**Nos. 25-49**

In the

# Supreme Court of the United States

ALEXANDER SITTENFELD AKA P.G. SITTENFELD,
*Petitioner,*
v.
UNITED STATES OF AMERICA,
*Respondent.*

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

## BRIEF OF AMICUS CURIAE CHRISTOPHER J. WRIGHT IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

Amicus Christopher J. Wright worked as a lawyer for the federal government for 18 years. Among other positions, he was a law clerk to Chief Justice Burger, an Assistant to the Solicitor General, and General Counsel of the Federal Communications Commission. He was the lawyer principally responsible for the production of the government's briefs in the two cases that are most relevant here, *McCormick v. United States*, 500 U.S. 257 (1991), and *Evans v. United States*, 504 U.S. 255 (1992).

In his government positions, Amicus sometimes learned important lessons from the cases he lost. In *McCormick*, which Amicus argued on behalf of the United States, this Court overturned the conviction of a state legislator after concluding that the instructions at trial permitted the jury to convict the defendant of extortion for receiving campaign contributions in the absence of an explicit *quid pro quo* agreement. The federal government had not challenged that legal standard, but argued that the payments at issue, which were not treated as campaign contributions by either party, were personal payoffs rather than campaign contributions so that explicit proof of a *quid pro quo* was not required. On reflection, Amicus

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[1] No one other than Amicus and his law firm authored the brief in whole or in part and no one other than Amicus and his law firm made a monetary contribution intended to fund the preparation or submission of the brief.

concluded that it was appropriate for the Court to ensure that there was no possibility that the defendant had been convicted for an act that a reasonable person would think is permissible.

Similarly, at the FCC, Amicus came to appreciate the importance of the "fair notice" rule, a civil law cousin of the rule of lenity. In *Trinity Broad. Of Fla., Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000), decided while Amicus was General Counsel of the FCC, the D.C. Circuit first held that the Commission had properly interpreted a regulation to require *de facto* control of a broadcast license by the members of its Board of Directors. *Id*. at 627. But the court went on to hold that the Commission had nevertheless erred by denying Trinity Broadcasting's request to renew its broadcast license because it did not have fair notice of the *de facto* control requirement. In reaching that conclusion, the court applied its longstanding rule that due process prohibits an agency from imposing a penalty for violating a rule unless the meaning of the rule is "'ascertainably certain.'" *Id*. at 628, quoting 47 CFR §73.3555. Again, on reflection, Amicus realized the importance of a rule that prevents the imposition of a penalty on a party that reasonably believed it was acting in accordance with the law.

This case involves a conviction on the basis of acts that Petitioner reasonably believed to be lawful.

## SUMMARY OF ARGUMENT

It is highly unusual for all three judges on an appellate panel to agree that guidance from this Court is needed. Yet that is what happened here—each judge on the Sixth Circuit panel stated that this Court's decisions in *McCormick* and *Evans* are difficult to apply. Moreover, two judges concluded that this Court's decisions permit juries to convict candidates of extortion and bribery related to campaign contributions on the basis of *inferences* rather than *explicit evidence* of a corrupt *quid pro quo* agreement. Pet. App. 21a.

Under the theory the federal government pursued in *McCormick*, it would not have brought this case. The payments at issue here were legitimate campaign contributions, while the government argued that the payments in *McCormick* were not. The government's theory in *McCormick* was that the cash payments were personal payoffs, which are inherently corrupt and require no explicit evidence of a *quid pro quo* to justify an extortion or bribery conviction. The government agreed that, if the payments were campaign contributions, explicit proof of a *quid pro quo* was required.

Nothing in *Evans* affects *McCormick*'s holding. The Court in *Evans* held that the government need not show *inducement* by the public official or show that the official *performed* his side of the *quid pro quo* bargain. But the Court did not have occasion to address the requirement of an "explicit" quid pro quo for

alleged bribery schemes based purely on otherwise lawful campaign donations.

