No. 12-1462

IN THE

Supreme Court of the United States

KEVIN A. RING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND RUTHERFORD INSTITUTE IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL was founded in 1958. NACDL has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges. NACDL provides amicus assistance on the federal and state level in cases that present issues of importance, such as the one presented here, to criminal defendants, criminal defense lawyers, and the proper and fair administration of criminal justice.

The Rutherford Institute is one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide spectrum of issues affecting individual freedom in the United States and around the world. It provides free legal services to people whose constitutional and human rights have been threatened or violated, and educates the public on important issues affecting constitutional freedoms.

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[1] Counsel of Record for the parties received timely notice of Amici Curiae's intent to file this Brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

SUMMARY OF THE ARGUMENT

In *United States v. Skilling*, 130 S. Ct. 2896 (2010), this Court sought to eliminate the vagueness that has long plagued the honest services fraud statute, 18 U.S.C. § 1346, by imposing the clear standards of bribery law on it, thus drawing a unambiguous line between prohibited honest services fraud and legal conduct, such as relationship building. However, the decisions below approved of honest services fraud jury instructions that eliminated the essence of "bribery" — the quid pro quo agreement between a public official and a third party to exchange official acts for items of value.

Kevin Ring was tried for providing "things of value" — including meals and entertainment — to public officials. Mr. Ring maintained that he provided "things of value" to public officials not in exchange for official acts, but in order to gain access and influence. The distinction between gifts given in exchange for official favors and those given merely to gain influence is critical, because, as this Court held in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), bribery requires proof that a "thing of value" was "give[n], offer[ed] or promise[d]" as a *quid pro quo* for an official act. *Id.* at 405. As the Court of Appeals in this case correctly recognized, "there [is] nothing criminal about giving gifts to an official in an attempt 'to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future,' and "[t]he line between legal lobbying and criminal conduct is crossed [only] when a gift possesses *a particular link to official acts.*" App. 4a

(emphasis added).

Lacking evidence of any *quid pro quo* exchange, the government charged Mr. Ring not with bribery, but with honest services fraud under 18 U.S.C. § 1346. However, in spite of the limits this Court imposed on honest services fraud in *Skilling*, the jury was allowed to convict Mr. Ring absent a showing of the *quid pro quo* required for bribery. If allowed to stand, the rulings in this case threaten to eviscerate *Skilling*, and criminalize a broad swath of conduct that is not only not illegal, but intrinsic to the democratic process.

The standard applied here would undo this Court's circumscription of honest services fraud in *Skilling*, and signal a return to the era in which the amorphous honest services fraud law was used as blunt instrument by "headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. United States*, 555 U.S. 1204, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). The intent to "influence," often by providing meals and other entertainment, is ubiquitous in politics, and the test for "honest services fraud" applied here threatens with jail those who seek — legally — to influence public policy.

This case also presents important questions about the proper role of campaign contributions in our system of privately financed elections. Campaign contributions are a form of protected First Amendment speech, which may be made to build influence or even as a "reward" for official action.

Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359-60 (2010); *McCormick v. United States*, 500 U.S. 257, 272 (1991). Nevertheless, the government in this case was permitted to introduce evidence of such legal campaign contributions in support of its charges, and then to invite the jury to convict Mr. Ring on the basis of this legal, and constitutionally protected conduct. This is fundamentally inconsistent with *McCormick v. United States*, where this Court held that campaign contributions may not be prosecuted as public corruption absent a showing that they were made in a *quid pro quo* exchange, 500 U.S. at 272, and *Citizens United v. Federal Election Commission*, where the Court made clear that the First Amendment protects the use of campaign contributions to obtain access to, and influence over, elected representatives. 558 U.S. at 359.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO MAKE CLEAR THAT THE HONEST SERVICES FRAUD STATUTE REQUIRES THE GOVERNMENT TO PROVE BRIBERY.

The criminal law — "[t]he state's authority to deprive freedom or even life itself" — is "the most potent action any government can take against the governed." Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 713-714 (2005). The stigma of a criminal judgment and "[t]he terrible nature of prison," William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. of Contemp. Legal Issues 1, 24 (1996), require that this

most awesome power be exercised with care, and that individuals be subjected to criminal punishment only when they violate clear proscriptions. A criminal statute that fails to "define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement" violates the Due Process Clause and is void for vagueness. *Skilling v. United States*, 130 S. Ct. 2896, 2927-28 (2010) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); *see also United States v. Bass*, 404 U.S. 336, 348 (1971) (citing an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should").

