No. 17-658

In the
Supreme Court of the United States

ROD BLAGOJEVICH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF OF THE INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech, previously known as the Center for Competitive Politics, is a nonpartisan, nonprofit organization that works to protect and defend the First Amendment rights of speech, press, assembly, and petition. As part of that mission, the Institute represents individuals and civil society organizations, *pro bono*, in cases raising First Amendment objections to burdensome regulation of core political activity. In addition, the Institute has participated as *amicus curiae* in many of this Court's most important First Amendment cases, including *McCutcheon v. Federal Election Commission,* 134 S. Ct. 1434 (2014), *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

SUMMARY OF ARGUMENT

A quarter century ago, in *McCormick v. United States*,[2] this Court cabined the application of the Hobbs Act, a statute of long standing that prosecutors gradually began to use in bribery cases. As Petitioner's case shows, it is even used in bribery cases where the "*quid*" is simply a donor's campaign

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. Both parties' counsel of record received timely notice of the intent to file the brief under Rule 37. Petitioner filed a blanket notice of consent with the Clerk. Pursuant to this Court's Rule 37.3(a), a letter from Respondent consenting to the filing of this brief has been submitted to the Clerk.

[2] 500 U.S. 257, 111 S. Ct. 1807 (1991).

contribution to a candidate, and the "*quo*" is some official act by the candidate-officeholder. From today's vantage, American politics in 1991 seems almost placid, but, even then, the Court was concerned that a broad and fuzzy conception of the bribery and extortion crimes "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." *Id.* at 272. Any consumer of news knows that what was probably true in 1991 is a near certainty in 2017.

The *McCormick* majority decided that the text of the Hobbs Act could support a cabining construction that would avoid reaching a large swathe of campaign contributions in which donors and candidates talk about issues. These discussions and contributions have the salutary effect of motivating candidates to push in the same direction as their constituents. The criminal law would only concern itself with contributions given in exchange for the candidates's "explicit promise or undertaking" to take (or not take) an official act. *Id.* at 273. The campaign finance law, meanwhile, would patrol the parapets, continuing to serve as a prophylaxis by shining a light on the transactions and prohibiting or limiting those contributions in which a substantial risk of *quid pro quo* corruption can, with precision, be avoided. That is the anti-corruption regime.

The driving force of *McCormick*, then, was its view of the realities of campaign finance—a vast and

roiling playground in which the First Amendment sets the rules. It is odd and even unfortunate that *McCormick* did not cite any of the Court's campaign finance cases—a judgment that is easier to make in retrospect given the severe and long-standing circuit split identified by the Petitioner. *Amicus* respectfully suggests that this case presents the ideal vehicle to clarify the First Amendment and Due Process concerns that truly undergird *McCormick*'s cabining construction. As shown in Part I, below, a line of post-1991 authority, including the *Wisconsin Right to Life, Inc.* [3] case, is now available to aid in this relatively straightforward project. Ultimately, this will not only resolve the circuit split, it will provide clarity for defendants—perfectly exemplified by Petitioner, but also potentially including all of the First Amendment speakers described in Part II—whose campaign financing conduct is susceptible to second-guessing under the vague, overbroad standard that *McCormick* had apparently rejected. For these reasons, *amicus* respectfully asks that the petition be granted.

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[3] *Federal Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652 (2007).

ARGUMENT

I. The Seventh Circuit's Application of *Evans* Impermissibly Chills Fundamental First Amendment Rights

A. The ability to give and receive campaign contributions is a fundamental First Amendment right

"There is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1440–41 (2014). A political contribution provides a way for a citizen to exercise that right to participatory democracy. *Id.* at 1441. Accordingly, "[t]he right to participate in democracy through political contributions is protected by the First Amendment[.]" *Id.* Restrictions on contributions, like expenditure restrictions, "implicate fundamental First Amendment interests." *Buckley v. Valeo*, 424 U.S. 1, 23, 96 S. Ct. 612 (1976) (per curiam).

