No. 24-142

IN THE

Supreme Court of the United States

BRIAN BENJAMIN,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER NEW YORK ELECTED GOVERNMENT OFFICIALS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

We are current and former elected officials in New York State. We have served in federal, state, and city government, as legislators and executive branch officials. Our political affiliations may vary, and we often disagree about policy issues and about how our state and country should be governed. Nonetheless, we have come together because we are gravely concerned that the legal standard adopted by the Second Circuit in this case is one that will change the existing rules for campaign fundraising and criminalize ordinary, innocent—indeed, necessary—conduct by elected officials and by their constituents. We seek to provide our unique perspective on the implications of the Second Circuit's decision and to explain why this Court should grant the petition for *certiorari*.

For this reason, the individuals listed in Appendix A submit this *amicus curiae* brief in support of Petitioner Brian Benjamin. This Court has long held that campaign contributions cannot form the basis for criminal charges absent an "explicit" *quid pro quo* agreement between the elected official and the payor. The Second Circuit's opinion, contrary to this Court's precedent, replaces this "***explicit***" standard with an ***implicit*** one by holding that the required *quid pro quo* "need not be expressly stated but may be

[1] No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, both parties have been timely notified of our intent to file this brief.

inferred from the official's and the payor's words and actions."

It is no overstatement to say that this holding, if allowed to stand, will cause grievous damage to the democratic values that underlie our political system. Constituents and elected officials must be able to make and receive campaign donations while also discussing issues of public policy without fear of investigation, prosecution or punishment. This Court's explicit *quid pro quo* standard in cases involving a donation to a candidate's campaign (rather than a personal gift to the candidate) is what allows them to do so without the lingering uncertainty over whether a prosecutor will decide to make an example out of them. By contrast, the new implicit *quid pro quo* standard adopted by the Second Circuit will make it impossible for constituents and elected officials alike to know when they are running afoul of the law. The Second Circuit's standard will open the door to prosecutions based on suspicion and surmise. It will chill elected officials from engaging with their constituents (or prospective constituents) to discuss the issues that are important to them—a principle at the very core of a representative democracy. The Court should grant the petition for certiorari in order to prevent the likely consequences of the Second Circuit's rule: constituents who are deterred from participating in the political process, elected officials who are fearful of engaging with constituents, and unjust investigations and prosecutions of both constituents and elected officials alike.

SUMMARY OF ARGUMENT

For decades, elected officials and candidates for office have taken comfort in this Court's rejection of the misguided notion that legislators break the law "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[.]" *McCormick v. United States*, 500 U.S. 257, 272 (1991). Allowing elected officials to be prosecuted for voting in favor of policies that are supported by donors to their campaigns "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[.]" *Id*. In order to avoid the prosecution of conduct that is both innocent in intent and unavoidable given our system of campaign finance, this Court has held that the acceptance of campaign contributions can form the basis for criminal prosecution "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." *Id*. at 273 (emphasis added).

When the government charged Brian Benjamin with bribery offenses arising out of his receipt of campaign contributions from a constituent affiliated with a nonprofit supporting Harlem schoolchildren that received a state grant, it did not allege the type of explicit *quid pro quo* that this Court requires. The district court therefore properly dismissed the charges against Mr. Benjamin prior to trial, concluding that the government's charges were brought in error.

On appeal, however, the Second Circuit decided that it did not matter whether Mr. Benjamin ever manifested an unmistakable intent to facilitate this state grant in exchange for campaign contributions. Rather, the court held that an "***explicit***" *quid pro quo* can "be ***implied*** from the official's and the payor's words and actions." App.12a. In other words, the Second Circuit adopted a standard that something can be both explicit and implicit. The Second Circuit's wordplay eliminates this Court's requirement of "explicitness" from the "explicit" *quid pro quo* test.

