No. 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 FORMER FEDERAL OFFICIALS AS AMICI CURIAE SUPPORTING PETITIONER

AMANDA N. BAIRD
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

DONNA M. FARAG
Counsel of Record
CHARLES C. SPETH
MEGAN O. GARDNER
WILMER CUTLER PICKERING HALE AND DORR LLP
2100 Pennsylvania Ave. NW
Washington, DC 20037
(202) 663-6000
donna.farag@wilmerhale.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

STATUTES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE

This brief is submitted by the following:

- John Ashcroft, Attorney General (2001-2005), U.S. Senator (1995-2001);
- William P. Barr, Attorney General (2019-2020 & 1991-1993), Deputy Attorney General (1990-1991), Assistant Attorney General, Office of Legal Counsel (1989-1990);
- Gregory B. Craig, Counsel to the President (2009-2010), Assistant to the President and Special Counsel (1998-1999), Senior Counsel at Foley Hoag (present);
- Mark Filip, Deputy Attorney General (2008-2009), Judge of the U.S. District Court for the Northern District of Illinois (2004-2008);
- Emmett T. Flood, Counsel to the President (2018), Special Counsel to the President (2018-2019 & 2007-2008), Deputy Counsel to the President (2008-2009);
- Michael B. Mukasey, Attorney General (2007-2009), Chief Judge of the U.S. District for the Southern District of New York (2000-2006), Judge of the Southern District of New York (1988-2006);
- Donald F. McGahn II, Counsel to the President (2017-2018), Chair of the Federal Election Commission (2008), Member of the Federal Election Commission (2008-2013).

Amici are a bipartisan group of former federal officials with unique expertise regarding interactions

that occur between government officials and campaign donors as well as members of the public at large. Amici's collective experience includes service as Attorney General of the United States and Counsel to the President. In their roles as the senior-most lawyers in the Executive Branch, they worked at the intersection of law and politics and frequently counseled elected officials on their legal obligations and ethical duties.

Based on their experiences, amici have a particular interest in the constitutional and even-handed application of our laws. This case therefore interests amici because the current framework applied by the Sixth Circuit presents serious risks of both chilling First Amendment rights and inviting politically motivated prosecution.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented in this case strikes at the heart of the First Amendment: whether a political candidate can be convicted for bribery or extortion based on political speech.[1] Campaign fundraising has been an essential part of elections and our democracy since the founding. Given this enduring reality, this Court imposed a stringent requirement for federal prosecutions for bribery based on campaign contributions: Public officials and candidates for public office cannot be convicted for bribery in the campaign

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief at least 10 days prior to its due date.

contribution context unless there is an explicit quid pro quo. In other words, prosecutors must show that the contribution is "made in return for an *explicit* promise or undertaking by the official to perform or not perform an official act." *McCormick* v. *United States*, 500 U.S. 257, 271, 273 (1991) (emphasis added). "To hold otherwise," this Court reasoned, "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.

Yet one year after this Court issued its opinion in *McCormick*, in a case involving a public official who accepted a personal cash payment in addition to a campaign contribution, this Court upheld a conviction based on "an *implicit* promise" alone. *Evans* v. *United States* 504 U.S. 255, 257 (1992) (emphasis added). And Justice Kennedy's concurrence opined that the "official and the payor need not state the *quid pro quo* in *express* terms." *Id.* at 274 (Kennedy, J., concurring). In the years since, lower courts have struggled to understand whether *Evans* applied to bribery cases involving only campaign contributions and if it modified *McCormick*, with some drawing an elusive distinction between "express" and "explicit" agreements. In the opinion below, the Sixth Circuit introduced another layer of confusion in a case involving pure campaign contributions: Evidence establishing a quid pro quo need not even be *unambiguous*. So, according to the Sixth Circuit, while explicit "'speaks'" to the "'degree to which the payor and payee were aware of'" the terms of the quid pro quo, the terms themselves need not be express, and the evidence establishing the "explicit" quid pro quo need not be unambiguous. Pet.App.21a.

The result? Courts, prosecutors, and juries continue to grapple with the "subtle distinction" between "explicit" and "express," even though those terms are "synonyms. Pet.App.64a (Murphy, J. concurring). Juries can convict a public official for a nebulous agreement that is not tethered as to a known, specific act, and can now do so based on ambiguous evidence. Pet.App.64a, 74a (Murphy, J. concurring).