This Court has long "recognized that 'contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.' " *McCutcheon*, 134 S. Ct. at 1444 (citing *Buckley*, 424 U.S. at 14). "The Court's decisions involving associational freedoms establish that the right of association is a basic constitutional freedom . . . [which] lies as the foundation of a free society." *Buckley*, 424 U.S. at 25 (internal citations and quotations omitted). A political contribution permits an individual to make a "symbolic expression of support." *Id.* at 21. Restrictions on contributions

limit the freedoms of "political expression," *id.* at 15, and "political association." *Id.* at 23.

Restrictions on political contributions also restrict speech. "Contributions to political campaigns, no less than direct expenditures, generate essential political speech by fostering discussion of public issues and candidate qualifications." *McCutcheon*, 134 S. Ct. at 1462 (Thomas, J., dissenting) (citations and internal quotations omitted). While *Buckley* characterized this speech restriction as "marginal," 424 U.S. at 20–21, a political "contribution, by amplifying the voice of the candidate, helps to ensure the dissemination of the messages that the contributor wishes to convey." *Nixon v. Shrink Mo. Gov't. PAC*, 528 U.S. 377, 414–15, 120 S. Ct. 897 (2000) (Thomas, J., dissenting). Regardless of any alleged distinction between contributions and expenditures, "the First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " *McCutcheon*, 134 S. Ct. at 1441 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S. Ct. 621 (1971)).

B. The *Evans* standard provides insufficient protection for a fundamental First Amendment right

1. The *Evans* standard cannot apply to political contributions because *Evans* depends on a determination of a public official's subjective beliefs.

Evans cannot apply to political contributions, which implicate fundamental First Amendment rights. *Evans* asks the factfinder to apply an unpredictable and unreliable test about the beliefs of the contributor and candidate. Instead of deciding whether a contributor and candidate actually expressed their willingness to enter into a *quid pro quo* agreement—an objective test—*Evans* uses a subjective knowledge-based test: the factfinder must determine whether a public official believed a donor made a campaign contribution with the intent to pay the official for official acts. *See* Pattern Criminal Jury Instructions of the Seventh Circuit (2012 ed.) at 494 (citing *Evans v. United States*, 504 U.S. 255, 268, 112 S. Ct. 1881 (1992)).[4] Thus, the Seventh Circuit asserts that under *Evans*, to establish a *quid pro quo* exchange, "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.*

Under the Seventh Circuit's interpretation of *Evans*, the relevant *quid pro quo* exchange can be

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[4] *Available at* http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_criminal_jury_instr.pdf (accessed Nov. 28, 2017).

satisfied merely by a payment (or attempted payment) and a public official's subjective beliefs. *See id.* Where the relevant "payment" is a political contribution, the Seventh Circuit holds that *McCormick v. United States*, 500 U.S. 257, 273, 111 S. Ct. 1807 (1991), permits a criminal conviction if a public official "knows" or "believes" that the donor intended the contribution to be in return for official acts. *Id.* In practice, this test may—and often will—include the official's subjective beliefs about the donor's subjective beliefs. According to the Seventh Circuit, the official's subjective beliefs about a donor's subjective beliefs serve as a sufficient proxy for an agreed *quid pro quo* exchange.

The Seventh Circuit's standard stands in sharp contrast to the objective standard embraced by *McCormick* and lacks any safe harbor for exercising First Amendment rights. *See* 500 U.S. at 273. *McCormick* stated that the Hobbs Act proscribes the receipt of campaign contributions "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. McCormick* emphasized that the official would be expected to explicitly state the exchange: "In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.* The Seventh Circuit's belief-laden standard, like the standard the government asserted in *Wisconsin Right to Life, Inc. ("WRTL")*, 551 U.S. 449, 465, 127 S. Ct. 2652 (2007) fails to adequately protect fundamental First Amendment rights by "defining the forbidden zone of conduct with sufficient clarity." *McCormick*, 500 U.S. at 273.

An inquiry into the possibly mistaken internal beliefs of donor and candidate—untethered to actual outward expressions of intent by which human beings typically ensure that they are an agreement—runs the additional risk of finding "agreement" where there was none, punishing donor-candidate ties that are close but that do not constitute *quid pro quo* corruption. *McCormick*, 500 U.S. at 270 (reversing ruling "that payments to elected officials could violate the Hobbs Act without proof of an explicit *quid pro quo* by proving that the payments 'were never intended to be *legitimate* campaign contributions.' " (citation omitted)).

