No. 25-49

IN THE

Supreme Court of the United States

ALEXANDER SITTENFELD
AKA P. G. SITTENFELD,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF *AMICI* LAW PROFESSORS DANIEL HEMEL, GREGORY GILCHRIST AND STEPHEN F. SMITH IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

STATEMENT OF INTEREST OF AMICI 1

INTRODUCTION. 2

LEGAL AND FACTUAL BACKGROUND 5

SUMMARY OF THE ARGUMENT. 10

ARGUMENT. 12

I. A "Clear and Unambiguous" Standard for Bribery and Extortion in Campaign Contribution Cases Is Necessary To Protect Core Political Speech and Conduct 12

II. A "Clear and Unambiguous" Standard for Bribery and Extortion in Campaign-Contribution Cases Is Necessary To Guard Against the Risk of Prosecutorial Bias 17

III. A "Clear and Unambiguous" Standard for Bribery and Extortion in Campaign-Contribution Cases Is Essential To Federalism and the Separation of Powers. 20

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

CASES:

Brown v. Hartlage,
456 U.S. 45 (1982) 12

Buckley v. Valeo,
424 U.S. 1 (1976) 12

Davis v. FEC,
554 U.S. 724 (2008) 14

Evans v. United States,
504 U.S. 255 (1992) 5, 6, 7, 8, 17

Gregory v. Ashcroft,
501 U.S. 452 (1991) 20

McCormick v. United States,
500 U.S. 257 (1991) 3, 5, 6, 7, 8, 11, 13, 16, 17, 23

McCutcheon v. FEC,
572 U.S. 185 (2014) 14

McDonnell v. United States,
579 U.S. 550 (2016) 21

McNally v. United States,
483 U.S. 350 (1987) 22

Monitor Patriot Co. v. Roy,
401 U.S. 265 (1971) 12

Cited Authorities

Page

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932). 22

Printz v. United States,
521 U.S. 898 (1997). 21

United States v. Allen,
10 F.3d 405 (7th Cir. 1993). 11

United States v. Benjamin,
95 F.4th 60 (2d Cir. 2024) 8

United States v. Blandford,
33 F.3d 685 (6th Cir. 1994) 7

United States v. Carpenter,
961 F.2d 824 (9th Cir. 1992) 7

United States v. Ganim,
510 F.3d 134 (2d Cir. 2007) 7, 8

United States v. Kincaid-Chauncey,
556 F.3d 923 (9th Cir. 2009),
abrogated on other grounds, Skilling v. United States, 561 U.S. 358 (2010). 7

United States v. Margiotta,
688 F.2d 108 (2d Cir. 1982) 18, 19

Page

United States v. Siegelman,
561 F.3d 1215 (11th Cir. 2009),
vacated and remanded on other grounds,
561 U.S. 1040 (2010) 6

United States v. Siegelman,
640 F.3d 1159 (11th Cir. 2011) 11

United States v. Terry,
707 F.3d 607 (6th Cir. 2013). 3, 11

Welsh v. United States,
398 U.S. 333 (1970). 6

STATUTES & OTHER AUTHORITIES:

The First Amendment 12

Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner 24, *Siegelman v. United States*, No. 11-055 (U.S. filed Mar. 1, 2012). 13, 14

Brent Ferguson, *Congressional Disclosure of Time Spent Fundraising*, 23 CORNELL J. L. & PUB. POL'Y 1 (2013) 13

Ilissa B. Gold, Note, *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s*, 36 WASH. U. J. L. & POL'Y 261 (2011). 7

Page

Sanford C. Gordon, *Assessing Partisan Bias in Federal Public Corruption Prosecutions*, 103 Am. Pol. Sci. Rev. 534 (2009). 19

Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?*, *in* Private and Public Corruption 127, 155 (William C. Heffernan & John Kleinig eds., 2004). 3, 18, 22

Or. Rev. Stat. § 162.005(1). 22

Alexei V. Ovtchinniko & Philip Valta, *Self-Funding of Political Campaigns*, 69 Mgmt. Sci. 2425 (2023). 14

Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 Duke L.J. 2087 (2009). 19

Christopher Robertson et al., *The Appearance and Reality of* Quid Pro Quo *Corruption: An Empirical Investigation*, 9 J. Legal Anal. 375 (2016) 15, 16, 17, 21

