters the federal-state balance so dramatically, the *Evans* Court took a step that Congress had not.[3]

---

[3] *See also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007, 1023 (1989) ("[D]eferring to the constitutional values inherent in federalism, the Court will 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress' (the rule against preemption of traditional state functions).") (citation omitted).

In fact, when Congress has extended the federal criminal power to cover bribery in various forms, it has done so in statutes that actually use the word "bribery." For example, Congress has criminalized state and local bribery in those areas that implicate federal interests—such as bribery involving federal funding (18 U.S.C. § 666) and bribery of state and local officials acting as agents of the federal government (18 U.S.C. § 201).

Nevertheless, the courts—starting with a gradual blurring of the lines between extortion and bribery and culminating in *Evans*—have acted "as if there [are] federal common law crimes" and have effectively amended the Hobbs Act. John T. Noonan, Jr., *Bribes* 586 (1987). Ignoring both "Blackstone and congressional usage," the courts ushered in an era of "federal policing of state corruption" by bringing "into existence a new crime—local bribery affecting interstate commerce." *Id.* That error worked an "unprecedented incursion into the criminal jurisdiction of the States." *United States v. Enmons*, 410 U.S. 396, 411 (1973).

II. *EVANS*'S IMPROVISED DEFINITION OF "EXTORTION" TURNS LOCAL CRIMES WITH SHORT SENTENCES INTO FEDERAL CRIMES WITH LONG SENTENCES.

Evans's indefensible statutory interpretation and the resulting intrusion on state police power alone warrant overruling the decision. But there is another, more practical reason to inter the decision: It has needlessly transformed small state crimes into big federal crimes.

It is a "basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). That principle "is deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983).

When Congress crafts federal criminal statutes based on common-law crimes, it "presumably knows and adopts the cluster of ideas" associated with those crimes. *Morissette v. United States*, 342 U.S. 246, 263 (1952). The *Evans* Court paid only lip service to that principle. It swept a public official's "passive acceptance of a bribe" into the federal definition of extortion—a crime carrying a maximum sentence of 20 years in prison and a $250,000 fine. *See* 504 U.S. at 260. In doing so, it expanded the pool of federal criminal defendants and simultaneously exposed them to disproportionate penalties. *See Pierce v. United States*, 314 U.S. 306, 311 (1941) ("[J]udicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.").

The 20-year maximum sentence under the Hobbs Act dwarfs historic penalties for bribing public officials—a misdemeanor at common law. *See Coleman v. State*, 182 So. 627, 628 (Fla. 1938) ("At common law bribery and an attempt to bribe are both misdemeanors.") (quoting 8 Am. Jur. 890–91); *Curran v. Taylor*, 18 S.W. 232, 233 (Ky. 1892) (same); *People v. Peters*, 106 N.E. 513, 515 (Ill. 1914) (same); *State v. Canova*, 365 A.2d 988, 990 (Md. 1976) (same) (citing

multiple treatises); *Bedinger v. Commonwealth*, 7 Va. 461 (1803) (misdemeanor conviction and fine of $100 for attempted bribery of a magistrate).

State statutes have largely replaced common-law bribery offenses, but the statutory penalties are still much lighter than Hobbs Act penalties. For example, North Carolina caps the prison term for bribing a state official at four years and eleven months. N.C. Gen. Stat. § 14-217; *id.* § 15A-1340.17. Other States impose similar limits. *See, e.g.*, Cal. Penal Code § 68 (four-year maximum); Mo. Rev. Stat. §§ 576.010, 558.011 (four-year maximum); Va. Code Ann. §§ 18.2-438, 18.2-10 (ten-year maximum).

A 20-year sentence under the Hobbs Act is disproportionate even compared to the penalties for *federal* bribery. Historically, bribing federal officials was punishable with a fine and possibly a short prison sentence. *See, e.g.*, Act of July 31, 1789, ch. 5 § 35, 1 Stat. 29, 46–47 (bribery of customs officer punishable by a fine of $200 to $2,000); *United States v. Worrall*, 28 F. Cas. 774, 2 U.S. 384 (C.C.D. Pa. 1798) (revenue officer punished by three months' imprisonment and a $200 fine for bribery). Although penalties for bribery had increased by the time that Congress enacted the Hobbs Act, bribery statutes from that era show that Congress intended Hobbs Act extortion to cover more severe conduct—not minor state and local bribery cases.

In 1948—two years *after* the Hobbs Act's passage—Congress revised and codified federal criminal law in Title 18 to cover a slew of bribery offenses. *See generally* Pub. L. No. 80-772, 62 Stat. 683 (1948). Congress calibrated the maximum prison term

for each bribery offense to the seriousness of the offense. *See, e.g.*, *id.* § 214 (bribery to procure Federal Reserve Bank loan: one-year maximum); § 212 (bribery of customs officer: two-year maximum); § 202 (bribery of congressional or federal agency staff member: three-year maximum); § 203 (bribery of U.S. Attorney or U.S. Marshal: five-year maximum); § 206 (bribery of judge or judicial official: 15-year maximum). Many of those distinctions remain today, and Congress has since created others. *See, e.g.*, 18 U.S.C. §§ 201–227 (maximum sentences ranging from one to 15 years); 18 U.S.C. § 666 (bribery concerning programs receiving federal funds: 10-year maximum).

