No. 12-1462

In The Supreme Court of the United States

KEVIN RING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF CENTER FOR COMPETITIVE POLITICS AND PROFESSOR RONALD D. ROTUNDA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a defendant can be convicted of the offense of honest services fraud by bribery as defined by this Court's decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010), in the absence of a *quid pro quo* bribery agreement.

2. Whether the First Amendment permits jurors to consider evidence of a lobbyist's legal campaign contributions, permissibly made to express appreciation toward and provide election assistance to political officials, as probative of whether the lobbyist engaged in corruption by putting other things of value to similar use.

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INTEREST OF AMICI CURIAE[1]

Amicus Center for Competitive Politics ("CCP") was founded in 2005 by former Federal Election Commission Chairman Bradley Smith. CCP is a non-profit 501(c)(3) organization that seeks to educate the public about the effects of money in politics and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First Amendment rights of speech, assembly, and petition through scholarly research and both state and federal litigation.

CCP has participated in many of the notable cases concerning campaign finance laws and restrictions on political speech, and appeared as amicus when this case was heard before the Court of Appeals.

Amicus Ronald D. Rotunda is a professor of law[2] signing this brief in his individual capacity as a legal educator and not on behalf of any institution, group, or association. His sole purpose for

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of amicus' intent to file this brief under Sup. Ct. R. 37.2(a). Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

[2] Amicus Rotunda is the Doy & Dee Henley Chair and Distinguished Professor of Jurisprudence at the Chapman University School of Law in Orange, CA. His title and institutional affiliation are provided for identification purposes only.

submitting this brief is an interest in the preservation of First Amendment rights for political speech and activity, and a belief that the D.C. Circuit's vague interpretation of the honest services statute fails to afford fair notice and is therefore inconsistent with basic norms and principles underlying a just and fair legal system.

REASONS FOR GRANTING THE PETITION

This Court has recognized the importance of drawing clear lines between protected First Amendment conduct and unlawful corruption. Despite the Court's efforts to draw such lines--principally in *McCormick v. United States*, 500 U.S. 257 (1991), and *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999)--the lower courts have interpreted the honest services statute and related criminal laws to permit juries to infer corrupt intent from conduct that is consistent with protected First Amendment activity. The D.C. Circuit's decision in this case exacerbates the uncertainty that these cases have created and thus increases their chilling effect on the lawful exercise of the First Amendment rights of speech and petition. The Court should grant the writ to restore the clarity that it sought to establish in *McCormick* and *Sun-Diamond*.

I. CLEAR LINES ARE ESSENTIAL TO AVOID CHILLING PROTECTED FIRST AMENDMENT ACTIVITY.

It has long been settled that "contributing money to, and spending money on behalf of, political candidates implicates core First Amendment protections." *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 486 (2007) (Scalia, J., concurring). Limitations on political contributions and expenditures thus "operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). Similarly, lobbying--the act of "trying to persuade Congressional action"--involves "exercising the First Amendment right to petition." *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967).

Because of the fundamental First Amendment rights at stake when citizens interact with public officials, either directly or through lobbyists, this Court has sought to draw clear lines between lawful, constitutionally protected advocacy and unlawful influence. The Court has insisted on clear lines because vague standards "may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley*, 424 U.S. at 41 n.48 (quotations and ellipses omitted). Even the process of interpreting a vague standard in the First Amendment context "create[s] an inevitable,

pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards . . . must give the benefit of the doubt to protecting rather than stifling speech." *Citizens United v. FEC*, 558 U.S. 310, 326-27 (2010) (quotation omitted).

II. THE LOWER FEDERAL COURTS HAVE MUDDIED THE CLEAR LINES THIS COURT HAS SOUGHT TO DRAW IN THE CONTEXT OF CRIMINAL PENALTIES FOR CAMPAIGN CONTRIBUTIONS AND LOBBYING ACTIVITIES.