Supreme Court Rule 37.2 1

Tex. Penal Code § 36.02(a)(4) 21

The American Heritage Dictionary of the English Language 645 (3rd ed. 1992) 3

Page

The Federalist No. 51 (Madison), *in* The Federalist Papers 263 (Ian Shapiro ed., Yale Univ. Press 2009). 20

The Federalist No. 57 (Madison), *in* The Federalist Papers 290 (Ian Shapiro ed., Yale Univ. Press 2009). 14

STATEMENT OF INTEREST OF AMICI

Amici are law professors whose research addresses the application of federal criminal law to elected officials. The interest of *amici* in this case is to ensure that the federal bribery and extortion statutes are not construed in a manner that threatens constitutionally protected political activity and undermines essential institutions of American democracy.[1]

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1. Institutional affiliations are provided for identification purposes only. This brief reflects the views of the *amici* only and does not purport to present the views of any institution. No party or counsel other than the *amici* and counsel of record authored or made any monetary contribution to the preparation and submission of this brief. Counsel of record received timely notice of the intent to file this amicus brief under Supreme Court Rule 37.2.

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INTRODUCTION

Every day, candidates and elected officials across the country ask potential donors for campaign contributions. Often in the course of fundraising, candidates reiterate their core policy commitments. And often, citizens contribute to campaigns because they believe that candidates will make good on those policy commitments. For all but the wealthiest candidates (who are capable of financing their own campaigns), soliciting potential donors is a virtual requirement of office-seeking. And not only are these interactions inevitable, but they are constitutionally protected.

To be sure, politicians cannot sell their official powers for campaign contributions—that would be bribery and extortion under federal law. But just as surely, candidates can lawfully accept a campaign contribution with the understanding that the donor has an interest—ideological or economic—in the candidate taking a particular action while in office. Or at least, that *was* the law under

McCormick v. United States, 500 U.S. 257, 273 (1991), in which the Supreme Court held that the receipt of a campaign contribution does not amount to a federal crime unless the contribution is part of an "explicit" *quid pro quo*. By all indications, the *McCormick* Court meant for "explicit" to carry its ordinary meaning: "entirely clear and unambiguous." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 645 (3rd ed. 1992).

Yet in the decades since that decision, some federal appeals courts have watered down *McCormick*'s "explicit" *quid pro quo* standard so much that in those circuits, the requirement is "all water." Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?*, *in* PRIVATE AND PUBLIC CORRUPTION 127, 155 (William C. Heffernan & John Kleinig eds., 2004). The decision below demonstrates this dilution: the Sixth Circuit stated that "by 'explicit' *McCormick* did not mean 'express,' and therefore we do not require unambiguous evidence" of a *quid pro quo* to sustain a conviction for bribery and extortion in a campaign contribution case. Pet.App.21a (quoting *United States v. Terry*, 707 F.3d 607, 612–13 (6th Cir. 2013)). Since "explicit" and "express" are synonyms, *see* AMERICAN HERITAGE DICTIONARY, *supra*, at 645, the Sixth Circuit's explicit-but-not-express standard amounts to no standard at all.

The present case illustrates the dangers of dispensing with *McCormick*'s "explicit" *quid pro quo* requirement. Alexander P.G. Sittenfeld, a two-term Cincinnati City Council member and candidate for mayor, was well-known for supporting the economic development of his city's downtown. Indeed, he voted for every development project put before the City Council during his tenure. In 2018, the

Federal Bureau of Investigation—as part of a broader public corruption probe into Cincinnati's municipal government—orchestrated a sting in which an undercover operative offered to contribute to Sittenfeld's campaign if the candidate promised to support a project to develop a blighted property in the city's urban core. Sittenfeld refused, stating—correctly—that the FBI operative's proposal would be "illegal" and that "nothing can be a quid pro quo." All that Sittenfeld would allow was that he was "always super pro-development" and had "voted in favor of every single development deal that's ever been put in front of me." Pet.App.170a. Nonetheless, Sittenfeld served four months in prison and now faces a $40,000 criminal fine for a *quid pro quo* that he explicitly—and expressly—rejected.