The obvious legal defect in the Court's ruling and its inconsistency with the governing law stated time and again by this Court is well-explained in both the district court's decision and in Mr. Benjamin's petition for certiorari. As current and former elected officials, we write separately to focus on another concern particular to our experience, which is that the Second Circuit's standard will put under the microscope every interaction between a campaign donor and a candidate for office or a sitting elected official. The implicit *quid pro quo* standard will empower prosecutors and federal agents to examine whether an elected official cast a vote based on his or her long-standing commitment to a particular policy objective or because of persuasive advocacy from a constituent, as opposed to an illegal, explicit *quid pro quo*. Without requiring that this *quid pro quo* be "explicit" as that term is commonly understood—clearly manifested by words or conduct, as opposed to inferred and vague—elected officials and constituents alike will lack clear guidelines marking whether their actions may subject them to investigation and prosecution. This will deter the type of open exchange

and constituent service that courts have long recognized to be essential to democracy. Even if the bribery charges are ultimately found to be meritless, the impact of the investigation on the lives of elected officials and our constituents will be dramatic, irreversible, and devastating.

The Second Circuit's reasoning also ignores that campaign contributions are a fundamental aspect of the rights of political speech and free association protected by the First Amendment. The rules that obtain in other bribery cases—where the benefit conferred on the elected official is tangible and personal, such as an expensive watch or a fur coat—do not obtain in the context of campaign contributions. A watch or coat is a gift of personal property conferred on the elected official for his or her own private benefit, not a form of speech by constituents that is protected by the First Amendment and essential to our political system.

For this reason, the law should force the government to tread lightly when it comes to initiating prosecutions based on a constituent's decision to donate money to a political campaign, or an elected official's decision to act in the hope of inspiring such donations. Since *McCormick*, this Court has held over and over again in a multiplicity of contexts that courts should be reluctant to permit prosecutions of government officials other than in the clearest cases of corruption and wrongdoing. In adopting its implicit *quid pro quo* standard, the Second Circuit overlooked these decisions, unwisely entrusted excessive discretion to prosecutors, and

paid little more than lip service to the First Amendment implications of its decision.

As current and former elected officials, we respectfully ask the Court to grant *certiorari* and make clear that an explicit *quid pro quo*—not merely one that the government purports to be "implied" from the parties' words and actions—is required to bring a bribery charge when the alleged bribe is a campaign contribution.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION DISREGARDS THIS COURT'S PRECEDENT AND THREATENS OUR DEMOCRATIC PROCESS

When the government charged Mr. Benjamin in an indictment barren of any allegations that he entered into an explicit *quid pro quo* agreement with a constituent, he moved to dismiss the charges as inconsistent with the *McCormick* explicit *quid pro quo* rule. The district court granted the motion, carefully reviewing *McCormick* and this Court's subsequent decision in *Evans v. United States*, 504 U.S. 255 (1992). App.36a–41a. The district court conducted a thorough analysis of the meaning of the phrase "explicit promise" and rejected the government's argument that "the Court can't really have meant explicit" when it used precisely that word. App.49a.[2]

[2] *See also Explicit,* OXFORD ENGLISH DICTIONARY (rev. ed. Dec. 2023) (defining "explicit" as an "***express***" action that "leav[es] ***nothing merely implied*** or suggested" (emphases added)), *found at* https://tinyurl.com/ycy2abwu (last visited Sept. 8, 2024).

On appeal, however, the Second Circuit agreed with the government that this Court did not mean what it said when it held in *McCormick* that campaign contributions can form the basis for criminal charges "only if the payments are made in return for an explicit promise." *McCormick*, 500 U.S. at 273. Rather than give the term "explicit" its ordinary meaning, the Second Circuit saw "no reason why" an "explicit" *quid pro quo* "cannot be implied from the official's and the payor's words and actions." App.12a. Relying on Justice Kennedy's concurrence in *Evans*—a case that did not solely concern campaign contributions—the court held that an explicit *quid pro quo* need not be communicated "in express terms," but can be "inferred" from the parties' conduct. *Id.*

In applying its implicit *quid pro quo* standard to Mr. Benjamin's case, the panel found that "the existence of the agreement, and the clarity of its terms [to Mr. Benjamin and his constituent], could be inferred from their words and actions," including Mr. Benjamin's ambiguous alleged statement, "Let me see what I can do." App.24a–25a. On that basis alone, the panel decided that the criminal prosecution of Mr. Benjamin could proceed. App.26a.