In P.G. Sittenfeld's case, the ambiguous evidence was an amalgamation of political statements that are squarely protected by the First Amendment. The Sixth Circuit's affirmance of Sittenfeld's conviction therefore eviscerates the very line this Court drew in *McCormick*. It opens the door to prosecutions for campaign contributions for "general influence," not quid pro quo bribery, *McCutcheon* v. *FEC*, 572 U.S. 185, 209 (2014) (plurality op.), criminalizing the "unavoidable" conduct long "thought to be well within the law," *McCormick*, 500 U.S. at 272. Where the evidence rests on the mine-run of statements made in the heat of campaigning, a prosecution no longer targets "campaign contributions *in exchange* for an explicit promise of favorable future action," but instead crosses the line and impermissibly targets "campaign contributions with *anticipation* of favorable future action." *Id.* at 276 (Scalia, J., concurring) (emphasis added).

The lower courts' contrived attempts to square *McCormick* and *Evans* have resulted in a vague and unworkable standard that subjects public officials to criminal liability for everyday statements to their supporters and contributors. And in the face of increasingly politicized prosecutions, a standard that does not adhere to *McCormick*'s rigid requirements risks the targeting of officials who espouse disfavored

views or are associated with unpopular groups. This Court should grant certiorari to clarify how courts should interpret *McCormick*'s quid pro quo requirement and articulate a standard that ensures that otherwise protected political speech is not the basis for prosecution and convictions in campaign bribery cases.

ARGUMENT

I. POLITICAL SPEECH AND CAMPAIGN FUNDRAISING ARE AN INDISPENSABLE PART OF OUR DEMOCRACY

Political speech sits at the core of the protections enshrined by the First Amendment. "Indeed, the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu* v. *San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989). This is because a campaign is not only a path to "attaining political office," but a critical "means of disseminating ideas" to constituents, donors, and the public at large. *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979). Time and again, this Court has affirmed the importance of candidates "hav[ing] the unfettered opportunity to make their views known" as part of our "'national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Buckley* v. *Valeo*, 424 U.S. 1, 14, 52-53 (1976) (per curiam); *see also Brown* v. *Hartlage*, 456 U.S. 45, 52-53 (1982) (collecting cases). Public officials have the right to freely express their positions, and the public has a right to be informed of those positions. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United* v. *FEC*, 558 U.S. 310, 339 (2010); *see also Buckley*, 424 U.S. 14, 15

("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential."). The laws prohibiting bribery and extortion cannot be construed, therefore, in a way that strikes at the heart of fundamental First Amendment interests and protections. But in the campaign contribution context, lower courts have done just that, jeopardizing the protections around core political speech.

Fundraising is an integral aspect of the election campaigns that actualize our democracy, and, for better or worse, it continues to dominate elections. The total cost of the 2024 election exceeded $15 billion, with more than $10 billion spent in congressional races and more than $5.5 billion spent in the presidential race.[2] Political action committees also raised $12.3 billion from January 2023 through September 2024.[3]

These funds are essential to candidates' campaigns. "There's only so much [one] can do without paying for some sort of advertising, whether it's TV, radio, print, the internet. All of those things require money and they're very expensive."[4] And sometimes, fundraising success serves as a ticket for admission. Republican presidential candidates must reach a threshold of unique donors, for example, to qualify for participation in the

---

[2] *Cost of Election*, Open Secrets, https://tinyurl.com/bkwk759b.

[3] *Statistical Summary of 21-Month Campaign Activity of the 2023-2024 Election Cycle*, FEC (Jan. 28, 2025), https://tinyurl.com/ycxakjsy.

[4] Bustillo, *It Takes Lots Of Money To Win Elections. Here's What You Need to Know*, NPR (Nov. 1, 2023), https://tinyurl.com/37pck5mc.

primary debates.[5] The need to raise funds capable of sustaining a viable campaign demands officials' time and energy even while officials govern and seek to enact their policy agendas.