If "explicit" does not mean "express," and rejecting a *quid pro quo* means accepting it, then we are in "an Alice-in-Wonderland world where words have no meaning." *Welsh v. United States*, 398 U.S. 333, 354 (1970) (Harlan, J., concurring in the result). And in that scenario, it is not only the English language—but also American democracy—that suffers. The democratic danger is three-fold. First, when routine interactions between donors and candidates can be prosecuted as bribery and extortion—as they can under the Sixth Circuit's holding—then the Constitution's protections for core political activity will be compromised. Second, when the "explicit" *quid pro quo* standard is stretched so far that "unambiguous evidence is not required" to convict a candidate who solicits legal campaign contributions, *see* Pet.App.26a, then federal law enforcement authorities will have wide latitude to pick and choose their prosecutorial targets based on partisan bias and other improper motives. And third, when every

elected official across the fifty states—or at least, every elected official who lacks the personal resources to self-finance a campaign—lies exposed to federal bribery and extortion charges, then the federal executive branch will have the ability to determine not only the winners of state and local elections but also the structure of state and local governments. This Court should grant certiorari and reverse the decision below to ensure that the bribery and extortion laws are not misconstrued to swallow up political speech, tip electoral outcomes, and subvert federalism values.

LEGAL AND FACTUAL BACKGROUND

In *McCormick v. United States*, the Supreme Court held that a public official's receipt of an otherwise-legal campaign contribution can constitute extortion under the Hobbs Act only if the government proves the existence of an "explicit" *quid pro quo*. *McCormick*, 500 U.S. at 273. "To hold otherwise," according to the *McCormick* Court, "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. Only by requiring an "explicit" *quid pro quo* would the "forbidden zone of conduct" be defined "with sufficient clarity" to protect the "everyday business of a legislator" from criminalization. *Id.* at 272-73.

The following year, in *Evans v. United States*, 504 U.S. 255 (1992), the Supreme Court considered a legal issue separate and apart from the one in *McCormick*: whether a public official commits extortion under the

Hobbs Act when he accepts—but does not demand—a cash bribe. There was no dispute in that case about the explicitness of the *quid pro quo*; the question before the Court was whether the petitioner could be convicted of extortion even though he "did not initiate the transaction." *Id.* at 257. The Court answered "yes" to that question—a conclusion entirely consistent with *McCormick*—and the *Evans* majority never indicated that it intended to modify *McCormick*'s explicitness requirement.

In a non-controlling concurrence, Justice Kennedy observed that under the Hobbs Act, "[t]he 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." *Evans*, 504 U.S. at 274 (Kennedy, J., concurring). On its face, Justice Kennedy's observation in *Evans* would not seem to break from *McCormick*. After all, even a non-verbal gesture such as a wink, nod, or handshake can be "explicit" in the ordinary sense. "Explicit" means "express," but it does not necessarily mean written or oral.

Nonetheless, some lower courts have read—or rather, misread—Justice Kennedy's concurrence in *Evans* as jettisoning *McCormick*'s "explicit" *quid pro quo* requirement. They have made mincemeat of the English lexicon in the process. For example, the Eleventh Circuit—in a case involving an otherwise-legal campaign contribution—held that "an explicit agreement may be implied from the official's words and actions." *United States v. Siegelman*, 561 F.3d 1215, 1226 (11th Cir. 2009) (alterations and internal quotation marks omitted), *vacated and remanded on other grounds*, 561 U.S. 1040 (2010). "Under that formulation," as one

commentator critical of the Eleventh Circuit's standard has observed, "the word 'explicit,' as applied to the quid pro quo agreement in *McCormick*, can actually mean the exact opposite, 'implicit.'" Ilissa B. Gold, Note, *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s*, 36 WASH. U. J. L. & POL'Y 261, 263 (2011); *see also United States v. Blandford*, 33 F.3d 685, 696 & n.13 (6th Cir. 1994) (noting that "*Evans* instructed that by 'explicit' *McCormick* did not mean 'express,'" while also acknowledging that a dictionary definition of "express" is "explicit").