Although the Second Circuit acknowledged that "campaign contributions implicate the First Amendment" (App.22a), it nevertheless held that cases involving campaign contributions are subject to exactly the same *quid pro quo* standard that obtains in non-campaign-contribution cases, such as those involving a personal gift to an elected official. The panel emphasized that its watered-down standard "applies regardless of whether the case involves

purported campaign contributions" (App.9a), and summarily dismissed Mr. Benjamin's First Amendment concerns in a single paragraph. App.22a-23a. The court reasoned that "[i]t is the corrupt *agreement* that transforms the exchange from a First Amendment protected campaign contribution . . . into an unprotected crime," and then declared that its implicit *quid pro quo* standard "alleviate[d]" any First Amendment concerns. App.22a–23a.

The Second Circuit's decision disregards the core First Amendment principles underlying this Court's opinion in *McCormick*, as well as the decades-long trend in this Court's jurisprudence that has limited the reach of federal criminal law in order to safeguard the essential attributes of our democratic process. We discuss these principles in greater detail below.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DECISION RESTRICTS CORE POLITICAL SPEECH AND CREATES UNCERTAINTY FOR ELECTED OFFICIALS AND THEIR CONSTITUENTS

A. *Campaign Contributions Are Among The Highest Forms Of Protected First Amendment Activity*

This is a case about campaign contributions, which play a central role in our democracy. For decades, this Court has instructed that the First Amendment "has its fullest and most urgent

application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). A campaign contribution "serves as a general expression of support for the candidate and his views" and also "serves to affiliate a person with a candidate." *Buckley v. Valeo*, 424 U.S 1, 21–22 (1976). It necessarily follows that the ability to make campaign contributions is "integral to the operation of the system of government established by our Constitution." *Id*. at 14.

As this Court has held over and over again, the First Amendment's guarantee of the rights of political expression and political association shield campaign contributions from most forms of regulation or prohibition. "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens . . . for simply engaging in political speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 349 (2010). While political speech in the form of campaign contributions may be restricted for "the prevention of '*quid pro quo*' corruption or its appearance," *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1652 (2022); *see also Buckley*, 424 U.S. at 25 (same), the government may not pursue a "prophylaxis-upon prophylaxis approach" to that end that broadly sweeps in innocent conduct. *Cruz*, 142 S. Ct. at 1652–53.

While we, as current and former elected officials, unanimously affirm that actual corruption is to be deplored, "the Government may not seek to limit the appearance of mere influence or access." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 208 (2014). Rather, influence and access "embody a central feature of democracy—that constituents

support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *Id.* at 192. This Court has recognized that even while "[t]he line between quid pro quo corruption and general influence may seem vague at times, . . . the distinction must be respected in order to safeguard basic First Amendment rights," and courts must "err on the side of protecting political speech rather than suppressing it." *Id.* at 209 (citation omitted). The interpretation of the criminal law by district and appellate courts should support and not undercut the Court's emphasis that campaign contributions are protected free speech.

B. McCormick *Recognized That Campaign Contributions Should Be Based Only On An Explicit Quid Pro Quo Agreement*

Given the important role that campaign donations play in our democratic system and their special protection under our First Amendment, it is no surprise that the Court has taken care to narrowly read bribery and extortion statutes in the context of public corruption cases that involve campaign contributions. Unlike the Second Circuit's implicit *quid pro quo* standard here, the standards this Court has articulated aim to avoid sweeping in innocent conduct or deterring protected First Amendment activity.

In *McCormick*, the Court made clear that campaign contributions can form the basis for criminal charges "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." 500 U.S. at 273 (emphasis added). The Court grounded its rule in democratic process, explaining in some detail the rationale for its concern that prosecutors not overstep narrow bounds when considering whether to prosecute elected officials for receiving campaign contributions.

