**No. 17-1687**

In The
# Supreme Court of the United States

THEODORE E. SUHL, *Petitioner,*
*v.*
UNITED STATES OF AMERICA, *Respondent.*

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

## Brief of Amicus Curiae James Madison Center for Free Speech Supporting Petitioner


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## QUESTION PRESENTED

Whether the government may obtain convictions for bribery under the honest-services fraud statute, 18 U.S.C. § 1346, and the federal-programs bribery statute, 18 U.S.C. § 666, in the absence of jury instructions expressly requiring an intended *quid pro quo* exchange.

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## STATEMENT OF INTEREST[1]

The mission of the James Madison Center for Free Speech ("Madison Center") is to support litigation and public education activities to defend the First Amendment rights of citizens and citizen groups to free political expression and association. The Madison Center is named for James Madison, the author and principal sponsor of the First Amendment, and is guided by Madison's belief that "the right of free discussion . . . [is] a fundamental principle of the American form of government." The Madison Center also provides nonpartisan analysis and testimony regarding proposed legislation. The Madison Center is an internal educational fund of the James Madison Center, Inc., a District of Columbia nonstock, nonprofit corporation. The James Madison Center for Free Speech is recognized by the Internal Revenue Service as nonprofit under 26 U.S.C. § 501(c)(3). *See* http://www.jamesmadisoncenter.org. The Madison Center and its counsel have been involved in numerous election-law cases, including *McCutcheon v. FEC,* 134 S.Ct. 1434 (2015), *Citizens United v. FEC,* 558 U.S. 310 (2010), *Wiscon-*

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[1] 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. A contribution to amicus the James Madison Center was made by Russ Spencer in order to defray the costs of this brief. No further person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, including waiving the 10-day notice requirement.

*sin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), *Republican Party of Minnesota v. White*, 536 U.S. 765 (2000), and *Randall v. Sorrell,* 548 U.S. 230 (2006).

## SUMMARY OF ARGUMENT

Allowing persons to be prosecuted for providing anything of value to a federal, state, or local official, with a mere intent to "influence" that official's conduct, but absent an intent to engage in a specific *quid-pro-quo* arrangement, is a stunningly overbroad reading of the federal-programs bribery and honest-services statutes. Such a reading would criminalize an endless swath of ordinary behavior involving government officials and employees, including a tremendous amount of behavior protected by the First Amendment. Attempting to "influence" government officials is much of the point of several clauses of the First Amendment, and anyone who has ever given "anything" of value to a government official or their family—a gift, dinner, a job or internship, a campaign contribution, public support or endorsement, etc. —would rightly be chilled from any further involvement in attempting to influence government action lest their earlier behavior be construed by a prosecutor or jury as intended to influence the recipient.

Because the construction of the statute below is so grossly overbroad, it raises serious First Amendment issues regardless whether a narrower reading of the statute could be found to apply to the facts of this case. The myriad examples of overbroad potential

application of these statutes demonstrate that such overbreadth is not merely minor or incidental, but likely overwhelms the legitimate application of the statute to more traditional *quid-pro-quo* bribes.

This Court should grant the petition in order to establish that the same narrow standards for defining *quid-pro-quo* bribery on the government official or "payee" side likewise should apply on the "payor" side of any alleged transaction, given the identical concerns with absurd applications and unconstitutional overbreadth.

## ARGUMENT

### I. Defining Bribery to Require Only a Generalized Intent to Influence a Government Official Is Overbroad and Reaches Substantial Conduct Protected by the First Amendment.

Amicus agrees with petitioner that the court of appeals erred in endorsing a jury instruction requiring only a general intent to influence a payee rather than a specific intent to create a *quid pro quo* involving discreet official action in exchange for any payment or other thing of value. *See* Pet. 5, 10-12. Amicus also agrees with petitioner that this Court's decisions in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), and *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), establish the proper minimum standards for defining bribery and should apply equally to charges involving payors and payees. Pet. 11.