Other courts have maintained that *McCormick*'s "explicit" *quid pro quo* standard remains the law of the land for campaign contribution cases. For example, the Ninth Circuit has recognized *McCormick* as holding that "the government must prove that there was an explicit *quid pro quo*" in campaign contribution cases, whereas "[a]n explicit *quid pro quo* is not required" to "convict a public official of Hobbs Act extortion for receipt of property other than campaign contributions." *See United States v. Kincaid-Chauncey*, 556 F.3d 923, 936–37 (9th Cir. 2009) (following *Ganim*), *abrogated on other grounds*, *Skilling v. United States*, 561 U.S. 358 (2010). As the Ninth Circuit has emphasized, "what *McCormick* requires is that the *quid pro quo* be clear and unambiguous, leaving no uncertainty about the terms of the bargain." *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992).

The Second Circuit, for its part, initially gave full effect to *McCormick*'s command. As then-Judge Sotomayor wrote for a unanimous court, the Second Circuit "harmonized *McCormick* and *Evans*" by holding

that "proof of an express promise is necessary when the payments are made in the form of campaign contributions," whereas Justice Kennedy's *Evans* concurrence applies in the "non-campaign context." *See United States v. Ganim*, 510 F.3d 134, 142-43 (2d Cir. 2007) (Sotomayor, J.). But in *United States v. Benjamin*, 95 F.4th 60, 65 (2d Cir. 2024), the Second Circuit dismissed now-Justice Sotomayor's statements in *Ganim* as "dicta" and held that "the *McCormick* explicit *quid pro quo* requirement may be met by implication from the official's and the payor's words and actions."

The case at bar illustrates the consequences of a watered-down "explicit" *quid pro quo* requirement. Alexander P.G. Sittenfeld was a Cincinnati City Council member and rising star in Ohio's Democratic Party who ran for U.S. Senate in 2016 and was the odds-on favorite to be the City's next Mayor once the term-limited incumbent left office. In 2018, the FBI recruited a well-known local real estate developer and former Cincinnati Bengals player, Chinedum Ndukwe, to work as a cooperating witness in the bureau's public corruption investigations. At the time, Ndukwe—a longtime donor to Sittenfeld's campaigns—was himself facing a federal investigation into possible money laundering, identity theft, and structured bank transactions, and his cooperation was part of a proffer with federal authorities. R.266.PageID.6267.

In late 2018, Ndukwe—acting at the FBI's behest—approached Sittenfeld to discuss the development of a blighted property at 435 Elm Street in Cincinnati's downtown, a project that Sittenfeld already had said he would support. Indeed, Sittenfeld—who had run for City Council on a pro-development platform—had voted in

favor of every development project put before the Council since he joined that body in late 2011. When Ndukwe asked for assurance that Sittenfeld would back the 435 Elm Street project, Sittenfeld interjected that "nothing can be a . . . quid pro quo," and "I know that's not what you're saying either," but "what I can say is that I'm always super pro-development" and that "in seven years I have voted in favor of every single development deal that's ever been put in front of me." Pet.App.170a.

Because these statements by Sittenfeld explicitly rejected any *quid pro quo*, the prosecution focused at trial on an earlier conversation between Ndukwe and Sittenfeld in late October 2018 during which the former football player suggested that—instead of contributing directly to Sittenfeld's campaign—he could bundle contributions to Sittenfeld from multiple limited liability companies (LLCs). At the time, local law imposed a per-donor cap of $1,100 on contributions to city campaigns but counted each LLC as a separate donor, even if the LLCs were owned or controlled by the same person. Sittenfeld opposed this "LLC loophole" and had endorsed a charter amendment to close it. R.269.PageID.6690.

During the October 2018 conversation, Sittenfeld said to the former football player: "[I]f you say, 'look I don't want to support you in the name of Chinedum Ndukwe,' but . . . you're going to round up . . . a bunch of LLC checks. Like that's great. . . . [Y]ou don't want me to be like 'hey Chin like love you but can't.'" Sittenfeld added that only a "dumb candidate" would decline such support. Pet.App.162a. As the Sixth Circuit recognized, Sittenfeld's "love you but can't" statement was "key to the government's narrative" at trial. Pet.App.49a.