Against this backdrop, the government prosecuted P.G. Sittenfeld for attempted Hobbs Act extortion under color of official right, 18 U.S.C. § 1951(a), (b)(2)), and federal-program bribery, *id.* § 666(a)(1)(B)), in connection with his efforts to solicit funds for his campaign. Pet.App.111a. Sittenfeld, a Cincinnati city councilman running for mayor, had consistently supported pro-development initiatives. As part of a years-long federal sting operation involving a development deal involving blighted property, Sittenfeld was arrested. At trial, the government introduced as evidence statements made by Sittenfeld that were otherwise protected speech, including descriptions of his political record, puffery about his political savvy, and pleas for financial support. One of those statements—dubbed by the district court as the government's best evidence—was a clumsy plea for funding: "[T]he one thing I will say is … you don't want me to be like 'hey Chin like love you but can't'[.] [A] lot of people have come through in a really big way … and I would love … for you to be one of those people too." Pet.App.162a-163a.

The jury convicted, and the Sixth Circuit affirmed in a divided opinion. While each judge acknowledged the ambiguity in evidence and the potential First Amendment violations, the court concluded that the jury was entitled to infer the contents of the quid pro quo based on ambiguous evidence. Pet.App.26a-27a. In

---

[5] *Id.*

doing so, it blessed a standard divorced from the realities of political fundraising and which undermines core First Amendment protections.

II. This Court Should Clarify The Proper Standard For Bribery And Extortion In A Campaign Finance Case

Sittenfeld's conviction is but one resulting from decades of courts struggling to understand the threshold for a quid pro quo bribery conviction in the campaign contribution context. This Court stated in *McCormick* that the quid pro quo must be "explicit"—the government must show that an elected official received campaign donations "in return for an explicit promise or undertaking." *McCormick*, 500 U.S. at 273. Then, a year later, *Evans* came down. That case involved a sting operation against a county commissioner who, amid conversations with an FBI agent posing as a real estate developer, accepted a personal cash payment *and* a check payable to his campaign. The unlawful payments were therefore not limited to otherwise lawful campaign contributions. In rejecting the commissioner's argument that a conviction required that he be the one to induce the transaction, this Court affirmed a conviction that rested on an "implicit promise" establishing the quid pro quo. *Evans*, 504 U.S. at 257. Justice Kennedy, concurring in part, opined that the quid pro quo did not need to be stated "in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." *Id.* at 274 (Kennedy, J. concurring). Instead, "[t]he inducement from the official is criminal if it is *express* or if it is *implied* from his words and actions, so long as he intends it to be so and the payor so interprets it." *Id.* (emphasis added).

Lower courts have since struggled with *Evans*' application and how to square it with *McCormick*. To begin with, courts have split over whether *Evans* has any bearing on bribery cases based solely on campaign contributions. Some have read *Evans* as introducing a "relaxed" quid pro quo standard that applies to non-campaign contribution cases. *United States* v. *Blandford*, 33 F.3d 685, 695 (6th Cir. 1994) (analyzing cases adopting the modified standard but rejecting their reading). Others, including the panel below, have applied *Evans* to pure campaign contribution cases, construing "*Evans* to mean that 'by "explicit" *McCormick* did not mean "express."'" Pet.App.20a; *accord United States* v. *Benjamin*, 95 F.4th 60, 69 (2d Cir.) ("*Evans* is an elaboration of *McCormick* rather than a separate test."), *cert. denied*, 145 S.Ct. 982 (2024). And courts have waffled between the two readings, at times offering inconsistent interpretations. *Compare, e.g.*, *United States* v. *Abbey*, 560 F.3d 513, 517-518 (6th Cir. 2009) ("*Evans* modified the standard in non-campaign contribution cases[.]"), *abrogated on other grounds by Snyder* v. *United States*, 603 U.S. 1 (2024), *with Blandford*, 33 F.3d at 696 ("We read *Evans* … [to] merely clarif[y] … that the quid pro quo of *McCormick* is satisfied by something short of a formalized and thoroughly articulated contractual arrangement[.]").