The need for clear lines in the context of political advocacy is particularly acute when violators face harsh criminal sanctions. The Court addressed this point in *McCormick v. United States*, 500 U.S. 257 (1991), which involved Hobbs Act extortion charges based on a public official's solicitation of campaign contributions. The Court observed:

> Whatever ethical considerations and appearances may indicate, 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." To hold otherwise 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. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

Id. at 272-73. The Court thus held that solicitation of campaign contributions constitutes extortion "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* at 273. The Court established the "explicit promise or undertaking" requirement to ensure that campaign contributions, with their First Amendment protections, are neither chilled nor improperly punished.[3]

A few lower courts have hewed faithfully to the *McCormick* "explicit promise or undertaking"

[3] The lower courts have applied the *McCormick* standard to campaign contributions prosecuted as bribes under the honest services statute, 18 U.S.C. § 1346. *See, e.g., United States v. Siegelman*, 640 F.3d 1159, 1170 & n.14 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2711 (2012); *United States v. Inzunza*, 638 F.3d 1006, 1013 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 997 (2012); Pet. App. 10a.

requirement in the context of campaign contributions. *See, e.g., United States v. Inzunza*, 638 F.3d 1006, 1013-14 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 997 (2012); *United States v. Abbey*, 560 F.3d 513, 517-18 (6th Cir. 2009); *United States v. Ganim*, 510 F.3d 134, 142-43 (2d Cir. 2007). But other courts have concluded--confusingly--that "the agreement must be *explicit*, but there is no requirement that it be *express*." *United States v. Siegelman*, 640 F.3d 1159, 1171 (11th Cir. 2011) (emphasis in original), *cert. denied*, 132 S. Ct. 2711 (2012); *see, e.g., United States v. Terry*, 707 F.3d 607, 613-14 (6th Cir. 2013). Despite occasional nods to *McCormick*, *e.g., Terry*, 707 F.3d at 615, these courts permit a *quid pro quo* agreement to be inferred from the conduct of the contributor and the officeholder--a standard that allows jurors to conclude that campaign contributions constitute bribes based on the fact that shortly before or after the contribution the public official took actions favorable to the contributor. In other words, when the "explicit promise or undertaking" requirement of *McCormick* is set aside, jurors are left free to convict based on conduct that is consistent with lawful, First Amendment protected activity.[4]

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[4] Some courts have suggested that this Court weakened the *McCormick* "explicit promise or undertaking" requirement in *Evans v. United States*, 504 U.S. 255 (1992). *See, e.g., United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994). But the question presented in *Evans* was "whether an affirmative act of inducement by a public official, such as a demand, is an element of the offense of extortion 'under color of official right' prohibited by the Hobbs Act, 18 U.S.C. § 1951." 504 U.S. at 256. The Court held that inducement is not an element of Hobbs Act extortion. In reaching that conclusion, the Court

McCormick left open whether its "explicit promise or undertaking" requirement extends to "other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value." 500 U.S. at 274 n.10. The lower federal courts have uniformly answered that open question in the negative; they permit bribery charges to rest on an "implicit" *quid pro quo* outside the campaign contribution context. *See, e.g., United States v. Andrews*, 681 F.3d 509, 527 (3d Cir. 2012); Pet. App. 10a-11a. With the *McCormick* "explicit promise or undertaking" requirement removed, it is all the more important to draw clear lines between lawful and unlawful conduct. But the lower courts have blurred this Court's efforts to make that critical distinction.

In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), which involved gifts from lobbyists to a public official, this Court drew careful lines between bribes, gratuities, and lawful gifts under 18 U.S.C. § 201. It held that "for bribery there must be a *quid pro quo*--a specific intent to give or receive something of value *in exchange* for an official act," while a gratuity "may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken." *Id*. at 404-05 (emphasis in original). For either offense--

(continued…)

found the district court's instruction on campaign contributions consistent with *McCormick*. *See id*. at 257-58, 268. Nothing in *Evans*'s approval of that instruction undermines *McCormick*'s "explicit promise or undertaking" requirement.

bribe or gratuity--the Court insisted that there be a "connection between respondent's intent and a specific official act." *Id.* at 405.[5]

The Court thus rejected the government's position that a gratuity offense could be established "by a showing that respondent gave Secretary Espy a gratuity because of his official position--perhaps, for example, to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future." *Id.* The Court noted that a series of statutes and regulations already governed gifts to public officials, and it declared that these provisions

> demonstrate that this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter. Absent a text that clearly requires it, we ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits.

Id. at 412.

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[5] Courts have applied the *Sun-Diamond* analysis to bribery charged under the honest services statute. *See, e.g., United States v. Wright*, 665 F.3d 560, 567-68 (3d Cir. 2012); Pet. App. 7a.