When a criminal statute applies to activity that furthers First Amendment interests, courts must exercise "particular care" to ensure that the statute "provide[s] more notice and allow[s] less discretion than for other activities." *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988); *see also Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2353 (2011) (Kennedy, J., concurring) (vague statute affecting First Amendment interests "is an invitation to selective enforcement; and even if enforcement is undertaken in good faith, the dangers of suppression of particular speech or associational ties may well be too significant to be accepted"). Mr. Ring was a lobbyist, and lobbying stands at the core of the First Amendment's guarantees of free speech and the right to petition the government. While those protections do not extend to bribery, the proper exercise of those rights must not be criminalized by the improper application of a vague statute.

Otherwise, conduct that is not criminal, has never been thought to be criminal, and clearly should not be criminal would expose millions of Americans, in politics, government service, and business, to the threat of lengthy jail terms.

> Here, the government argued to the jury that:
>
> > The defendant's job may have been to influence the course of government policy, but the defendant's job does not entitle him to influence that policy by showering public officials with things of value.

However, as the Court of Appeals found, it is not illegal to give gifts to an official "in an attempt 'to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future.'" App. 4a; *see also Sun-Diamond*, 526 U.S. at 405; *Schaffer*, 183 F.3d at 842; *United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007) (Sotomayor, J.) ("[B]ribery is not proved if the benefit is intended to be, and accepted as simply an effort to buy favor or generalized goodwill from a public official who either has been, is, or may be at some unknown, unspecified later time, be in a position to act favorably on the giver's interests—favorably to the giver's interest. That describes legal lobbying."). Therefore, it was critical in this case to define precisely the point at which legal lobbying — including the provision of meals and entertainment to build goodwill and cultivate political friendships — crosses into bribery and honest services fraud. Despite the lip service paid here to the difference between bribery and "legal lobbying," App. 4a-5a, the

courts in this case failed to do so.

A. The Honest Services Fraud Statute Is Unconstitutionally Vague Unless Limited To Bribery, As *Skilling* Requires.

As Justice Scalia has stated: "[w]e face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws." *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting). In the criminal arena, the consequences are "particularly dire when legislative language is vague, unclear, or confusing: the misuse of governmental power unjustly deprives individuals of their physical freedom." *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 51, 65 (2010) at 55 (statement of Brian W. Walsh). Congressional representatives have noted that many federal criminal statutes are "poorly defined," and "set[] traps for the uninformed, the unaware, and the naïve." *Id.* at 7 (statement of Rep. Conyers). Imprecise statutes encourage arbitrary and discriminatory enforcement, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 (1972), and vague federal criminal statutes "have been stretched by prosecutors, often with the connivance of the federal courts, to cover a vast array of activities neither clearly defined nor intuitively obvious as crimes."

Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* xxxv (2009).

The honest services fraud statute, 18 U.S.C. § 1346, is emblematic of these problems. The statute was "rushed through," Frank C. Razzano and Kristin H. Jones, *Prosecution of Private Corporate Conduct: The Uncertainty Surrounding Honest Services Fraud*, Business Law Today, Vol. 18, No. 3 (January/February 2009), with minimal consideration, Daniel W. Hurson, *Mail Fraud, the Intangible Rights Doctrine, and the Infusion of State Law: A Bermuda Triangle of Sorts*, 38 Hou. L. Rev. 297 (2001), by a Congress reacting to a well-publicized Supreme Court decision addressing political corruption that supposedly dealt "a crippling blow to the ability of Federal law to curtail political corruption in the United States." 133 Cong. Rec. E3240-02, 1987 WL 944184 (Aug. 4, 1987) (remarks of Rep. Conyers).