This Court first recognized that "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator." *Id.* at 272. In other words, legislators need to work on behalf of their constituents to press for policies that those constituents support. The Court also understood the practical realities of modern campaigns and the need to finance those campaigns—realities that in our experience have only intensified since *McCormick* was decided in 1991. As the Court explained, "campaigns must be run and financed" and "[m]oney 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." *Id.*

Again focusing on the practical realities faced by elected officials and our constituents, the Court reasoned that "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" when it passed the Hobbs Act. *Id.* In other

words, a rule that prevents constituents and candidates or elected officials from advancing the interests of the other would carry with it serious consequences for our system of government by "open[ing] 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." *Id.*

This is the foundation upon which the *McCormick* explicit *quid pro quo* rule rests. *McCormick* allows elected officials, candidates for office, and constituents to each play their part in the political process. Candidates for office are allowed to raise money from those constituents who wish to express their support. Constituents are encouraged to state their views and to advocate to their elected officials, asking that they take positions that will advance their views and interests. And candidates, if elected, may then seek to change the law to advance the policy objectives supported by their constituents. Under *McCormick*, no crime has been committed absent an ***explicit*** *quid pro quo* between the elected official and the constituent for official action in exchange for a contribution. This is and should remain the law.

III. THE SECOND CIRCUIT'S WATERED-DOWN STANDARD CANNOT BE RECONCILED WITH THIS COURT'S RECENT PUBLIC CORRUPTION AND CAMPAIGN FINANCE DECISIONS

The Second Circuit's decision is inconsistent with *McCormick* and the twin trends of this Court's decisions in the past several decades, namely, placing limits on the ability of prosecutors to interfere in the political process and rejecting restrictions on First Amendment-protected campaign finance activities.

A. *This Court Consistently Has Rejected Prosecutions Of Public Officials That Rest On Expansive Interpretation Of Federal Criminal Statutes*

This Court has repeatedly clipped the wings of prosecutors, recognizing that an expansive interpretation of federal criminal statutes in the context of prosecuting government officials will "raise significant constitutional concerns." *McDonnell v. United States*, 579 U.S. 550, 574 (2016). When taken together they demonstrate that the Court has consistently declined to permit prosecutors to advance broad or novel arguments in support of its public corruption prosecutions.

For example, these concerns animated the Court's decision in *McDonnell* to limit the definition of official acts in the context of bribery prosecutions and to reject the government's suggestion that "nearly anything a public official does" is an official act. *Id.* at

575. As the Court explained, "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time." *Id*. If all of these forms of constituent service were to be treated as official acts, then "[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *Id*. As we have seen in our careers, constituent service and responsiveness to the community are the touchstone of elected public service.

In the same spirit, the Court has taught that federalism concerns are also implicated whenever the federal courts "construe the statute in a manner that . . . involves the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987); *see also McDonnell*, 579 U.S. at 576–77 (holding that states have "the prerogative to regulate the permissible scope of interactions between state officials and their constituents" and citing *McNally,* 483 U.S. at 360). The Court reiterated the point recently, in the context of the infamous "Bridgegate" scandal. Even where—unlike in this case—the conduct underlying that "Bridgegate" prosecution was concededly improper, the Court admonished prosecutors not to "use the criminal law to enforce ([their] view of) integrity" in state and local politics. *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020).

Likewise, in *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999), the Court read the federal anti-gratuity statute to require that a gratuity paid to a government official be linked to a particular official act in order for it to be criminal. Absent this linkage, an over-zealous prosecutor could charge the president with a crime for accepting a ceremonial jersey from a sports team that visits the White House after winning a championship title. *Id.* at 406–07. Indeed, the prosecutor in *Sun-Diamond* stated that it would be a crime if a group of farmers provided a complimentary lunch to the Secretary of Agriculture in connection with his speech to those farmers. *Id.* at 407. "[N]othing but the government's discretion prevents the foregoing examples from being prosecuted." *Id.* at 408. As in *McDonnell*, the Court was alert to the dangers posed by a broad reading of federal criminal statutes.

Just last Term, this Court considered the related question of whether the federal bribery statute makes it a crime for state and local officials to accept gratuities. *See Snyder v. United States*, 144 S. Ct. 1947 (2024). In holding that it did not, this Court emphasized that the government had "simply opined" that the statute proscribed "wrongful" gratuities, without "identify[ing] any remotely clear lines separating an innocuous or obviously benign gratuity from a criminal" one. *Id.* at 1957. The same concern applies with equal force here. By vaguely holding that a criminal *quid pro quo* can "be implied from the official's words and actions," the Second Circuit's diluted standard would "create traps for unwary" elected officials. *Id.* Indeed, officials would be left "at sea to guess about" whether they are running afoul of

the law, "with the threat of [landing] in federal prison if they happen to guess wrong." *Id.* at 1958. As this Court recognized in *Snyder*, that "is not how federal criminal law works." *Id.*

Considered together, these decisions are important to elected officials. We seek engagement with the voters and our supporters and the community at large, and the Court should follow the careful approach it has taken in recent cases involving allegations of public corruption.