Consistent with *Sun Diamond*, some lower courts have required that the public official's receipt of the gift "be in return for a *specific* official action--a *quid pro quo*. No generalized expectation of some future favorable action will do. . . . In the absence of such an agreement on a specific action, even a close-in-time relationship between the donation and the act will not suffice." *Siegelman*, 640 F.3d at 1171 (emphasis in original; footnote omitted). But other courts have effectively eliminated the *Sun-Diamond* "specific official act" requirement. Those courts apply the so-called "stream of benefits" approach, under which "a particular, specified act need not be identified at the time of payment to satisfy the *quid pro quo* requirement, so long as the payor and payee agreed upon a specific *type* of action to be taken in the future." *United States v. Whitfield*, 590 F.3d 325, 349 (5th Cir. 2009) (emphasis in original), *cert. denied*, 131 S. Ct. 136 (2010); *see, e.g., Terry*, 707 F.3d at 614; *United States v. Wright*, 665 F.3d 560, 568 (3d Cir. 2012); *Ganim*, 510 F.3d at 148. Courts adopting the "stream of benefits" theory have permitted jurors to convict where the public official "agreed to accept things of value in exchange for performing official acts on an as-needed basis, so that whenever the opportunity presented itself, he would take specific action on the payor's behalf." *United States v. Jefferson*, 674 F.3d 332, 358 (4th Cir.) (quoting jury instruction) (bracket omitted), *cert. denied*, 133 S. Ct. 648 (2012).

The "stream of benefits" theory blurs the line drawn in *Sun-Diamond* between gifts connected to a "specific official act" and gifts given based on (in

Siegelman's words) a "generalized expectation of some future favorable action." Especially in conjunction with an instruction permitting jurors to find an implicit *quid pro quo*, the stream of benefits theory creates the risk that jurors will convict based on inferences drawn from lawful conduct. That is a substantial danger; but, as discussed in the next section, the court of appeals' decision in this case greatly increased that risk.

III. THE D.C. CIRCUIT'S DECISION EXACERBATES THE CHILLING EFFECT OF VAGUE LAWS ON PROTECTED FIRST AMENDMENT ACTIVITIES.

The D.C. Circuit's decision in this case embraces a stream of benefits instruction and permits the jury to convict based on an implicit *quid pro quo*. Pet. App. 9a-11a, 14a-15a. But the court of appeals takes two additional steps which create an unacceptable risk that lobbyists and other citizens will be subject to prosecution for entirely lawful conduct, with the attendant chilling effect on their First Amendment rights to speak on political topics and to petition the government.

First, the court of appeals permits the use of concededly lawful campaign contributions as evidence of a lobbyist's corrupt intent. Pet. App. 20a-28a. It is hard to imagine an approach more likely to obliterate the line between lawful and unlawful conduct and thus chill protected activity. Campaign contributions "implicate[] core First Amendment protections." *Wisconsin Right to Life,*

Inc., 551 U.S. at 486 (Scalia, J., concurring). Permitting a jury to draw inferences of bribery from protected conduct--particularly if the *quid pro quo* may be implicit and no specific official act need be identified--inevitably chills fundamental First Amendment rights. Lobbyists and other citizens who may hope to influence public policy through campaign contributions will be reluctant to exercise that First Amendment right for fear that their lawful conduct may later be used as evidence that they intended to influence public officials unlawfully. The profound dangers of such an approach are particularly evident here, where "through its questioning the government invited the jury to conflate the contribution evidence with evidence about the things of value that were actually at issue." Pet. App. 25a.

Second, the court of appeals eliminated the requirement that the *quid pro quo* manifest itself in an agreement between the person giving the gift and the public official receiving it. Pet. App. 11a-14a. In addition to conflicting with *United States v. Brewster*, 408 U.S. 501 (1972), and numerous court of appeals decisions, Pet. 12-15, this holding further blurs the line between lawful and unlawful conduct. According to the court of appeals, not only may the *quid pro quo* be implicit, not linked to any specific official act, and provable through evidence of lawful campaign donations; it can also rest on the donor's unilateral hope that the gift might influence the public official in some unspecified way in the future.

The court of appeals' decision amounts to a "meat-axe" where a scalpel is needed. *Sun-Diamond*, 526 U.S. at 412. Reasonable, precisely targeted laws regulating gifts to public officials are entirely appropriate and consistent with First Amendment standards. As this Court has recognized, there are many such statutes and regulations already in place. *See id.* But the vague contours of the honest services statute, as interpreted by the court of appeals, will inevitably "operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley*, 424 U.S. at 41 n.48 (quotations and ellipses omitted). As with *McCormick* and *Sun-Diamond*, the Court's intervention is needed to restore clarity to the law.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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