Public officials may well believe that some donors make political contributions with the hope that the official will, in return, be responsive to the donor's concerns when and if the official takes official action. And some donors undoubtedly do harbor this hope. But far more frequently, candidate and donor simply share some concord in their political views. In that case, the contribution is not only the tangible confirmation that they are compatriots, it is also the means by which their amicable association effects political change. Even if it were possible to tease out the precise mental state of every donor and candidate in the absence of express statements or agreements, however, the point is this: all of the foregoing conduct is garden variety "ingratiation," not the *quid pro quo* corruption that campaign finance laws are supposed to prevent, and that bribery laws are supposed to punish. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 360, 130 S. Ct. 876 (2010). If the law merely tests a donor's or candidate's unexpressed beliefs, how is one

ever to separate ingratiation (or its many near and distant relatives) from true *quid pro quo* corruption?

Can a potential donor know whether an official subjectively believes that a political contribution is really attempted ingratiation in return for future, undefined official acts? If even a potential donor could know the official lacks such a belief, the donor must then estimate the likelihood that the donor will nonetheless become implicated in a criminal investigation of the official. In practice, the donor who considers these risks may frequently decide not to contribute.

In short, subjective tests present at least as serious difficulties in bribery and extortion prosecutions as they do in campaign finance enforcement.

2. Subjective knowledge-based standards impermissibly chill protected First Amendment activity

Regulating First Amendment freedoms requires objective, clear, and predictable tests. *WRTL* considered the appropriate standard in the campaign finance context, where the law imposes both civil and criminal penalties. *WRTL* stated that when the government regulates political speech "the proper standard . . . must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." 551 U.S. at 469 (citing *Buckley*, 424 U.S. at 43–44, 96 S. Ct. 612). The appropriate standard must be clear and allow the parties to quickly determine what

violates the law. *Id.* In the civil context, the standard must "entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *Id.* (citation omitted). The objective standard "must eschew the open-ended rough-and-tumble of factors, which invit[es] complex argument in a trial court and a virtually inevitable appeal." *Id.* (citations and internal quotations omitted) (alteration in original). "In short, it must give the benefit of any doubt to protecting rather than stifling speech." *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 at 269–70, 84 S. Ct. 710 (1964)). These requirements take on special importance where the relevant statute imposes criminal sanctions. *Virginia v. Hicks*, 539 U.S. 113, 118–20, 123 S. Ct. 2191 (2003) (analyzing an overbroad criminal statute).

WRTL considered "whether it [wa]s consistent with the First Amendment for [the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA")] § 203 to prohibit WRTL from running . . . three ads." 551 U.S. at 464. BCRA § 203 prohibited[5] certain "electioneering communications" that constitute "the functional equivalent of express advocacy." *Id. WRTL* considered the appropriate constitutional test for determining if an advertisement constitutes "the functional equivalent of express advocacy." *Id.* at 465–71.

WRTL rejected a proposed "intent and effect" test that sought to determine "whether the ad [wa]s

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[5] *Citizens United* declared BCRA § 203 facially unconstitutional. 558 U.S. at 372.

intended to influence elections and ha[d] that effect." *Id.* at 465. Analyzing questions of permitted political speech in terms "of intent and of effect" affords "no security for free discussion." *Id.* at 467 (citations and internal quotations omitted).

"First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328 (1963). *WRTL* stated that tests regulating "constitutionally protected political speech" must "provide a safe harbor for those who wish to exercise First Amendment rights." *WRTL*, 551 U.S. at 467. A test turning on the intent of the speaker fails to "reflec[t] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 467–68. (citations and internal quotations omitted).