Courts have further labored to square *McCormick*'s requirement that payments be made "in return for an explicit promise or undertaking," 500 U.S. at 273, with the pronouncement that a promise that could be "implicit," *Evans*, 504 U.S. at 257, or "implied," *id.* at 274 (Kennedy, J. concurring). For good reason. "[I]f one thing is clear, it is that an 'explicit' promise cannot be satisfied by implication, as it would be contradictory to hold that a *quid pro quo* agreement could be

simultaneously 'explicit' and 'implicit.'" *United States* v. *Benjamin*, 2022 WL 17417038, at *9 (S.D.N.Y. Dec. 5, 2022), *reversed and remanded*, 95 F.4th 60 (2d Cir.), *cert. denied*, 145 S. Ct. 982 (2024). The appellate courts expressed similar confusion: "*Evans* offers two slightly different statements of what satisfies the quid pro quo requirement," said the Second Circuit. *United States* v. *Coyne*, 4 F.3d 100, 113 (2d Cir. 1993). Thirty years ago, the Fourth Circuit opined that defining extortion "has proved difficult, and the Supreme Court is still developing an understandable definition." *United States* v. *Taylor*, 993 F.2d 382, 383 (4th Cir. 1993). That definition has yet to come.

Instead, petitions for certiorari have sprung from nearly every circuit, each asking the Court to provide clarification on what type of quid pro quo is needed for a federal bribery conviction in the campaign contribution context. *See, e.g.*, *Benjamin* v. *United States*, No. 24-142 (U.S. Aug. 5, 2024) (2d Cir.); *Allinson* v. *United States*, No. 22-328 (U.S. Oct. 5, 2022) (3d Cir.); *Minor* v. *United States*, No. 09-1422 (U.S. May 24, 2010) (5th Cir.); *Terry* v. *United States*, No. 13-392 (U.S. Sept. 23, 2013) (6th Cir.); *Blagojevich* v. *United States*, No. 17-658 (U.S. Nov. 2, 2017) (7th Cir.); *Scrushy* v. *United States*, No. 11-972 (U.S. Feb. 6, 2012) (11th Cir.).

Without guidance, the circuits have developed a test that is malleable at the hands of the prosecutor. "[C]ircumstantial evidence can prove an agreement, and though an explicit agreement must be present, it need not be express." Pet.App.26a. But the line between "explicit" and "express" is so thin as to be nonexistent. Indeed, there is a dispute as to whether the terms mean the same thing. *Compare* Pet.App.64a (Murphy, J. concurring) (noting that "express" and "explicit" are

"synonyms"), *with United States* v. *Davis*, 841 F. App'x 375, 379 (3d Cir. 2021) (rejecting argument that "'express' and 'explicit' mean the same thing"). As Judge Murphy aptly noted, "I doubt many jurors would understand this subtle distinction. And I doubt even more that courts should be sending people to prison based on it." Pet.App.64a. Yet that is precisely the approach courts below have blessed.

This confusion is only compounded by the fact that, at least regarding federal-program bribery under 18 U.S.C. § 666(a)(1)(B)), prosecutors need not link to the quid pro quo to a specific act or omission. "[O]fficials can violate the law if they accept money with the corrupt intent to use their official influence in the contributor's favor at some unknown point." Pet.App.74a (cleaned up). So although a "quid pro quo is most traditionally characterized with reference to a specific, one-for-one trade," courts have accepted "a more general, free-floating exchange where an agreement is reached to exchange a bribe for official action but where the official action is not precisely identified at the time of the bribe." *United States* v. *Morgan*, 635 F. App'x 423, 453 (10th Cir. 2015) (Holmes, J. concurring). Courts have deemed it "sufficient to show that the payor intended for each payment to induce the official to adopt a specific *course of action*," but not necessarily "specific official acts (or omissions)." *United States* v. *Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) (emphasis added). The quid pro quo therefore need not be express, and it can cover unknown acts or courses of conduct that a public official supports based on his or her ideology or constituent backing. That alone gets dangerously close to criminalizing "campaign contributions [made] with *anticipation* of favorable future action." *McCormick*, 500 U.S. at 276 (Scalia, J. concurring).

But the opinion below introduces yet *another* wrinkle to the "express" versus "explicit" dichotomy: While the quid pro quo itself must be "unambiguous," *see United States* v. *Allinson*, 27 F.4th 913, 925 (3d Cir. 2022); *United States* v. *McCabe*, 103 F.4th 259, 282 (4th Cir. 2024); *United States* v. *Tomblin*, 46 F.3d 1369, 1381 (5th Cir. 1995); *United States* v. *Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992), evidence supporting that quid pro quo can be ambiguous, Pet.App.26a. This, too, is another "subtle distinction" likely to be elided by prosecutors and juries. Pet.App.64a.