The resulting vague and uncircumscribed language of the statute "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. United States*, 555 U.S. 1204, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). Prosecutors have brought honest services cases against a variety of high-profile targets for a wide range of conduct; but in the wake of *Skilling*, many of these convictions have been

overturned.[2]

In the midst of Enron Corporation's highly publicized bankruptcy, the company's President and COO was indicted for honest services fraud and accused of defrauding shareholders by manipulating Enron financial statements in order to increase his own compensation. *Skilling*, 130 S. Ct. at 2908. On appeal, he argued that the honest services fraud statute, 18 U.S.C. § 1346, is unconstitutionally vague because it "does not adequately define what behavior it bars," and because its "standardless sweep . . . facilitate[s] opportunistic and arbitrary prosecutions." *Skilling*, 130 S. Ct. at 2928. This Court agreed that, on its face, the statute raises due process concerns, but applied a saving construction limiting the statute's reach to bribery and kickback schemes. *Id.* at 2931. The Court made clear that "no other misconduct falls within § 1346's province." *Id.* at 2933.

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[2] *See*, *e.g.*, *Black v. United States*, 130 S. Ct. 2963 (2010) (newspaper magnate and owner of Chicago Sun Times); *United States v. Ford*, 639 F.3d 718 (6th Cir. 2011) (Tennessee state senator); *United States v. Bruno*, 661 F.3d 733 (2d Cir. 2011) (Majority Leader of New York Senate); *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011) (Alabama governor); *United States v. Riley*, 621 F.3d 312 (3d Cir. 2010) (mayor of Newark); *United States v. Hereimi*, 396 F. App'x 433 (9th Cir. 2010) (wealthy small business owner); *United States v. Harris*, 388 F. App'x 608 (9th Cir. 2010) (former city councilman and mayor).

B. The Honest Services Fraud Standard Applied In This Case Is Inconsistent With This Court's Rulings.

In *Sun-Diamond*, this Court addressed the question when, precisely, the gift of "things of value" to a government official becomes criminal. The Court found that gifts may legally be given to an official "based on his official position and not linked to an identifiable act" taken, or to be taken, by the official. 526 U.S. at 406-07. Gifts to an official become criminal only when they are linked to particular official acts. *Id.* at 404-05, 408; *see also* App. 4a-5a ("The line between legal lobbying and criminal conduct is crossed . . . when a gift possesses *a particular link to official acts.*") (emphasis added). The *Sun-Diamond* Court also noted the "distinguishing feature" that makes bribery more serious than gratuities — a *quid pro quo*, or the exchange of a thing of value for an official act. *Id.* at 404-05. An illegal gratuity, by contrast, "may constitute merely a reward for some future act that the public official will take . . . or for a past act that he has already taken." *Id.* at 405.

In sum, *Sun-Diamond* differentiates three different scenarios in which an individual provides a "thing of value" to a government official:

1. When the "thing of value" is given not in connection with a particular official act, but merely "to build a reservoir of goodwill that might affect one or more of a multitude of unspecified acts,"

there is no crime;

2. When the same individual provides the same "thing of value" to the same official as a "reward" for "some particular official act," he violates the gratuities statute,[3] 18 U.S.C. §201(c); and

3. When the same individual offers or provides the same "thing of value" to the same official "in exchange for an official act" — *i.e.*, where there is a *quid pro quo* between the thing of value and the official act — he commits bribery.

Sun-Diamond, 526 U.S. at 405. Scenario (1) is not illegal. *See Citizens United*, 558 U.S. at 360 ("Ingratiation and access . . . are not corruption."); *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2007) ("bribery may not be founded on a mere intent to curry favor. . . . There is a critical difference between bribery and generalized gifts provided in an attempt to build goodwill") (citing *Sun-Diamond*); *United States v. Schaffer*, 183 F.3d 833, 842 (D. C. Cir. 1999) (gifts given "in the hope that, when . . . particular official actions move to the forefront, the

[3] It is not, however, illegal to provide campaign contributions as a "reward" for official acts. *See* § II, *infra.*

public official will listen hard to, and hopefully be swayed by, the giver's proposals, suggestions, and/or concerns" are not bribes). And the crucial factual distinction between scenarios (2) and (3) (*i.e.,* between a gratuity and a bribe) is the difference between a "reward," on one hand, and an "exchange," or *quid pro quo*, on the other.