In a vacuum, a rational factfinder certainly could arrive at multiple interpretations of Sittenfeld's statement. As the defendant emphasized at trial, "love you but can't" could be interpreted to mean that Sittenfeld, who was term-limited as a City Council member, would not be able to advance Ndukwe's downtown development efforts unless he raised enough money to actually *win* the mayoral election. R.269.PageID.6746. Ndukwe testified that he understood the statement to mean that "whether you donate or don't donate, that it's going to have an impact on my advocacy for you." R.266.PageID.6247. But if "explicit" is understood to mean "clear and unambiguous," then the critical question is *not* whether Sittenfeld's statement *could* be interpreted Ndukwe's way. The question is whether a rational factfinder could conclude—*beyond a reasonable doubt*—that "love you but can't" is a "clear and unambiguous" *quid pro quo*, notwithstanding the fact that Sittenfeld clearly and unambiguously refused to enter into any *quid pro quo* agreement.

For what were at-best-ambiguous statements by a candidate engaged in core political activity—raising funds for a campaign for higher office—Sittenfeld was indicted on six counts, convicted on two (federal-funds bribery and attempted extortion under the Hobbs Act), and sentenced to sixteen months in prison—ultimately serving four. In the process, federal law enforcement officials—who specifically targeted Sittenfeld with their sting—effectively ended the political career of Cincinnati's most likely next Mayor.

SUMMARY OF THE ARGUMENT

Contrary to the Sixth Circuit's decision below, the "clear and unambiguous" test—the standard once

adopted by the Second Circuit and still embraced by the Ninth Circuit—supplies the appropriate criterion for determining whether an alleged *quid pro quo* involving an otherwise-legal campaign contribution satisfies the explicitness requirement under *McCormick*. The "clear and unambiguous" test accomplishes what *McCormick* set out to do and what the Sixth Circuit's explicit-but-not-express formulation fails to achieve: it "defines the forbidden zone of conduct with sufficient clarity" so that the federal bribery and extortion laws do not criminalize quotidian political activity. *Cf. McCormick*, 500 U.S. at 273.[2]

Allowing bribery and extortion convictions to stand in campaign contribution cases without proof of a "clear and unambiguous" *quid pro quo* would give rise to three distinct harms. First, it would exert a chilling effect on core political speech and conduct. Second, it would exacerbate the risk of partisan and political bias in public corruption prosecutions. And third, it would undermine federalism values and the separation of powers. The heavy hand of federal criminal law enforcement would loom large over every state and local election in which candidates and officeholders engage in the constitutionally protected practice of political fundraising.

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2. Courts across the country apply the same *quid pro quo* standard in bribery cases and in Hobbs Act extortion cases, since extortion under the Hobbs Act and bribery are "different sides of the same coin." *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993); *United States v. Siegelman*, 640 F.3d 1159, 1170 (11th Cir. 2011); *United States v. Terry*, 707 F.3d 607, 613 (6th Cir. 2013).

ARGUMENT

I. A "Clear and Unambiguous" Standard for Bribery and Extortion in Campaign Contribution Cases Is Necessary To Protect Core Political Speech and Conduct

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). As this Court has emphasized, "it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." *Buckley v. Valeo*, 424 U.S. 1, 52–53 (1976) (per curiam). For that reason, the Court has long recognized "constitutional limits on the State's power to prohibit candidates from making promises in the course of an election campaign." *Brown v. Hartlage*, 456 U.S. 45, 55 (1982). According to the Court in *Hartlage*:

> 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. 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.

Id. at 55–56.

Often in the course of campaigning, candidates will make promises about how they will act when in office, and often they will make these promises in campaign fundraising settings. After all, candidates for many offices spend much—maybe even a majority—of their time soliciting contributions. *See, e.g.*, Brent Ferguson, *Congressional Disclosure of Time Spent Fundraising*, 23 Cornell J. L. & Pub. Pol'y 1, 27 (2013) ("Estimates vary, but most agree that members of Congress spend between thirty and seventy percent of their time raising money."). During that time, candidates typically talk about their plans and policy positions. For example, a pro-choice candidate may promise to codify *Roe v. Wade*, while a pro-life candidate may promise to support a ban on abortion after a certain number of weeks. And often, a candidate will know that certain single-issue donors are contributing to the candidate's campaign because those donors believe that the candidate will follow through on her promises.