In short, courts have interpreted *McCormick* to require a quid pro quo that is explicit, but which need not be express and can be implied or inferred; at the same time, the terms of the quid pro quo must be unambiguous, but they need not involve a specific act or omission—and if in the Sixth Circuit, the evidence supporting that unambiguous quid pro quo can be ambiguous. This standard is so esoteric as to be untenable. The Court's formulation in *McCormick* was intended to "define[] the forbidden zone of conduct with sufficient clarity." 500 U.S. 273. Any such clarity has long since been obfuscated. When "[p]eople 'of common intelligence must necessarily guess at the law's meaning and differ as to its application,'" constitutionally protected speech is chilled. *Citizens United*, 558 U.S. at 324.

III. THE SIXTH CIRCUIT'S APPLICATION OF *MCCORMICK* VIOLATES THE FIRST AMENDMENT RIGHTS OF PUBLIC OFFICIALS AND THEIR SUPPORTERS

This case provides an ideal vehicle for this Court to intervene and address this confusion. The Sixth Circuit affirmed Sittenfeld's conviction based on ambiguous

evidence of a quid pro quo, Pet.App.26a-27a, contravening this Court's directive in *McCormick* that normal political activity should not be deemed unlawful in the fight against public corruption.

The statements underlying Sittenfeld's conviction are typical of our political discourse and are protected by the First Amendment. The government's case proving a corrupt agreement rested on a mosaic of statements that fall into three primary categories: (1) expressions of Sittenfeld's pro-development record, (2) puffery about Sittenfeld's ability to build consensus and pass initiatives, and (3) pleas for financial support to Sittenfeld's campaign. These statements typify the everyday discourse on public issues between politicians and their supporters, "'occup[ying] the highest rung of the hierarchy of First Amendment values, and … entitled to special protection.'" *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011). But as Sittenfeld's case makes clear, such statements can nonetheless serve as the basis for unlawful and unjust prosecutions.

First, the government relied on Sittenfeld's assertions touting his pro-development record and policy goals. For example, the government targeted Sittenfeld's assertion that "[i]n seven years, [he] voted in favor of every single development deal that's ever been put in front of [him]" along with his expressed commitment to being "super pro-development and revitalization[.]" Jury Instructions/Closing Arg. Tr., R.251, PageID#5006-5007. But descriptions of a candidate's policy stance and record on issues of interest are emblematic of crucial political discourse; indeed, these are precisely the statements that constituents and prospective supporters are entitled to hear. *See Citizens United*, 558 U.S. at 339.

Public officials routinely publicize their record,[6] including how they have voted or intend to vote.[7] Salient issues especially attract trade associations and interest groups, which serve an important role in our democracy. As this Court has repeatedly recognized, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Americans for Prosperity Found.* v. *Bonta*, 594 US 595, 606 (2021) (alteration in original) (quoting *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). Not only do interest groups and political action committees rate and endorse officials, but they also provide financial support to public officials.[8] Such support follows public officials who have established "lengthy and proven record[s]"[9] and who have "vocal[ly] advocate[d]" for the policy positions that

---

[6] Beland, *Mayor Wu Kicks Off Reelection Campaign in South End*, WBUR News (Apr. 5, 2025), https://tinyurl.com/46tpxe7h ("Speaking to supporters[,] … Wu touted her first term's record — describing her efforts to fight off state receivership of the Boston public schools, improve transportation for seniors, expand access to the city's arts institutions, and reduce deadly violence.").

[7] *See, e.g.*, *Voting Record*, Senator Elizabeth Warren, https://tinyurl.com/mw8edjr5; Press Release, Senator Joe Manchin, *Manchin to Oppose Every EPA Nominee* (May 10, 2023), https://tinyurl.com/4e5nfvuk.

[8] *See, e.g.*, Friedman, *Oil Interests Gave More Than $75 Million to Trump PACs, New Analysis Shows*, NY Times (Nov. 1, 2024), https://tinyurl.com/3e6eusev; Frazin, *Climate Groups Say They're Putting $55M Into Pro-Harris Ads*, The Hill (Aug. 19, 2024), https://tinyurl.com/bdzjktr7.

[9] *Landry Receives NRA Endorsement*, Jeff Landry for Governor, https://tinyurl.com/5n6uaenu.

are central to an interest group's objectives.[10] And those interest groups expect that the public officials they support will continue to advance mutual policy objectives[11] or reject adverse initiatives.[12] "Influence and access 'embody a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns.'" *FEC* v. *Cruz*, 596 U.S. 289, 308 (2022); *McCutcheon*, 572 U.S. at 191 (plurality op.). Given his pro-development record, it is natural that Sittenfeld would attract support from like-minded individuals and associations interested in development. This very fact was what made him an eventual target in the FBI sting operation.