Even where a thing of value is linked to a particular official act, in order to prove bribery, the government must show that the linkage between gift and act involved an exchange, rather than a mere unilateral "reward." Since *Skilling* limits honest services fraud to bribery, and *Sun-Diamond* holds that gifts meant to "build a reservoir of goodwill" and even a "reward" for an official act are insufficient to show bribery, it necessarily follows that the gift of "things of value" to an official to build goodwill, or even as a reward for a particular act, are insufficient to support a conviction for honest services fraud.

For example, if a lobbyist gives sports tickets to an official, who then takes an act favorable to the lobbyist's client, there is no gratuity absent additional evidence that the gift was a "reward" for the act, rather than a generalized attempt to "curry favor." *Sun-Diamond*, 526 U.S. at 405. And absent still further evidence of an "exchange," these facts do not permit a conviction for bribery under *Sun-Diamond*, or for honest services fraud under *Skilling*. The same is true where a salesman entertains a potential customer who then buys the salesman's product — there can be no honest services fraud absent proof of a *quid pro quo*.

Even if, as the District Court found here, the

bribery statute's prohibition on "offer[ing]" a bribe means that the offeror may be convicted whether or not the official *agrees* to an exchange, *United States v. Ring*, 768 F. Supp. 2d 302, 308-09 (D.D.C. 2011), such an exchange must be proposed, understood, or agreed to before bribery can be shown. Otherwise, the bribery statute's *quid pro quo* or "exchange" requirement is meaningless. The *Sun-Diamond* Court made clear that even if the giver of a thing of value hopes or even intends that the gift will result in some particular official action, that mere unilateral intent or hope is insufficient to elevate the gift to a bribe. 526 U.S. at 405. Even if a "thing of value" is conveyed to an official in connection with a particular official act, absent the recipient's agreement — explicit or implicit — to the exchange, or, at least, the offeror's proposal of an exchange, the gift can be, at most, a mere unilateral "reward" (and therefore a gratuity) rather than an "exchange" (and thus a bribe).

This crucial distinction was ignored in this case. The District Court instructed the jury that "[w]hen a public official acts to enrich him or herself through his or her office by accepting things of value, he or she acts against the public's expectation that he or she will work for, and serve, the public welfare." However, as discussed above, to prove bribery it is not sufficient merely to show that an official has "enrich[ed] him or herself" — there must be an "exchange," if not agreed to, at least offered or proposed.

The District Court went on to instruct the jury that a *quid pro quo* was required, but eliminated the

"exchange" requirement by focusing solely on Mr. Ring's unilateral intent. It instructed the jury that it could convict Mr. Ring of honest services fraud if it found that he "intend[ed] to receive an official act in return" for a thing of value, or "intend[ed]" that a public official "realize or know that he or she is expected, as a result of receiving this thing of value, to exercise particular kinds of influence or decision-making to benefit the giver as specific opportunities to do so arise." *Id.*

By focusing solely on Mr. Ring's unilateral intent, and omitting any requirement that the government prove an agreement (explicit or implicit) to an exchange, or even that that Mr. Ring offered one, this instruction allowed the jury to convict Mr. Ring for honest services fraud upon a showing of something less than bribery — *i.e.*, gifts given to build goodwill or as a mere "reward," rather than an "exchange." *See Schaffer*, 183 F.3d at 841 (gratuity requires only "one-way nexus," but bribery requires "two-way nexus"). By instructing the jury that it could convict Mr. Ring of honest services fraud upon a finding that he gave things of value in the hope that the recipients would act favorably "as specific opportunities to do so arise," the District Court permitted a conviction for honest services fraud — in contravention of *Skilling* — for gifts intended to "build a reservoir of good will," *Sun-Diamond Growers,* 526 U.S. at 405, or "in the hope that, when . . . particular official actions move to the forefront, the public official will listen hard to, and hopefully be swayed by, the giver's proposals, suggestions, and/or concerns." *United States v. Schaffer*, 183 F.3d 833, 842 (1999); *see also Citizens United*, 558 U.S. at 360

("Ingratiation and access . . . are not corruption.") And although the Court of Appeals noted that gifts given for these purposes are not illegal, App. 4a, it failed to recognize or correct this flaw in the District Court's instruction.