Given the deep uncertainty regarding the proper interpretation of *McCormick* and *Evans* reflected in the Sixth Circuit's decision, review by this Court is warranted. And because the conviction here affects First Amendment interests and will encourage prosecutors to engage in similar misguided sting operations in the future, this Court should review this case rather than wait for another.

## REASONS FOR GRANTING THE PETITION

### A. The Lower Courts Need Guidance from This Court.

Every judge on the Sixth Circuit panel expressed a desire for guidance from this Court. Judge Nalbandian, writing for the majority, recognized that the *McCormick* Court held that to convict a public official of extortion or bribery, "the government must show that an elected official received campaign donations 'in return for an explicit promise or undertaking.'" Pet. App. 17a-18a, quoting 500 U.S. at 273 (Hobbs Act). That is, there must be clear proof of a *quid pro quo* agreement pursuant to which the defendant would take an agreed-upon official act. But Judge Nalbandian thought that *Evans* muddied the waters and "read *Evans* to mean that 'by 'explicit' *McCormick* did not mean 'express,'" … and therefore we do not require unambiguous evidence, so long as the jury can infer the content of the quid pro quo." Pet. App. 21a (internal citation omitted).

Judge Murphy concurred, but recognized that under the Sixth Circuit's standard, a candidate might be convicted for merely saying "Donate to my campaign today because I will vote to repeal the Affordable Care Act if elected.'" Pet. App. 57a (describing the hypothetical), 67a ("the district court's definition of 'quid pro quo' here would seem to render that hypothetical campaign contribution illegal"). But he stated that "the Supreme Court created this dilemma" and "[o]nly that Court can resolve … what it meant by 'explicit.'" Pet. App. 68a.

Judge Bush, who dissented, emphasized that "the prosecuted conduct here is solely a campaign contribution" that is protected by the First Amendment. Pet. App. 98a. But he agreed "with Judge Murphy that … further Supreme Court guidance would help lower courts, particularly for cases like this one where there is no unambiguous evidence of a quid pro quo and no independent indicia of corrupt intent, like personal gifts or a connection to an independently criminal scheme." Pet. App. 100a.

Judge Nalbandian's majority opinion responded to Judge Bush's dissent in a footnote by conceding that Judge Bush's conclusion that Petitioner should not have been convicted given the lack of evidence of an explicit *quid pro quo* agreement is "perhaps wise, or even one we might adopt if we were writing on a blank slate." Pet. App. 26a-27a n.8. Judge Nalbandian concluded, however that it is "a question for the Supreme Court." Pet. App. 26a-27a n.8.

These remarkable requests for clarification from each member of the panel alone present an unusually strong case for review by this Court.

In addition, however, the conviction here is also likely—particularly in a time of deeply divided partisan politics—to provoke more misguided sting operations. The sting operation at issue was specifically designed in an attempt to make it appear wrongful or corrupt for Petitioner to support a real estate project that he almost certainly would have supported in any event. The project at issue involved replacing a "dilapidated" property "costing Cincinnati taxpayers hundreds of thousands of dollars each

year to maintain" with "a mixed-use development project." Pet. App. 5a. When the prosecution's "asset" (Ndukwe), Pet. App. 4a, attempted to induce Petitioner to promise to support the project in return for payments, Petitioner stated that "*nothing can be a quid, quid quo pro*" [sic]. Pet. App. 9a. He then noted that "I'm always super pro-development" and favored "revitalization of … our urban core," adding that "in seven years I have voted in favor of every single development deal that's ever been put in front of me." *Id*. Petitioner was plainly saying that he would not sell his vote, but was the type of candidate developers should support.

Subsequently, an undercover FBI agent ("Rob") offered to pay Petitioner in cash and, when Petitioner refused, offered to pay in various ways other than by making a lawful campaign contribution. But as Judge Bush stated, "Each time Sittenfeld saw potential impropriety in how Rob wanted to contribute, he reminded Rob how to do so legally and refused a donation when it did not comply with the law." Pet. App. 97a. And yet he was convicted.