Second, the government relied on Sittenfeld's opinions and aspirations about his ability to build

---

[10] Press Release, *EMILYs LIST Endorses Kamala Harris for President*, EMILYs List (July 21, 2024), https://tinyurl.com/5kuy556b (EMILYs List endorsed Harris, noting, "She has been an especially powerful advocate for abortion rights, and broke new barriers as the first Vice President to visit an abortion provider and to invite abortion providers to the White House.").

[11] *Landry Receives NRA Endorsement*, *supra* note 9 ("Clearly, if elected the next governor of Louisiana, you will continue to stand against those who seek to diminish our freedoms by ultimately destroying the Second Amendment and our Right to Keep and Bear Arms."); *ENDORSEMENT: Planned Parenthood Action Fund Backs Alsobrooks, Mucarsel-Powell for Senate* (May 21, 2024), https://tinyurl.com/3cubyydu ("Debbie Mucarsel-Powell will be an outspoken champion for abortion rights in the Senate. She is a vocal opponent of Florida's 6-week abortion ban.").

[12] Ikonomova, *Blue Cross Has Given More Cash To Whitmer Than Any Michigan Gov Candidate In Past Decade*, Detroit Metro Times (Aug. 2, 2018), http://tinyurl.com/2h8t3uuj.

consensus and be an effective advocate. Specifically, the government identified Sittenfeld's statements that he "can deliver the votes," Jury Instructions/Closing Arg. Tr., R.251, PageID#5011, "'[is] ready to shepherd the votes,'" *id.* at PageID#5012, and "'can move more votes than any single other person,'" *id.* at PageID#5010. Again, such statements are commonplace in politics. Members of legislative bodies are constantly vowing that they can secure the necessary votes or that a certain measure will "absolutely pass."[13] And at all levels of elected office, public officials seek to distinguish themselves by arguing that they, unlike their political opponents, can "get things done,"[14] "deliver" on an agenda, or "lead [their colleagues] into a consensus."[15] Such aspirational statements signal to constituents the public official's priorities and those issues on which he or she is willing to spend political capital. As this Court has observed, "'It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing

---

[13] Slattery & Sullivan, *Republicans speak out against US debt-ceiling deal, in sign of rocky road ahead*, Reuters (May 29, 2023), https://tinyurl.com/5dwpzddt ("'[The debt ceiling deal] will absolutely pass. There's no question about that,' said Republican Representative Dusty Johnson, who said he had talked to dozens of fellow lawmakers.").

[14] *A list of 50 things Andrew Cuomo has 'gotten done'*, The New York Groove (June 5, 2025), https://tinyurl.com/96ddpvde ("I know how to get things done. Not just plans, plans, plans.")

[15] McGrory, *Signs of Democratic Life*, Wash. Post (Nov. 14, 2002), https://tinyurl.com/mryds34m (describing Nancy Pelosi as "the velvet hammer" and quoting her as saying, "I have perfect confidence in my ability to do this job[.] I know I can lead the Democrats into a consensus").

those political outcomes the supporter favors.'" *Citizens United*, 558 U.S. at 359.

Furthermore, comments like Sittenfeld's are meant to project confidence—like a candidate for Speaker of the House asserting that he expects to prevail[16] or a candidate for city council claiming his experience and expertise are unparalleled[17]—rather than to reflect an actual promise or undertaking of official action. A public official's assertion that he "can move more votes than any single other person" is part and parcel of political discourse today. An official's political relationships,[18] the clout he has developed, and the ability to move votes or deliver on an agenda[19] are critical to how he promotes himself—that is, whether he is a "'winning endeavor.'" Jury Instructions/Closing Arg. Tr., R.251, PageID#5007. Regardless of whether such statements are earnest expressions of political objectives or are self-

[16] *See* Irwin, *Johnson Expresses Confidence Ahead of Friday's Speaker Vote*, The Hill (Jan. 2, 2025), https://tinyurl.com/3jerscfy ("Johnson said … 'I think we'll get it done,' he continued. 'I really do.'").