That flaw is demonstrated by the example of an individual who takes a public official to dinner in the hope, and with the intent, that in exchange for the dinner, the official will in the future take action favorable to the individual "as specific opportunities to do so arise." The instruction given in this case would stretch the honest services fraud statute to this individual even if he never expresses his hope or intent, and where the official attends and leaves the dinner believing that the individual is merely attempting to "build a reservoir of goodwill," and then takes no action because of the dinner. In such a case, it is crystal clear that no one has "give[n], offer[ed] or promise[d]" anything of value, or "demand[ed], s[ought], receive[ed], accept[ed], or agree[d] to receive" anything of value, as required by the express language of the bribery statute, 18 U.S.C. § 201(b). Nevertheless, even though it is clear that no bribery occurred, and that no exchange was agreed to or even offered, the standard applied in this case would permit the individual to be convicted of honest services fraud, contrary to *Skilling.*[4]

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[4] Businesses also seek to "influence" customers, and routinely entertain existing and potential clients with meals and other hospitality. Various federal and state laws prohibit bribery in the commercial context, *e.g.* 15 U.S.C. § 78dd-2(a) (Foreign Corrupt Practices Act); Cal. Penal Code § 641.3 (commercial bribery), but under *Skilling*, a salesman may entertain a prospect with the hope and intent of receiving business in

The failure to define criminal conduct properly was particularly critical in this case which, as the District Court found, presented "novel" and "complicated" questions concerning legal versus illegal lobbying and the prosecution of a lobbyist for providing things of value to a public official without an explicit *quid pro quo*. Lobbying goes to the heart of the First Amendment's guarantees of free speech and the right to petition the government. *See United States v. Harriss*, 347 U.S. 612, 635 (1954) (Jackson, J., dissenting); William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform,* 33 J. Legis. 32, 35 (2006). Unless carefully circumscribed as required by *Skilling*, the vague honest services statute threatens to allow "abuse by headline-grabbing prosecutors" seeking criminal penalties for "unappealing or ethically questionable" — or even merely unpopular — conduct. *Sorich*, 555 U.S. 1204, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari).

By permitting Mr. Ring to be convicted of honest services fraud with no showing that he "g[ave], offer[ed], or promise[d]" any *quid pro quo*, or that any official accepted such a proposal, explicitly or implicitly, the lower courts allowed the jury to find

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return — absent evidence that he "g[ave], offer[ed] or promise[d]" anything of value "in exchange" for that business, there can be no honest services fraud. By blurring the line between the *quid pro quo* required for bribery and a unilateral intent to "influence," the rulings below would have disastrous and absurd consequences for the business community, making felons of businessmen who engage in activities as commonplace and innocuous as buying a customer lunch.

honest services fraud absent a showing of bribery, in violation of *Skilling*. The instructions given in this case are an invitation to arbitrary and discriminatory enforcement of the honest services statute. The practices engaged in by lobbyists — *e.g.*, providing officials with expensive meals, entertainment and campaign contributions — are certainly offered with the intent to influence official policy, and may be unappealing to the average American, or to individuals who disagree with the causes for which an individual lobbies. But absent a *quid pro quo*, these practices do not constitute bribery, *Sun-Diamond*, 526 U.S. at 405, and therefore do not constitute honest services fraud. *Skilling*, 130 S. Ct. at 2933.

II. THE ADMISSION OF EVIDENCE OF LEGAL AND CONSTITUTIONALLY PROTECTED CAMPAIGN CONTRIBUTIONS, IN CONTRAVENTION OF THIS COURT'S RULINGS, WILL CRIMINALIZE, AND THEREBY CHILL, CONSTITUTIONALLY PROTECTED CONDUCT.

In *McCormick v. United States*, 500 U.S. 257, 272 (1991), this Court made clear that "[w]hatever ethical considerations and appearances may indicate," it is no crime to make campaign contributions to Members of Congress who take actions one views as favorable. The *McCormick* Court wrote that:

> [T]o 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.