"An intent-based standard 'blankets with uncertainty whatever may be said," and "offers no security for free discussion.' " *Id.* at 468 (quoting *Buckley*, 424 U.S. at 43). Such intent-based standards fail to "serv[e] the values the First Amendment is meant to protect . . . ." *Id.* They "chill" protected conduct by "opening the door to a trial" over a person's intent every time a person exercises a First Amendment right. *Id.* No reasonable person will engage in protected First Amendment activity "if [his or her] only defense to a criminal prosecution would be that [his or her] motives were pure." *Id.* *WRTL* highlighted the precarious nature of engaging in First Amendment activity against an intent-based test: "identical ads aired at the same time could be

protected speech for one speaker, while leading to criminal penalties for another." *Id.*

WRTL also recognized that inquiries about the psychological effects the speaker's words supposedly have on listeners fail to adequately protect First Amendment interests. A standard based on speech's effect on a listener " 'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers.' " *Id.* at 469 (quoting *Buckley*, 424 U.S. at 43). "It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result," other than the "unquestionabl[e] chill [on] a substantial amount of political speech." *Id.*

3. Restrictions on political contributions must only target *quid pro quo* corruption and not any other types of alleged corruption

"Any regulation on campaign contributions must target what [this Court has] called '*quid pro quo*' corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money." *McCutcheon*, 134 S. Ct. at 1441 (citing *McCormick*, 500 U.S. at 266) (internal citations omitted). "Campaign finance restrictions that pursue other objectives . . . impermissibly inject the Government into the debate over who should govern. And those who govern should be the last people to help decide who should govern." *McCutcheon*, 134 S. Ct. at 1441–42.

"Congress may not regulate contributions simply to reduce the amount of money in politics, or

to restrict the political participation of some in order to enhance the relative influence of others." *McCutcheon*, 134 S. Ct. at 1441 (citations omitted). "Many people . . . would be delighted to see fewer television commercials touting a candidate's accomplishments or disparaging an opponent's character." *Id.* "Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects." *Id.*

"[G]overnment 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." *Id.* "Ingratiation and access . . . are not corruption." *Citizens United*, 558 U.S. at 360. The First Amendment even protects an individual's "robust" quest for ingratiation and access. "[T]he Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights." *McCutcheon*, 134 S. Ct. at 1449 (quoting *Davis v. Federal Election Comm'n*, 554 U.S. 724, 739, 128 S. Ct. 2759 (2008)).

Naturally, "constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon*, 134 S. Ct. at 1441. This political exchange is "a central feature of democracy[.]" *Id.* "[C]ampaigns 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." *McCormick*, 500 U.S. at 273. "[S]o long as election campaigns are financed by private contributions or expenditures, as they

have been from the beginning of the Nation," a public official unavoidably wears two hats: policymaker and campaign fundraiser. *Id.* Criminal law should acknowledge these dual roles and create at least as much breathing room as this Court has required in the campaign finance context.

II. Left Unchecked, the Seventh Circuit's Reliance on *Evans* Will Chill Political Contributions and Threaten Unfair Results

The application of the *Evans* standard to political contributions raises serious concerns for potential donors, large and small. *Evans* raises the spectre of a potential criminal investigation or prosecution of any political contribution or solicitation whenever the donor might benefit from an official act or legislative position the officeholder or candidate controls. Since, "[s]erving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator," *McCormick*, 500 U.S. at 272, expansive application of *Evans* requires a potential donor to carefully consider whether expressing political belief through a contribution is worth the risk of a criminal investigation.

The *Evans* standard's subjective inquiry effectively allows the government to investigate or probe the legality of any campaign contribution where the candidate has reason to believe the donor desires a specific official act. *Evans* thereby casts a shadow over a potential or current donor's interactions with candidates; the donor's petitions for

policy change become Exhibit A in any criminal prosecution. The more a donor speaks with an official about a desired act, the easier it will be for the government to argue that the official believed the donor's campaign contribution attempted to secure the desired act. Under *McCormick*, 500 U.S. at 273, the donor is fully free to petition officeholders and contribute to campaigns, so long as there is no explicit *quid pro quo*. The donor can readily determine the legality of their conduct and the official's conduct. But under *Evans*, the donor must always monitor the likelihood the candidate believes the donor is actually attempting to bribe the candidate.