Amicus writes this brief to provide further support for the proposition that a broad definition of bribery

requiring only a general intent to "influence," rather than a specific *quid pro quo*, would criminalize a wide swath of commonly accepted behavior, would apply to substantial First Amendment activity, and thus would raise serious constitutional questions. Such constitutional problems could be readily avoided by application of this Court's *McDonnell* and *Sun-Diamond* standards.

### A. This Court Has Recognized the Serious Constitutional Concerns Caused by an Overbroad Reading of Bribery Statutes.

In *McDonnell*, this Court narrowly construed the elements of bribery in order to avoid "significant constitutional concerns" raised by a broader reading. *McDonnell*, 136 S. Ct. at 2372. Accordingly, the federal crime of bribery must be narrowly construed to involve a *quid pro quo* "exchange" of something of value for an "official act" involving the "formal exercise of governmental powers." *Id.* at 2371-72.

This Court has given a variety of examples of the overreach of the bribery statutes if a broader standard were applied. In *McDonnell*, this Court observed that the government's view—which it seeks to revive, at least in part, here—interprets § 201 as encompassing the exchange of nearly anything of value, from a "campaign contribution to lunch," as the "*quid*," and virtually anything, including taking a meeting to listen to citizen concerns or interests, as the "*quo*." 136 S. Ct. at 2372. The problem with that view, however, is that it covered all sorts of common democratic behavior:

> The basic compact underlying representative government *assumes* that public officials

> will hear from their constituents and act appropriately on their concerns—whether it is the union official worried about a plant closing or the homeowners who wonder why it took five days to restore power to their neighborhood after a storm. The Government's position could cast a pall of potential prosecution over these relationships if the union had given a campaign contribution in the past or the homeowners invited the official to join them on their annual outing to the ballgame. Officials 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.*

The absurd results of such a broad approach was also recognized by this Court in the context of illegal gratuities in *Sun Diamond*. For example, government officials often receive token gifts such as sports jerseys, caps, or merely a free lunch in connection with various official functions. But "the official acts of receiving the sports teams at the White House, visiting the high school, and speaking to the farmers about USDA policy . . . —while they are assuredly 'official acts' in some sense—are not 'official acts' within the meaning of the statute." 526 U.S. at 407. Such examples apply equally to the bribery statute if interpreted broadly as requiring an amorphous intent to influence rather than a specific exchange for an official act. *See McDonnell*, 136 S. Ct. at 2370 (reiterating the *Sun-Diamond* examples and noting

that "speaking with interested parties is not an official act").

### B. A Standard Requiring Only a General Intent to "Influence" a Recipient of Anything of Value Would Cover a Wide Range of Common and Protected Activity.

In addition to the examples previously given by this Court, a wide variety of innocuous and protected conduct may be viewed as having an intent to "influence" government officials—either to sway their views, make them more favorably inclined to take a meeting or to respect important interests, or to remember favorably a name or face for potential future job openings or appointments.

Inviting a government official to dinner and serving nice wine certainly constitute things of value and could be viewed as an attempt to "influence" if the host later seeks a government job. (One imagines that hiring former colleagues and friends with whom an official may have socialized is common in government; even in the Department of Justice.) Indeed, maintaining social relationships and business contacts invariably could be viewed as an attempt to curry favor for future possible benefit.

Hiring the spouse, child, or relative of a government decisionmaker likewise could be viewed as an attempt to gain "influence" or favor and could be deemed a bribe should the person doing the hiring ever have occasion to talk to the official on governmental matters.

A donor or alumni taking someone from a state university (receiving federal grant money) to lunch, or making a contribution to some school project the

university seeks to fund, might be viewed as attempting to influence an official decision if the alumni or donor ever subsequently mentions a potential applicant or recruit or other potential operational decision by the university.