Interpreting the Hobbs Act to criminalize the same conduct as those statutes obliterates the distinctions that Congress crafted. It also exposes all classes of offenders to a 20-year maximum prison term—a sentence up to 20 times greater than the maximum for some bribery offenses—regardless of the conduct's severity. And of course, those severe and disproportionate penalties give prosecutors enormous leverage to wring guilty pleas out of defendants—given the enormous risks of going to trial. *See* Nat'l Ass'n of Crim. Def. Law., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 6 (2018) ("[T]here is ample evidence that federal criminal defendants are being *coerced* to plead guilty because the penalty for exercising their constitutional rights is simply too high to risk.") (emphasis in original).

When a legislature—or in this case a court—"fails to provide such minimal guidelines [for law enforcement], 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) (internal alteration and quotation marks omitted); *see also* Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction,* 46 Hastings L.J. 979, 997 (1995) (in the American criminal system, offenders "are subject to a kind of cruel lottery, in which a small minority of the persons who commit a particular offense is selected for federal prosecution and subjected to much harsher sentences.").

"At common law, the relationship between crime and punishment was clear." *Alleyne v. United States*, 570 U.S. 99, 108 (2013). With *Evans* on the books, it is anything but.

III. *STARE DECISIS* SHOULD NOT SAVE *EVANS*.

"[*S*]*tare decisis* is not an end in itself." *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring). On the contrary, "[i]ts greatest purpose is to serve a constitutional ideal—the rule of law." *Id.* (Roberts, C.J., concurring). *Evans* was wrongly decided, but more than that, its wrongness has worked such outsized harm to federalism principles that it does not deserve the respect that *stare decisis* affords.

As Flowers explains in her petition, *Evans*'s extraordinary interpretation (1) came without full briefing and argument, (2) has proven unworkable in practice, and (3) raises serious federalism and separation-of-powers concerns. *See* Pet. at 13–20. *Evans* also wreaks havoc well beyond "the particular

context" in which it was decided. *See Citizens United*, 558 U.S. at 380 (Roberts, C.J., concurring). It infringes on traditional state authority and ratchets up penalties for crimes that states previously treated with shorter sentences.

Even as *Evans* wanders zombie-like through the federal system—leaving behind the remains of state law—it also exacerbates the problem of federal overcriminalization. The overall trend in federal law has been a one-way ratchet in favor of ever-expanding criminal liability. One scholar estimates that the U.S. Code contains 3,300 federal criminal statutes, ballooning to about 300,000 possible offenses after accounting for federal regulations. Paul J. Larkin, Jr., *Public Choice Theory & Overcriminalization*, 36 Harv. J. L. & Pub. Pol'y 715, 726–29 (2013). The challenge (or, in many cases, impossibility) of knowing whether someone committed a federal crime has become a cruel joke. *See, e.g.*, @CrimeADay, *Twitter*, https://twitter.com/CrimeADay (posting a different federal crime each day since July 2014).[4]

To be sure, there is no simple solution to the problem of federal overcriminalization. But the Court should not make matters worse by perpetuating a judicial expansion of criminal liability that Congress

---

[4] Some recent posts: "21 U.S.C. §§ 331, 333, 379e, and 21 C.F.R. § 73.275(b)(1) make it a federal crime to put dried algae meal into chicken feed unless it's being used to make the chickens and their eggs look yellower" (November 26, 2018); "21 U.S.C. §§ 352(f) & 21 C.F.R. § 876.5981(b)(4)(i)(C) make it a federal crime to sell a device that people are supposed to put in their mouth to take up space and force them to take smaller bites so they'll lose weight, unless it comes with instructions" (November 23, 2018).

never undertook. Instead of "jury-rigging new and different justifications to shore up the original mistake," the Court should relegate *Evans* to the dustbin. *See Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring). *Stare decisis* is not a cure for a broken decision that continues to corrupt our constitutional structure.

CONCLUSION

Because "[a] State defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority,'" it must have "the prerogative to regulate the scope of interactions between state officials and their constituents." *McDonnell v. United States*, 579 U.S. --, 136 S. Ct. 2355, 2373 (2016) (quoting *Gregory*, 501 U.S. at 460). There is no reconciling *Evans* with this Court's many other decisions respecting the States' prerogative to regulate local crimes. This Court should grant the petition for a writ of certiorari and, having done that, should reverse the judgment below.

Respectfully submitted,

CLARK M. NEILY III
JAY R. SCHWEIKERT
CATO INSTITUTE
1000 MASS. AVE. N.W.
WASHINGTON, D.C.
20001
(202) 842-0200
jschweikert@cato.org

BRIAN D. BOONE
Counsel of Record
MICHAEL R. HOERNLEIN
BRANDON C.E. SPRINGER*
ALSTON & BIRD LLP
101 S. TRYON STREET
CHARLOTTE, NC 28280
(704) 444-1000
brian.boone@alston.com

Attorneys for Amicus Curiae

**Admitted to practice in New York only.*

December 6, 2018