A watered-down version of *McCormick*'s explicitness requirement—one that allows for a conviction in the absence of a clear and unambiguous *quid pro quo*—will exert a chilling effect on this routine political activity. As more than 100 former State Attorneys General have warned, such a standard "subjects public officials to the unreasonable burden of having to reject campaign contributions if there is any reason to believe that such contributions were made by donors desiring that the officials take certain actions." Brief *Amici Curiae* of Former Attorneys General in Support of Petitioner 24, *Siegelman v. United States*, No. 11-055 (U.S. filed Mar. 1, 2012). Moreover, "if public officials choose to actually accept campaign contributions with that same belief, they now must take pains to not do what the donors desire or

else face the threat of criminal recriminations." *Id.* And because the same standard applies both to bribery and extortion—and thus to donors as well as public officials—the chill will extend to citizens who are exercising their fundamental right to participate in the democratic process through campaign contributions. *Cf. McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality opinion) (stating that "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders," and among the "variety of ways" that "[c]itizens can exercise that right" is by "contribut[ing] to a candidate's campaign").

Importantly, this chilling effect will not affect all candidates equally: self-funded candidates, who need not rely on campaign contributions, would be insulated. Wealthy candidates are, of course, constitutionally entitled to self-fund their campaigns, *see Davis v. FEC*, 554 U.S. 724, 738 (2008), and self-funding has become a widespread phenomenon in American democracy. *See* Alexei V. Ovtchinniko & Philip Valta, *Self-Funding of Political Campaigns*, 69 Mgmt. Sci. 2425, 2430 tbl.1 (2023) (finding that 60 percent of House and Senate campaigns from 1983 through 2018 were self-funded in part or in whole, and that among those campaigns, own-source contributions accounted for 34 percent of all funds). But a system in which everyone except the wealthiest candidates must fundraise and campaign under the pall of potential prosecution would look more like an oligarchy than a democracy. It would contravene the principle—"at the very root of republican government"—that "[n]o qualification of wealth" should be "permitted to fetter the judgment or disappoint the inclination of the people." *The Federalist No. 57 (Madison)*, *in* The Federalist Papers 290, 291 (Ian Shapiro ed., Yale Univ. Press 2009).

A careful study published in the peer-reviewed *Journal of Legal Analysis* underscores the democratic dangers of an amorphous *quid pro quo* standard. *See* Christopher Robertson et al., *The Appearance and Reality of* Quid Pro Quo *Corruption: An Empirical Investigation*, 9 J. Legal Anal. 375 (2016). In the first part of that study, Professor Christopher Robertson and coauthors conducted a three-hour simulation in which they asked a diverse group of forty-five adults to act as mock grand jurors. In the simulation, a Congressman expressed support for a legislative rider after a company that would benefit from the provision contributed $50,000 to an outside group that backed the Congressman. The witnesses in the simulation testified that they were not aware of "any agreement to exchange one thing for another," and "the facts of the case were designed to mimic ubiquitous behavior that virtually any of the 535 Members of Congress engage in every day." *Id.* at 380, 396.

At the end of the simulation, 33 out of the 45 participants (72 percent) voted to indict both the Congressman and the company's CEO on charges of bribery. *See id.* at 398. In a follow-up experiment, the authors asked a separate group of 1,271 U.S. adults—balanced to be representative of the U.S. population along lines of gender, age, and political affiliation—whether they would *convict* the Congressman or CEO based on similar facts. Most of the participants—even after receiving jury instructions that matched those used in federal court—said that they would. *See id.* at 406 fig.3. Indeed, even when participants were told that the Congressman and the CEO "simply had background knowledge about the reciprocal interests of each other, and acted in accordance, without any direct or indirect contact between the parties," nearly half of participants voted to convict. *Id.* at 405.

Simulation-based experiments provide only suggestive evidence as to how individuals will behave in real-world settings such as a jury room. With that caveat in mind, the authors interpreted their results to indicate "that, under the Federal bribery statutes, grand jurors applying the probable cause standard, and even petit jurors applying the beyond a reasonable doubt standard, may actually pose a real risk of jeopardy for politicians and benefactors." *Id.* at 416. The authors added:

> Frankly, we have provided a very soft test of this phenomenon, one that likely underestimates the risk of jeopardy. In a real case, Federal prosecutors would buttress their case by offering immunity to favorable witnesses and withholding it from unfavorable witnesses .... With such a deal, the prosecutors might find witnesses willing to say that there was a much more explicit agreement than the two witnesses in our grand jury experiment, who we scripted to insist that they were unaware of any bribery agreement.