If allowed to stand, this precedent provides a roadmap for misguided or politically motivated prosecutors that this Court should eliminate. Under the Sixth Circuit's decision, a prosecutor may select some action that a candidate is sure to favor, have an agent offer to make a lawful campaign contribution, and then prosecute the candidate. That is like shooting innocent fish in a barrel. And it is clearly contrary to *McCormick*, in which the Court explained that encouraging contributions from persons who favor positions

the candidate also favors is an integral part of any electoral system based on campaign contributions. 500 U.S. at 272.

### B. Under the Theory the Government Pursued in *McCormick,* It Would Not Have Brought This Case.

It is noteworthy that, in *McCormick*, the Solicitor General essentially agreed with all of the legal principles the Court enunciated. The differences involved the interpretation of jury instructions.

Specifically, in *McCormick* the Solicitor General's brief did *not* argue that the defendant, a West Virginia legislator, could be convicted for obtaining campaign contributions. Rather, the government's brief argued that the cash payments McCormick had received were not campaign contributions and that the jury had correctly been instructed that "it could not convict petitioner if it concluded that the $900 payment was a campaign contribution." Brief for the United States in No. 89-1918, *McCormick v. United States* at 44. Thus, the government's position was premised on the fact that, in the government's view, campaign contributions were not at issue.

The government's brief *endorsed* the requirement of proof of an explicit *quid pro quo* in cases involving "a campaign contribution rather than a personal payoff." *Id.* at 46. It explained that, if the case had involved only campaign contributions, "it would have been necessary for the government to prove that the contribution was obtained by a threat to take

unfavorable action or a specific promise to take favorable action, i.e., a quid pro quo." *Id.* Moreover, the brief endorsed a strong *quid pro quo* requirement—a showing that "the connection between the contribution and the candidate's official acts is clearly conditional." *Id.* at 48. It added: "A candidate is, of course, free to point out to potential campaign contributors that he favors their position on an important issue and to advise them that a contribution to his campaign is therefore in their best interest." *Id.* "But," the brief continued, "a candidate cannot sell his vote by stating explicitly that his position on a particular issue will depend on whether he receives a suitable campaign contribution." *Id.* In contrast, in cases involving personal payoffs rather than campaign contributions, the brief argued that "it is not necessary for the government to prove that the public official offered a quid pro quo in exchange for payment made to him." *Id* at 48-49.

This Court did not disagree with the government's position on the law. The Court also emphasized the importance of distinguishing campaign contributions from personal payoffs. It noted that "[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." 500 U.S. at 272. "Whatever ethical considerations and appearances may indicate," the Court added, "to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign

contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.'" *Id.* "To hold otherwise," the Court concluded, "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.*

The Court recognized that "[t]he United States agrees that if the payments to McCormick were campaign contributions, proof of a *quid pro quo* would be essential for an extortion conviction." *Id.* at 273. The Court approvingly quoted a portion of the U.S. Attorneys' Manual the Solicitor General's brief had cited in its brief, which provided: "'Campaign contributions will not be authorized as the subject of a Hobbs Act prosecution unless they can be proven to have been given in return for the performance of or abstaining from an official act; otherwise any campaign contribution might constitute a violation.'" *Id.* In the Court's own words, it agreed that campaign contributions could be the basis of a prosecution only in cases involving explicit vote selling—*i.e.*, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." *Id.*

The Court overturned the conviction in *McCormick* only because it concluded that the instructions allowed the jury to convict even if it

thought that the payments at issue were campaign contributions. The Court acknowledged that the instructions provided that "the receipt of voluntary campaign contributions did not violate the Hobbs Act." *Id.* at 274. But a supplemental instruction defined "voluntary" to mean "freely given without expectation of benefit", *id.* at 275, and the Court concluded that the jury might have concluded that the "*any* expectation of benefit" language effectively eliminated the requirement of an explicit *quid pro quo* even with respect to campaign contributions. *Id* at 274. Therefore, the Court concluded, the jury might have accepted McCormick's argument that the cash payments were intended to be campaign contribution and yet convicted him in the absence of an explicit *quid pro quo*. *Id*.