[17] Palmer, *East Lansing City Council Races Features Eight Candidates, Numerous Issues*, Lansing State Journal (Nov. 4, 2023), https://tinyurl.com/2jtenhbz ("It can be fairly said that no other member of the council has my experience in economic development, zoning, urbanism, my depth of knowledge on those.").

[18] *See, e.g.*, *Joe Biden The former vice president wants to restore the soul of America*, N.Y. Times (Jan. 4, 2020), https://tinyurl.com/dfreychh (Biden campaign speech claims Biden has "met personally every major world leader in the last 40 years.").

[19] *CNN Interview with Rep. Pramila Jayapal* (Sept. 20, 2021, time 4:25-4:33), http://tinyurl.com/mr278ur4 ("Regardless of how people feel about the infrastructure bill, we would deliver our votes for the infrastructure bill. We would deliver the entirety of the president's agenda to him for his signature.").

aggrandizing, this Court should put an end to a rule that threatens to convert ordinary political puffery into promises subject to prosecution.

Third, the government relied on several statements in which Sittenfeld urged donors to back him while attempting to dissuade them from supporting his rivals. The government invoked Sittenfeld's insistence on "stop[ping] the developers from supporting" multiple candidates. Jury Instructions/Closing Arg. Tr., R.251, PageID#5004, and Sittenfeld's remarks made to a cooperating witness: "I mean, you don't want me … to be like, 'hey [Chin], like love you but can't'[.] I want people to support me … if a candidate doesn't want people to support them, they're a shitty, dumb candidate." Indictment, R.3, PageID#30. While these statements do not reflect Sittenfeld's political positions or record, they still embody the pleas made by public officials to potential donors.

Although the government made much of Sittenfeld's suggestion that his donors should not hedge because it was not in "[their] interest," *e.g.*, Jury Instructions/Closing Arg. Tr., R.251, PageID#5002, public officials have the right to discourage funding of their political opposition. Indeed, it is natural that they do so. After all, successful fundraising is key to both winning an election and wielding political cachet once in office.[20] Former Texas State Senator Robert Duncan recounted a pivotal fundraising point for his campaign, where he met with Karl Rove and then-Governor George Bush, who expressed concerns about Duncan's

[20] Bustillo, *supra* note 4 ("[E]veryone's pretty well funded and spends a lot of time fundraising[.] [Y]ou have to keep up with your opposition to get your message out").

fundraising efforts. Recognizing the urgency of his situation, at his next meeting with a group of lobbyists, Duncan pleaded, "Are you with me or against me?" He wanted to know, "Would they support me, would they raise the money necessary from their clients?"[21] Leaders from both political parties have long been perceived as using their fundraising prowess to prop up allies and punish enemies. Former Speaker of the House Kevin McCarthy said Democrats failed to support his speakership "because he could raise the money to oust them in 2024," quoting Democrats who reportedly told him, "Why would we help the person that becomes our executioner?"[22] That Sittenfeld urged donors to invest in him and refrain from empowering his opponents is another example of commonplace, protected political speech that will be chilled unless this Court intervenes.

Given the stakes associated with campaign fundraising, public officials are bound to make exaggerated or aggressive appeals for support. Those statements should not sustain a bribery or extortion conviction. Indeed, a rule that allows prosecutions to rest on inartful statements both sweeps up the fundraising pleas that reverberate across the country (and that are not elicited as part of a sting operation) and supplants the government's requirement to prove an explicit agreement. Ratifying prosecutions that rely on these commonplace statements would chill speech and perversely permit the targeting of new politicians and

---

[21] Lemann, *The Controller*, New Yorker (May 4, 2003), https://tinyurl.com/y8mk8cwc.

[22] Ackley, *McCarthy's Money at Stake for House GOP in Speaker's Downfall*, Bloomberg Government (Oct. 4, 2023), https://tinyurl.com/mt74pky7.

donors who lack the polish and experience required to navigate discussions that demand nuance.