Id. at 417. Indeed, just as Professor Robertson and his coauthors anticipated, the star witness at Sittenfeld's trial – who also happened to be a well-known former player for the local NFL team – had entered into a proffer with prosecutors in hopes of leniency in his own case.

While it is tempting to wish that well-crafted jury instructions might mitigate the risk that donors and public officials will be convicted under the bribery and extortion statutes for conduct that falls outside *McCormick*'s "forbidden zone," Professor Robertson and his coauthors

found no statistically significant difference in conviction rates based on whether guilt-phase jurors were given instructions that matched *McCormick* or *Evans*. *See id.* at 408. Thus, the authors concluded that the best defense against criminalization of routine fundraising activity is for courts to apply the sufficiency-of-the-evidence standard with rigor. Although "criminal jury convictions are almost never overturned on questions of the sufficiency of the evidence," the authors noted, "it is possible that appellate courts will give a more scrutinizing review" in the "speech sensitive area" of campaign finance. *Id.* at 416.

The present case illustrates that the "risk of jeopardy" identified by Professor Robertson and his coauthors is a real one. The supposedly criminal conduct at the heart of the government's case is core political activity: a politician stating his policy commitments and trumpeting his track record in conversations with donors. And if this conduct can be criminalized, then—as Professor Robertson and his coauthors concluded from their study—"[f]ederal prosecutors can target just about any contemporary politician"—except for a self-funded one—"with a plausible chance of exacting a conviction (by plea or trial)." Robertson et al., *supra*, at 418.

II. A "Clear and Unambiguous" Standard for Bribery and Extortion in Campaign-Contribution Cases Is Necessary To Guard Against the Risk of Prosecutorial Bias

Of course, even if federal prosecutors *can* target "just about any contemporary politician" who engages in routine fundraising activity, federal prosecutors can't and won't target all of them. The "real danger," as Judge

Winter warned in a similar case involving the mail fraud conviction of a local party official, is "prosecutorial abuse for partisan political purposes." *United States v. Margiotta*, 688 F.2d 108, 139 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part). As Judge Winter elaborated:

> I am not predicting the imminent arrival of the totalitarian night or the wholesale indictment of candidates, public officials and party leaders. To the contrary, what profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power the freeswinging club of mail fraud affords federal prosecutors.

Id. at 143. What Judge Winter said about mail fraud will apply equally to the federal bribery and extortion statutes if convictions like this one in campaign contribution cases are allowed to stand without the government proving a "clear and unambiguous" *quid pro quo*. As a leading scholar of the law of bribery and extortion has warned, criminalizing "practices in which politicians are nearly forced to engage routinely" would "give discretion to prosecutors to decide de facto what practices will be punished and, in the worst case, to abuse their positions by engaging in partisan or other improperly motivated selection of cases." Lowenstein, *supra*, at 158.

Rigorous empirical research bears out these concerns regarding partisan bias in public corruption prosecutions. In a peer-reviewed analysis of 222 federal public corruption prosecutions from the late 1990s and mid-2000s, Professor Sandford Gordon of New York University

found "strong evidence of aggregate partisan bias" in federal public corruption prosecutions in the late 1990s and 2000s. *See* Sanford C. Gordon, *Assessing Partisan Bias in Federal Public Corruption Prosecutions*, 103 Am. Pol. Sci. Rev. 534, 549 (2009). Professor Gordon's findings align with the anecdotal observations of former federal prosecutors themselves. As one veteran of the U.S. Attorney's Office for the Southern District of New York puts it, "[t]he risk that partisan prosecutors with allegiance to the president's party will target local political opponents—either at the behest of the White House or on their own—is real." Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 Duke L.J. 2087, 2122 (2009).

Even when federal prosecutors' motives are pure, the potential for abuse can itself distort the democratic process. *See Evans*, 504 U.S. at 296-97 (Thomas, J., dissenting) ("The potential for abuse, of course, is particularly grave in the inherently political context of public corruption prosecutions."). Prospective candidates may be more reluctant to seek public office when their views clash with the presidential administration that controls federal prosecutions, and citizens may be more reluctant to contribute funds to candidates who refuse to toe the presidential party line. The upshot—as Judge Winter put it—is "a danger of corruption to the democratic system greater than anything [the defendant] is alleged to have done." *Margiotta*, 688 F.2d at 144 (Winter, J., concurring in part and dissenting in part).