That a person gives an official "anything" of value—a book, a framed photo, a dinner invitation – in the mere hope of some future positive inclinations is not bribery—it is friendship, social intercourse, and maintaining basic business or political relations. Dinner or drinks between friends, colleagues, or acquaintances may well provide future opportunities to work in government or have your voice heard, but they are not bribes in any sensible understanding of the law. At a minimum, there is no agreed upon exchange or *quid pro quo* in such interactions, and any "influence" hoped for or gained by such commonplace behavior cannot be the measure of a crime.

In the more directly political arena, campaign contributions, OpEds, newspaper endorsements, or a wide range of independent expenditures might be something of "value" to a candidate or officeholder. Volunteer work on a campaign, fundraising or "bundling," and other forms of political activity likewise are of value to candidates and government officials. If the person or entity making such contributions, endorsements, writings, or expenditures were thereafter to meet with the candidate or officeholder and give their views on any number of issues, that could be construed by an aggressive prosecutor as demonstrating the earlier conduct was an attempt to gain influence on the latter issues. Indeed, volunteering for a campaign or helping fund-

raise is often done with the express and unabashed hope of gaining "influence" and landing a position in the ensuing administration. Similarly, OpEds and independent expenditures often are an express attempt to influence or reward the official conduct of an officeholder even while they are of value to that person. At a minimum they are an inducement to stay the course or risk losing such political support.

Where the thing of value is itself protected First Amendment activity—a campaign contribution, volunteer campaign assistance, an endorsement, or an independent expenditure in support of a candidate—criminalizing the mere hope and intent that such conduct leads to favorable future treatment is constitutionally suspect, to say the least. Indeed, it would involve a complete paradigm shift in our democratic processes and hand prosecutors a powerful tool to harass political opponents.

Ultimately, such attempts to influence official action are not bribery, but rather are expressly protected parts of the democratic process regardless whether they are also valuable to the officeholder. At a minimum there needs to be an express *quid pro quo* before leveling charges of bribery, and even then, not all *quids* and not all *quos* can constitutionally be viewed as unlawful or corrupt attempts to bribe and official.[2]

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[2] In some instances, even if there were an express *quid pro quo*, the behavior might still be protected by the First Amendment. *See FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 498 (1985) (observing that a candidate or public official altering or affirming his positions on issues because of a contribution is not

### C. Principles of Overbreadth and Constitutional Avoidance Favor a Narrow Reading of the Bribery Statutes.

Part of what makes the above examples so shocking is the breadth of persons to whom it would apply. The federal-programs statute, for example, covers countless entities that receive federal funds, and thus have countless employees and officials who might be thought to be the targets of influence-seeking from ordinary or protected interactions. Under the government's view, all such officials and employees would need to be kept at arm's length by all those who might ever interact with them regarding their official duties. Indeed, the spouses, children, and relatives of such persons would be off limits too, lest hiring them, providing an internship, paying for a meal, or giving a graduation or birthday present be deemed an attempt to gain influence. In each of those instances, the lack of any *quid pro quo* is essential to determining whether the employer, host, or gift-giver is even potentially engaging in a bribe. Imposing such isolation on office holders and their families lest their friends and acquaintances be accused of bribery is simply absurd. Yet it is the

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evidence of *quid pro quo* corruption). A newspaper or a prominent individual who expressly conditions their endorsement on a politician's promise to act in a certain way on a particular issue—abortion, immigration, discrimination, etc.—is doing absolutely nothing wrong, even if such endorsement is of value to the politician and even if it in fact influences that politician on such issues. That is the essential *quid pro quo* of democracy and a core aspect of free speech.

consequence of the broad approach adopted below that eschews the requirement of a direct *quid pro quo* for a specific official action, requiring only the amorphous hope or intent to gain general influence or favor.