In short, in *McCormick* the Court required explicit evidence of an explicit *quid pro quo* to sustain a conviction in cases involving campaign contributions. The Solicitor General did not disagree with that legal standard. Indeed, the Solicitor General, like the Court, recognized that it was implausible to conclude that Congress intended to criminalize 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.* at 272.

Thus, under the theory the government pursued in *McCormick*, it would not have brought the case against Petitioner—who accepted only campaign contributions while

rejecting personal payoffs and did so without explicit evidence of a *quid pro quo*. As Judge Bush explained, the meager evidence the government marshaled in support of a claim for vote-selling was at best "ambiguous." Pet. App. 97a. "Even though the government tried to get Sittenfeld to take the bribery bait, he never bit. No illegal agreement ever materialized. Sittenfeld accepted the campaign contribution for what he thought it was—a campaign contribution—and not the product of any explicit quid pro quo for official acts." *Id*.

### C. *Evans* Did Not Alter the Explicitness Requirement.

Nothing in *Evans* undermined *McCormick*'s explicit *quid pro quo* requirement. The defendant there had received a $1,000 check for a campaign donation plus $7,000 in cash that he never reported as a campaign donation, 504 U.S. at 257, so the case did not present the circumstance of a bribery prosecution based on what were otherwise clearly lawful campaign contributions. Instead, the main issue there was whether the defendant had to *induce* the payments at issue and the Court held that there is no inducement requirement. "[T]he 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*. at 268.

The defendant in *Evans* also argued that in order to show an unlawful *quid pro quo*, the government had to show that the public official *fulfilled* his part of the corrupt bargain. The government's brief described this argument as

being "wholly without merit. … Fulfillment of the quid pro quo is not an element of the offense. Indeed, it is not an element of the offense that the public official even intended to fulfill the quid pro quo, as long as he obtains a payment by communicating an intention to exchange his services for money." Brief for the United States in No. 90-6105, *Evans v. United States* at 51. This Court agreed. It rejected the defendant's argument in one paragraph, explaining that "fulfillment of the *quid pro quo* is not an element of the offense." 504 U.S. at 268.

The Sixth Circuit thought that *Evans* changed the explicitness requirement because Justice Kennedy's allegedly "crucial fifth vote" stated that "'the official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods.'" Pet. App. 20a, quoting 504 U.S. at 274. As an initial matter, Justice Kennedy's concurrence was not the fifth vote—Justice O'Connor joined the relevant portions of Justice Stevens' opinion, which was also joined by Justices White, Blackmun, and Souter. Moreover, since the defendant had received $7,000 in cash in addition to a $1,000 campaign contribution, *id.* at 257, Justice Kennedy did not address what would be required in a case where an otherwise lawful campaign contribution was the only alleged quid.

In any event, even if Justice Kennedy's position did apply to campaign contributions, it still would not open the door to allowing juries to infer corruption from evidence that is ambiguous as to whether the contribution is made in

exchange for official action. His main concern was that the prohibition on bribery should not "frustrated by knowing winks and nods." *Id.* at 274. But while a wink and nod may not be as explicit as a verbal "yes," a wink-and-nod agreement would still involve *clear and unambiguous* evidence of a quid pro quo. In this case that would require evidence showing that Sittenfeld clearly nodded in agreement to a statement such as "am I correct that you will support our project only if we make a significant campaign contribution?" There is no such evidence here. To the contrary, when the government's asset explicitly proposed a *quid pro quo*, Petitioner declined. Pet. App. 9a.

## CONCLUSION

The Court should grant the petition for a writ of certiorari.

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