Even an ordinary campaign promise or pledge could spark a bribery investigation under *Evans*. Suppose a state legislator publicly pledges to introduce legislation on a topic during the next legislative session if the legislator is reelected. A potential donor sees the pledge, agrees with the officeholder's proposed legislation, and decides to support the officeholder's re-election campaign. If the donor simply makes the donation, no one would suggest anything foul has occurred. But if the donor expresses to the officeholder that the political contribution is made based on the officeholder's pledge to introduce specific legislation, *Evans* suggests that the officeholder's acceptance of the contribution may be criminally punished as accepting a bribe and extortion under color of official right, 18 U.S.C. § 1951. 504 U.S. at 268. Potential donors faced with these scenarios must balance their desire to engage in First Amendment activity with

the burdens and reputational damage associated with federal criminal investigations.

If the Seventh Circuit's decision is allowed to stand, it should surprise no one when ordinary political pressures become the basis for investigations and prosecutions into alleged bribery. *See*, *e.g.*, Pattern Criminal Jury Instructions of the Seventh Circuit (2012 ed.) at 207 ("A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence him in connection with his [official] duties."), 209 (stating a similar standard for paying a bribe).

Real-world evidence suggests that officeholders at all levels of government perceive that donors will stop political contributions if the officeholders fail to fulfill campaign promises and deliver desired results. *See*, *e.g.*, Lauren Fox, "Hill Republican dilemma: Dash to pass tax reform or face donor backlash," CNN, Nov. 13, 2017 ("In a candid moment last week, Rep. Chris Collins conveyed out loud what many members have been thinking for months. "My donors are basically saying, 'Get it done or don't ever call me again,'" the New York Republican told The Hill. . . . Sen. Lindsey Graham, a Republican from South Carolina, also warned that the 'financial contributions will stop' if the GOP failed on tax reform.");[6] Marietta Daily Journal, "Chairman Randy Scamihorn: Cobb County School System is Broke," Dec. 5, 2013 (accessed Nov. 29,

[6] *Available at* http://www.cnn.com/2017/11/13/politics/tax-reform-republican-donor-backlash/index.html (accessed Nov. 29, 2017).

2017) ("Cobb school board member Scott Sweeney called on parents at a Wednesday town hall meeting to deprive Gov. Nathan Deal of another term in office if he doesn't give the school system more money. 'Gov. Deal needs to feel uncomfortable,' Sweeney said to about 100 parents gathered at East Side Elementary School. 'He needs to think the people of Cobb County will not support him unless he writes in additional funding for education. It's a fight for dollars.' Board Chairman Randy Scamihorn and member David Banks, who were also at the meeting, agreed with Sweeney.");[7] David Freedlander, "Dem Donors' Lysistrata Moment on Climate Change," The Daily Beast, Sept. 18, 2014 (" 'I just can't give people a bye,' said Marc Weiss, a New York-based Media entrepreneur who has given tens of thousands of dollars to Democratic candidates in recent years and who has been organizing his fellow fundraisers not to give to any candidates who don't make addressing climate change a central campaign talking point.").[8]

Small donors, too, will feel the chill if the Seventh Circuit's misapplication of *Evans* is allowed to stand. Nothing in the Seventh Circuit's analysis requires a political contribution of a large sum of money, nor is there any textual or theoretical basis for assuming that this new theory of bribery will not reach the little guy. This Court recently noted that it "cannot construe a criminal statute on the

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[7] *Available at* http://www.mdjonline.com/news/chair-randy-scamihorn-cobb-county-school-system-is-broke/article_18bdd604-6794-548a-a8e6-8e2ecd72e398.html (accessed Nov. 29, 2017).

[8] *Available at* https://www.thedailybeast.com/dem-donors-lysistrata-moment-on-climate-change (accessed Nov. 29, 2017).

assumption that the Government will 'use it responsibly.' " *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016) (quoting *United States v. Stevens*, 559 U.S. 460, 480, 130 S. Ct. 1577 (2010)).[9]

Even beyond individual donors, political groups commonly base support for candidates on a pledge of action on key legislation. Take, for example, the 1978 action of American Tax Reduction Movement, a group supported by Howard Jarvis. American Tax Reduction Movement "contributed to 138 Congressional campaigns after demanding that candidates sign up in support of his plan to cut $100 billion in Federal spending in order to get his help." Adam Clymer, "Jarvis Gave to 138 in Congress Races," New York Times, Nov. 16, 1978.[10] "The Jarvis demand, made by telegram in August, had drawn criticism from Bill Brock, the Republican national chairman, who warned it raised a close legal question about selling Congressional votes in exchange for contributions." *Id.* " 'If you support the plan,' [Jarvis'] telegram advised, 'my office will contact you with respect to possible financial assistance in your campaign from the American Tax Reduction Movement-PAC as well as direct mail, radio, TV and newspaper endorsements, which will be available to our supporters.' " *Id.*