Beyond such absurdities, the political examples above stray well into the realm of unconstitutionality. Given that the very point of much speech and related activities is to encourage and positively influence those who have or will take favored political action and to criticize and negatively influence those whose actual or proposed actions are disfavored, the standard applied below is grossly overbroad and would sweep in a wide range of protected First Amendment activity. *Cf. McDonnell*, 136 S. Ct. at 2372-73 (looking beyond conduct in the case before it to overbroad applications when deciding to narrowly construe statute). Campaign contributions, independent expenditures, OpEds, and endorsements are core political speech, are plainly both of value and intended to influence official action, yet cannot possibly, constitutionally, be deemed bribes without much more. At a minimum there needs to be an express *quid pro quo* for a specific action, and even then there needs to be a further constitutional narrowing of our notion of illegal bribery.

These principles are especially important to apply to the "payor" side of an alleged bribe given that this Court has already applied them to payee-side charges of bribery. Indeed, holding private citizens to a stricter standard than the public official involved would be particularly odd given the higher level of

public trust and fiduciary duty on the party of the public official. If anything, it is the public official that should be held to a higher standard than a private citizen, but, at a minimum, they should be held to equal standards when addressing two sides of the same alleged transaction. To do less, and give public officials greater protections than the private citizens involved in the same transactions, would create the appearance of favoritism and the very sort of government corruption that the bribery laws are meant to address.[3]

[3] Indeed, the activity as described by the Eighth Circuit in this case could more easily be viewed as a pay-to-play scheme by the government official rather than bribery on the part of petitioner. What the court below described was at most a private citizen being forced to pay for meetings in order to petition a government official regarding various concerns with government programs. Pet. App. 2a-3a. There is no suggestion that such alleged meeting fees bought anything other than an opportunity to be heard, and no suggestion that any specific official action was agreed upon in return for the alleged meeting fees. Pet. App. 3a. While the government official involved certainly was abusing his office through such a pay-to-play scheme, it would not constitute bribery under this Court's current precedents and should not be considered bribery by the citizen forced to pay for what should have been free.

## II. *Quid Pro Quo* Corruption Must Be Narrowly Defined To Avoid Unconstitutional Chill of Activity Protected by the First Amendment.

In light of the above concerns and overbreadth of the bribery statutes as applied by the court below, this Court should apply here the same basic requirements from *McDonnell* and *Sun-Diamond* that it applies to bribery charges against government officials. Beyond that, the Court might well consider providing additional guidance regarding the *quid pro quo* requirement, the need for express instructions addressing that requirement, and perhaps on what sorts of official action might fall within a safe harbor for ordinary democratic behavior protected by the First Amendment.

This Court's decisions defining *quid pro quo* corruption can be summarized as requiring 1) an unambiguous arrangement 2) for the direct exchange of something of value for 3) a public official's improper promise or commitment that is 4) contrary to the obligations of his or her office 5) in an effort to control an official, sovereign act.

First, this Court has stated that a *quid pro quo* arrangement must be unambiguous. *McCormick v. United States*, 500 U.S. 273 (1991); *see also McDonnell,* 136 S. Ct. at 2359. Addressing political contributions and their use for *quid pro quo* arrangements, the Court observed that "[t]he receipt of [ ] 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 . . . ." *Id.* at 273; *see*

*also United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993) (charges under the Hobbs Act must show that the offer at issue was "made in exchange for an explicit promise to perform or not to perform an official act. Vague expectations of some future benefit should not be sufficient to make a payment a bribe"). An agreement is unambiguously established "if the evidence shows that the public official received a thing of value knowing that it was given with the expectation that the official would perform an 'official act' in return." *McDonnell,* 136 S. Ct. at 2371.

Second, an unambiguous arrangement must also be a direct one: the hallmark of *quid pro quo* corruption is "a direct exchange of an official act for money." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) (citing *McCormick,* 500 U.S. at 266).