B. *This Court Consistently Has Rejected Limitations On Campaign Finance Because Of Their Impermissible Burden On Protected Speech*

Similarly, this Court has "spelled out how to draw the constitutional line" between government efforts to "avoid[ ] corruption in the political process," and efforts that—even while gesturing to this concern—primarily function to "limit speech." *McCutcheon*, 572 U.S. at 192. In seeking to draw those lines, the Court has understood that "a legitimate and substantial reason" to contribute to a candidate "is that the candidate will respond by producing those political outcomes the supporter favors." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 297 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part).

As a corollary to this fundamental principle, "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such

support may afford." *McCutcheon*, 572 U.S. at 192. Indeed, only two years ago the Court denied that contributions should be limited or restricted even in contexts in which the contributor had particular assurance that the public official could or would take action favorable to him. *Cruz*, 142 S. Ct. at 1652 (rejecting restrictions on "particularly troubling" post-election contributions that allegedly "raise a heightened risk of corruption").

The Second Circuit's implicit *quid pro quo* standard eviscerates the line this Court has sought to maintain, at the expense of elected officials and their constituents. Permitting prosecution in this context based on only an implicit agreement would too easily and impermissibly blur the distinction between, on the one hand, the (entirely appropriate) expectation that public officials will act on supporters' concerns and, on the other, a corrupt bribe. *See McCutcheon*, 572 U.S. at 209 ("[T]he distinction must be respected in order to safeguard basic First Amendment rights."). The Second Circuit's decision—which devotes just a single, casual paragraph to the First Amendment implications of the standard it has adopted (App.22a)—makes clear that it has not adequately considered these concerns or shown due regard for this Court's many decisions in this area.

IV. THE SECOND CIRCUIT'S WATERED-DOWN STANDARD WILL INTERFERE WITH THE DEMOCRATIC PROCESS AND LEAD TO UNJUST PROSECTIONS BASED ON INNOCENT CONDUCT

If the Court does not reverse the Second Circuit's attempt to dilute the explicit *quid pro quo* requirement in *McCormick*, any elected official who accepts a campaign contribution will necessarily feel constrained from taking official acts that are in favor of the campaign donor, in case an over-zealous prosecutor should decide that, in the Second Circuit's words, a *quid pro quo* can "be implied from the official's words and actions." App.47a; *see also* Benjamin Pet. 17 (noting that "over half a million elected officials in the United States at the state and local level" are "potentially subject to" criminal prosecution under the bribery statute at issue here). Any time a government official considers taking a step that would assist a campaign donor, he or she will need to engage counsel to conduct careful analysis about whether such an action is permitted, or else face prosecution for otherwise innocent activity. More likely, many elected officials will decide to minimize contact with constituents who are campaign donors lest such contact form the basis for a criminal bribery charge. A rule of law that discourages interactions between elected officials and their constituents is not a good rule.

Likewise, a constituent who hopes to persuade an elected official to take some official action on an issue the constituent believes to be important might

conclude that making a campaign contribution to the elected official will put her or him at risk of criminal prosecution, and thereby be deterred from engaging in the core protected First Amendment activity of making campaign contributions. Constituents might even fear that making a donation to a candidate who shares their views will make it harder for the elected official to take action in support of those views, out of the candidate's concern that such actions will be viewed as an illegal *quid pro quo*. A rule of law that discourages core protected free speech by threatening the criminal investigation and prosecution of those who would engage in it is not a good rule.

Just as in *Sun-Diamond*, it is not hard to imagine the types of hypothetical prosecutions that the government could bring if the Second Circuit's diluted standard is allowed to stand. For example:

- A state legislator holds a meeting with constituents who are focused on the issue of climate change. The constituents seek to persuade her that certain policy measures should be adopted to reduce the rate of increase in the global average temperature.

Under the Second Circuit's standard, if she votes for those measures after accepting campaign contributions from constituents who attended the meeting, both she and her constituents can be investigated or even charged, even in the absence of any explicit promise.