IV. THE WEAKENED *MCCORMICK* STANDARD APPLIED BELOW INVITES ARBITRARY OR POLITICALLY MOTIVATED PROSECUTIONS

The lower courts' diluted reading of *McCormick* also invites misguided (at best) or politically motivated prosecutions. Even the most well-meaning prosecutors are susceptible to confusing the various facets of bribery and corruption elements and pursuing cases on something less than an explicit quid pro quo. More pernicious, however, is the risk of discriminatory prosecutions. Such a concern is far from speculative. The Bill of Rights itself is proof that our Founders "understood that historically, government prosecutors could become extremely abusive of individual rights."[23] Justice Robert Jackson warned of the potential for targeted prosecution while serving as U.S. Attorney General:

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. … It is in this realm in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an

[23] Barth, *Criminal Prosecution in American History: Private or Public?*, 67 S.D. L. Rev. 119, 147 (2022).

> offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.[24]

This Court is acutely aware of such risks. It has repeatedly declined to accept the government's "assurances that prosecutors and grand juries will not permit political or baseless prosecutions" and affirmed the longstanding principle that that it does not defer "significant constitutional questions based on the Government's promises of good faith." *Trump* v. *United States*, 603 U.S. 593, 637 (2024); *see also, e.g.*, *McDonnell* v. *United States*, 579 U.S. 550, 576 (2016) (A court "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'")

This risk of politically motivated prosecution is especially alarming as partisan divides continue to widen in our country, and where disfavored opinions or political actors are targeted in unprecedented ways and with increasing frequency.[25] The standard espoused by

---

[24] Jackson, *The Federal Prosecutor, Delivered at The Second Annual Conference of United States Attorneys* (Apr. 1, 1940), https://tinyurl.com/mt3ynxrm.

[25] *See, e.g.*, Slip Op., *Libby* v. *Fecteau*, No. 24A1051 (U.S. May 20, 2025, 605 U. S.__ (2025) (granting injunction to require the clerk of the Maine House of Representatives to count lawmaker's votes following censure for social media post about transgender athlete); Peek, *Biden's Alarming Harassment of Elon Musk*, The Hill (Dec.

the Sixth Circuit ratified a conviction based on underlying campaign contributions that were otherwise lawful and supporting evidence consisting of everyday, protected political statements. Interpreting a criminal statute in such an "unconstitutionally vague [way]," *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 283, 284 (1961), opens the door for prosecutors to select targets based only on "'their personal predilections,'" *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983). Indeed, such a standard provides ammunition to overly zealous prosecutors to target the speech and policy preferences of public officials and candidates for offices at all levels, including the President and Vice President.[26] In the current moment, such a blank check is especially frightening to unsuccessful political candidates or those espousing dissenting views.

Aside from the obvious injustice of indicting and convicting an innocent person, a political prosecution presents numerous harms to our democracy. The real possibility of unfair, overbroad enforcement chills political speech, both by candidates and their supporters. "Officials might wonder whether they could

---

15, 2023), https://tinyurl.com/ef8e642c (describing Biden administration's legal challenges against Elon Musk).

[26] *See* Dawsey, *Trump makes sweeping promises to donors on audacious fundraising tour* (May 28, 2024), https://tinyurl.com/2dhch4pb; Democrats, *Veepstakes: Trump and J.D. Vance Will Give Ultra-Wealthy Donors Whatever They Want if They Bring Their Checkbooks* (June 20, 2024), https://tinyurl.com/45eyfkzc (collecting Trump statements to donors and characterizing Trump-Vance fundraising efforts in Ohio as "Trump ... parading his VP contenders around for campaign cash from billionaire buddies as they all double down on a disastrous MAGAnomics agenda[.]").

respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *McDonnell*, 579 U.S. at 575. Such consequences are antithetical to our representative system of government. And even reports or insinuations of political targeting and prosecutions are likely to take a toll on our system.[27] Political prosecutions erode public trust in the justice system and our government more broadly.

---

[27] Penn & Spoto, *Trump's LA Prosecutor Orders Cases His Staff Say Lack Evidence*, Bloomberg Law (July 29, 2025), https://tinyurl.com/suhw38hw ("[Essayli] talked to staff about using the position to criminally charge politicians, judges, or other officials who block the Trump agenda"); Donald J. Trump (@realDonaldTrump), Truth Social (July 26, 2025, 7:45 p.m.), https://tinyurl.com/2nz56prn (asserting Democrats paid Beyoncé for illegal endorsement and declaring, "They should all be prosecuted!").

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

AMANDA N. BAIRD
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109

DONNA M. FARAG
Counsel of Record
CHARLES C. SPETH
MEGAN O. GARDNER
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
donna.farag@wilmerhale.com

AUGUST 2025