III. A "Clear and Unambiguous" Standard for Bribery and Extortion in Campaign-Contribution Cases Is Essential To Federalism and the Separation of Powers

That "danger of corruption to the democratic system" is especially acute when, as here, federal prosecutors wield the "freeswinging club" of the federal bribery and extortion statutes against state and local officeholders like Sittenfeld. The threat to federalism values in those cases is two-fold. First, state and local governments are less likely to serve as effective checks on federal power when their elected officials are vulnerable to retaliatory prosecution under amorphous federal criminal laws. Second, states and localities will be unable to set their own ground rules for citizen-officeholder interactions when donors and candidates who abide by state and local campaign finance laws run the risk of federal indictment and imprisonment.

In "the compound republic of America," where power is divided horizontally among the branches of government and vertically between the federal government and the states, "a double security arises to the rights of the people." *The Federalist No. 51 (Madison)*, *in* THE FEDERALIST PAPERS 263, 265 (Ian Shapiro ed., Yale Univ. Press 2009). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). An overly expansive interpretation of the federal bribery and extortion laws would upend that "healthy balance." Without clear limits

on their reach, the federal bribery and extortion statutes will be a "sword of Damocles" hanging over the heads of state and local officials. Robertson et al., *supra*, at 421. The threat of federal prosecution will generate "an implicit incentive for state officials to play nicely" rather than "to robustly challenge prerogatives of the Federal executive." *Id.*

The risk that state and local officials might be deterred from challenging the power of the federal executive is not the only way in which an expansive interpretation of the federal bribery and extortion laws would undermine federalism values. The "great innovation" of the Framers' federalist design is "that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other," and "each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *Printz v. United States*, 521 U.S. 898, 920 (1997) (internal quotation marks omitted). An essential component of the states' distinct capacity is "the prerogative to regulate the permissible scope of interactions between state officials and their constituents." *McDonnell v. United States*, 579 U.S. 550, 576 (2016).

States have exercised that prerogative in different ways. Under Texas law, for example, a campaign contribution can constitute a bribe only if it was "offered, conferred, solicited, accepted, or agreed to pursuant to an *express agreement*," and only if that "express agreement" is substantiated by "direct evidence." Tex. Penal Code § 36.02(a)(4). Texas thus has decided to provide more breathing room for core political speech and conduct than the Sixth Circuit's standard here would allow. *Cf.* Pet.App.26a (*quid pro quo* "need not be express"). "In

Illinois, the judiciary has read several statutes together to reach a special rule for campaign contributions similar to the Texas rule." Lowenstein, *supra*, at 141. Oregon, for its part, excludes all properly reported campaign contributions from its bribery laws. Or. Rev. Stat. § 162.005(1).

By devising different definitions of bribery and extortion, states act as "laboratories of democracy" in the purest sense: they experiment with different ways to balance anti-corruption goals with free speech—and thus, different ways to structure a polity. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., concurring) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). But of course, it is impossible for state and local governments to "try novel . . . experiments" when federal prosecutors may charge into the laboratory at any moment. To preserve that freedom of experimentation, this Court has elsewhere declined to construe criminal laws "in a manner that leaves [their] outer boundaries ambiguous and 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). The Court's wisdom in *McNally* applies with full force here.

The stakes of Sittenfeld's case reach well beyond the fate of a single elected official in a single city. The Sixth Circuit's watered-down explicit-but-not-express test exposes elected officeholders across all levels of government to the risk of retaliatory federal prosecution, thus discouraging state and local officials from fulfilling

the checking-and-balancing function assigned to them in the Framers' grand plan. By holding the government to the "clear and unambiguous" *quid pro quo* standard in campaign contribution cases—a standard that tracks the dictionary definition of "explicit" as used in *McCormick*—this Court can constrain the federal bribery and extortion laws so that they do not become a "freeswinging club" that places constitutional values in peril. The Court can ensure that, once again, the line between politics and bribery is defined with "sufficient clarity" so that candidates who pursue public office as they have "from the beginning of the Nation" do not run the risk that routine fundraising will land them behind bars. *Cf. McCormick*, 500 U.S. at 272–73.

CONCLUSION

For all these reasons, *amici* urge the Court to grant the writ of certiorari.

Respectfully Submitted,

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