- A city council member meets separately with representatives of both an organization that represents taxi drivers and the management of

a private car service to hear their views on policy changes relating to traffic congestion. Each side calls for placing limits on the other's ability to provide car service. In the aftermath of these meetings, some attendees make donations to the candidate's campaign; the strong majority of the donations are made by the private car service and its executives. The council member makes no explicit promises to either side of this dispute other than to consider seriously their advice. He then votes for the policies advocated by the private car service.

Under the Second Circuit's standard, he is subject to investigation or even charges in order to determine whether layers of inference could suggest that the vote was cast in exchange for the political donations.

- A candidate running for office holds an informal "meet and greet" with potential constituents. The candidate states her position on important issues affecting the district. Liking what he hears, a constituent states that he would be excited to contribute to a candidate who espouses those positions. The candidate responds that the constituent can "count on me" to stick to her principles. The constituent makes a donation to the candidate's campaign before leaving. The candidate, subsequently elected, votes consistently with the positions she described at the "meet and greet."

Under the Second Circuit's standard, both the candidate and the constituent could be investigated or even charged because, in the government's view, the

candidate and constituent implicitly entered a *quid pro quo* agreement.

In none of these real-world hypotheticals was there anything like an explicit *quid pro quo* and yet in all of these cases, the government could investigate or even prosecute individuals for conduct that is commonplace and unremarkable in the current political system. Innocent conduct along the lines of the conduct described in the hypotheticals above should not be the basis for criminal investigation and prosecution.

Even the investigations themselves, whether or not followed by charges or a successful prosecution, would achieve a punitive end, tarnishing the elected official's record and forcing him to spend considerable funds to engage counsel in order to defend against the charges. The official's family, friends, associates, and political allies could also face similar consequences. This minefield created by the government's proposed rule will also discourage speech, impede interactions between elected officials and their constituents, advantage self-funded candidates who do not need to engage in the campaign fundraising process, and lead to unwarranted investigations and prosecutions. No rule that brings about these results is a good rule.

Of course, the Court does not require these hypotheticals to understand the harm the government's position would cause: the Court need look no further than the prosecution of Mr. Benjamin that is the subject of this appeal. Mr. Benjamin worked for many years to build a successful career in public service and he had recently become the lieutenant governor of New York State, only to be

forced to resign because of charges that amount to little more than his acceptance of campaign donations from a constituent months after he supported a state grant to a nonprofit dedicated to supporting Harlem schoolchildren. All of us will only see more of this type of prosecution if the Second Circuit's diluted rule becomes the law of the land.

Finally, the Court should consider the risk of selective prosecution. Without an explicit *quid pro quo* requirement, this risk would be even greater than it already is today. This is because when a criminal statute is read broadly, it "risks allowing 'policemen, prosecutors, and juries to pursue their personal predilections.'" *Marinello v. United States*, 584 U.S. 1, 11 (2018) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). To guard against such risk, this Court has repeatedly warned that courts "cannot construe a criminal statute on the assumption that the [g]overnment will 'use it responsibly,'" *id.* (quoting *McDonnell*, 579 U.S. at 576), rather than in a manner that "result[s] in the nonuniform execution of [prosecutorial] power across time and . . . location," *id.* This caution regarding the impropriety of relying on prosecutorial discretion is particularly appropriate in the context of public corruption cases, where there is a heightened risk of selective prosecution based on an elected official's views or votes or even the appearance thereof, which "undermin[es] necessary confidence in the criminal justice system." *Id.*

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant Mr. Benjamin's petition.

Dated: September 9, 2024

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Counsel for Amici Curiae

APPENDIX A*

New York State Senator Marisol Alcantara (ret.)

New York State Assemblymember Michael Blake (ret.)

New York State Assemblymember Karim Camara (ret.)

New York State Senator Leroy Comrie

New York City Councilmember Robert Cornegy (ret.)

New York State Assemblymember Inez Dickens

United States Representative Max Rose (ret.)

New York State Assemblymember Frank Seddio (ret.)

New York State Assemblymember Al Taylor

New York City Councilmember David Yassky (ret.)

* *Amici curiae* appear in their individual capacities; institutional affiliations are provided here for identification purposes only.