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[9] In an unrelated but illustrative example, this Court is also considering this issue in the government's ever expanding use of 26 U.S.C. § 7212(a) in prosecuting taxpayer's actions before the IRS. *See Marinello v. United States of America*, 137 S. Ct. 2327 (2017).

[10] *Available at* http://www.nytimes.com/1978/11/16/archives/jarvis-gave-to-138-in-congress-races-112-in-gop-among-beneficiaries.html?_r=1 (accessed Nov. 29, 2017).

Here, there was hardly a *quid pro quo* agreement, yet the very malleability of some readings of the elements of bribery—the same type of malleability *Evans* invites—prompted calls for bribery prosecution. For a broad swathe of conduct, "bribery" is in the eye of the beholder, and all too frequently that eye is rendered unreliable by the jaundice of political animus.

Indeed, one cutting edge in campaign finance consists of "crowd-funding" intermediaries that aggregate "pledges" for potential candidates based on those candidates' promises regarding key issues. Malcom Burnley, "Unhappy With the Mayoral Options? Next Time, Make a Pledge for Someone Better," Philadelphia Magazine, April 30, 2015.[11] Some hail this innovation as small donors' answer to Super PACs. *Id.* But with the new intermediaries, candidates obtain the crowd-funded tranche of contributions knowing full well that each small donor gave the money only after ascertaining that the candidate would probably vote in certain ways as an officeholder (after all, that is how the intermediary links donors and potential candidates). Thus, even this innovation in participatory democracy is potentially problematic under *Evans*' theory of bribery.

These examples merely scratch the surface, but they sound the alarm about three major risks. First, a legal standard with such broad coverage places enormous discretion—and enormous

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[11] *Available at* http://www.phillymag.com/citified/2015/04/30/crowdpac-crowdfunding/ (accessed Nov. 29, 2017).

temptation—in the hands of prosecutors. The risk of overzealous prosecutions counsels in favor of a clear, objective, and narrow standard for *quid pro quo* corruption. Accordingly, "a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *United States v. Sun–Diamond Growers of Cal.*, 526 U.S. 398, 412, 119 S. Ct. 1402 (1999).

Second, when laws restrict protected First Amendment conduct, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech[,] harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Hicks*, 539 U.S. at 118–20 (internal citations omitted).

Third, a federal standard for public officials' conduct that leaves the "outer boundaries ambiguous" also requires federal law enforcement and prosecutors to make judgments best left to constituents. *McDonnell*, 136 S. Ct. at 2372–73 (citations and internal quotations omitted). Such a standard unnecessarily and improperly "involves the Federal Government in setting standards of good government for local and state officials." *Id.* If there is no true *quid pro quo* agreement and a candidate's ties to a donor are more attenuated, shouldn't voters themselves then decide whether those ties are nonetheless sufficiently strong to make the candidate "too" motivated by the prospect of (or in gratitude for) financial support?

Preventing *quid pro quo* corruption by public officials is a laudable goal; it is necessary to the effective functioning of our democracy. But when the alleged "*quid*" is a campaign contribution, the First Amendment requires the government prove the *quid pro quo* corruption under the clear and objective test mandated by *McCormick*: that the government prove an explicit *quid pro quo*. 500 U.S. at 273. Laws regulating the making and receiving of political contributions operate in the most fundamental area of First Amendment concern. A political contribution is not a Ferrari or a Rolex; it is political speech expressing support for and association with a political candidate's campaign. A standard focusing on an official's beliefs about the subjective intent of a donor decreases the ability of all participants in the political process to determine what is proscribed, chilling speech that donors may believe comes too close to the restricted area. The Court should align the Seventh Circuit decision with the *McCormick* standard to protect fundamental First Amendment rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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