Third, for a *quid pro quo* arrangement to occur, the candidate or public official must make an improper promise or commitment. *See Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) (quoting *Buckley v. Valeo,* 424 U.S. 1, 47 (1976) (holding that for expenditures to be corrupt they must "be given as a *quid pro quo* for improper commitments from the candidate."). And not all promises or commitments are improper:

> [T]here are constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign. Some promises are universally acknowledged as legitimate, indeed "indispensable to decisionmaking in a democracy," *First National Bank of Boston v. Bellotti*, 435

> U.S. 765, 777, 98 S.Ct. 1407, 1416, 55 L.Ed.2d 707 (1978); and the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means ... is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931). Candidate commitments enhance the accountability of government officials to the people whom they represent, and assist the voters in predicting the effect of their vote.

*Brown v. Hartlage*, 456 U.S. 45, 55-56 (1982).

Additionally, promises or commitments to an individual that serve that individual's self-interest are not inherently improper:

> The fact that some voters may find their self-interest reflected in a candidate's commitment does not place that commitment beyond the reach of the First Amendment. We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare.

*Id.* at 56.

Fourth, a *quid pro quo* arrangement cannot occur where the obligations of public office are not thwarted. Promises to vote in a way that is consistent with a candidate's or political party's platform, or in favor

of or against an issue do not subvert the political process because they are not contrary to the obligations of office. Likewise, promises merely to look into problems or issues, or to obtain non-confidential information on a topic of concern would not contravene an officeholder's duties or obligations. *Cf. Republican Party of Minnesota v. White*, 536 U.S. 765, 813 (2002) (narrowly tailoring permissible restrictions on judicial candidate promises to cover only those inconsistent with the judge's obligations of office); *See Buckley v. Ill. Jud. Inquiry Bd.,* 997 F.2d 224, 229 (7th Cir. 1993) (striking down Illinois' pledges and promises clause because it "is not limited to pledges or promises to rule a particular way in particular cases or classes of case; all pledges and promises are forbidden except a promise that the candidate will if elected faithfully and impartially discharge the duties of his judicial office . . . he cannot, for example, pledge himself to be a strict constructionist, or for that matter a legal realist. He cannot promise a better shake for indigent litigants or harried employers. . . . The rule thus reaches far beyond speech that could reasonably be interpreted as committing the candidate in a way that would compromise his impartiality should he be successful in the election."). Only promises of conduct contrary to the obligations of office can implicate *quid pro quo* corruption.

Fifth, for *quid pro quo* corruption to be implicated, the arrangement at issue must also be an effort to control an official act. *Sun-Diamond*, 526 U.S. at 404-05 ("there must be a *quid pro quo*—a specific intent to give or receive something of value *in*

*exchange* for an official act."). It is not enough that the act in question "pertain[s] to the office," it must pertain to *particular* official acts." *Id.* at 409. In an illegal *quid pro quo* situation, "the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *McCormick*, 500 U.S. at 273.

Some of these criteria apply to the case at hand and others may not, but they collectively illustrate the proper boundaries of what can be deemed *quid pro quo* bribery, illustrate the tremendous overbreadth of a standard based on a mere intent to gain "influence" generally, rather than an intent or attempt to exchange value for an explicit and concrete agreement on a specific official act contrary to the obligations of office.[4]

Setting the proper standards for bribery prosecutions and instructions and avoiding the unconstitutional and absurd overbreadth of the standards applied below, are important tasks for this Court and this case is a sound vehicle through which to address those issues. The fundamental issue is the improper overbreadth of the instructions permitting the jury to convict based on a mere intent to gain influence rather than on an express exchange for a particular improper official act. Those issues are not fact-

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[4] *Lair v. Mangan,* which will be filed on July 31, 2018, also will petition this Court for a writ of certiorari involving the definitional issue of *quid pro quo* corruption but in the context of campaign contribution limits. Should this Court accept *Suhl*, it should hold *Lair* for review and possible remand as the Court considers this constitutionally important question.

bound, involve looking at the overbreadth implications of the law as instructed, and thus are readily addressed by the Court in this case.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and reverse the decision of the Eighth Circuit.

Respectfully submitted,

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