Id. at 272. Therefore, the Court held, campaign contributions may be the basis of a public corruption prosecution "only if the payments are made in return for an *explicit promise or undertaking* by the official to perform or not perform an official act." *Id.* at 273 (emphasis added).[5]

Campaign contributions can be a highly controversial subject, since individuals may disagree

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[5] *McCormick* involved extortion, but bribery and extortion are "different sides of the same coin," *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993), and the *McCormick* rule applies to bribery. *See Evans v. United States*, 504 U.S. 255, 268 (1992); *United States v. Siegleman*, 640 F.3d 1159, 1172 n.14 (11th Cir. 2011).

with the causes and individuals to whom contributions are made, may believe that moneyed interests have inordinate influence on the political process through campaign contributions, or may find the entire process of election financing distasteful. *E.g.*, Joe Nocera, *Boycott Campaign Donations!*, N.Y. Times, Aug. 12, 2011, at A19, *available at* http://www.nytimes.com/2011/08/13/ opinion/nocera-boycott-campaign-donations.html; *see also* Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118 (2010), *available at* http://www.-harvardlawreview.org/issues/124/november10/Comment_7318.php ("Lurking beneath the surface of all debates on campaign finance is a visceral revulsion over future leaders of state groveling for money. The process of fundraising is demeaning to any claim of a higher calling in public service and taints candidates, policies, donors, and anyone in proximity to this bleakest side of the electoral process. The intuition is that at some level money must be corrupting of the political process and that something must be done to limit the role of money in that process.") Criminalizing campaign contributions would invite prosecutions based on differing political views, and to protect this conduct, the *McCormick* Court walled it off from criminal liability where there is no explicit *quid pro quo*.

There was no evidence that Kevin Ring ever made any campaign contribution as part of a *quid pro quo* exchange, and Mr. Ring was not charged with any illegality in connection with any campaign contribution. *See* App. 20a. However, the government was permitted to introduce dozens of email messages in which Mr. Ring and other

lobbyists carried on crude discussions of campaign contributions. These emails reflected activity that was "well within the law," *McCormick*, 500 U.S. at 272, and by allowing the government to use evidence of this constitutionally protected conduct as evidence of gratuities and honest services fraud, the courts below permitted an end-run around *McCormick.* This standard would allow prosecutors to take aim at political enemies, and jurors to convict defendants for conduct that they may find unappealing, but which is not only not illegal, but constitutionally protected. This Court should grant certiorari in order to make clear that *McCormick* means what it says, and that this evasion is not permissible.

As the Court of Appeals recognized, the campaign contribution evidence in this case "had a strong tendency to prejudice, confuse, and mislead the jury." App. at 24a. For example, the government put on evidence that Mr. Ring:

> "[H]eld $300,000 checks" in his hand and joked "Hello, quid, Where's the pro quo?"

Id. Not only did this "distasteful" evidence "pose[] a significant risk of evoking precisely the kind of negative emotional response that might 'lure the [jury] into declaring guilt on a ground different from proof specific to the offense charged," *id.* at 24a-25a (quoting *Old Chief v. United States*, 519 U.S. 172, 180 (1997)), it invited a guilty verdict based on constitutionally protected conduct.

And the Court of Appeals went on to find that

this evidence "may have been even more confusing and misleading than it was prejudicial." *Id.* at 25a. The critical determination the jury was asked to make in this case was whether the things of value Mr. Ring gave officials were intended to "to build a reservoir of goodwill" or as part of a "*quid pro quo*," and the government presented evidence that Mr. Ring referred to campaign contributions in "precisely these terms." App. 25a. At the same time, the prosecution adduced testimony — specifically, deliberately and repeatedly — that Mr. Ring treated the "things of value that were actually at issue" in exactly the same way as campaign contributions. For example, prosecutors asked witnesses:

> [D]id Kevin Ring tell you that he treated campaign contributions any differently than he did the giving of tickets to public officials?

and

> [W]hether or not Mr. Ring ever had any conversations that he treated campaign contributions differently than he treated the giving of meals and tickets to public officials?

App. 25a-26a. In short, as the Court of Appeals found, the prosecution "invited the jury to conflate the contribution evidence with evidence about the things of value that were actually at issue."

This is impermissible. In *Citizens United v. Federal Election Comm'n*, the Court not only refused to equate campaign contributions with corruption, but found those contributions a necessary feature of

our democracy:

> 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 those political outcomes the supporter favors. Democracy is premised on responsiveness.

558 U.S. 310, 359 (2010) (quoting *McConnell v. Fed. Election Commission*, 540 U.S. 93, 297 (2003)). And in *McCormick*, the Court noted that to permit prosecution for campaign contributions absent a *quid pro quo* "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." 500 U.S. at 272. Nevertheless, despite the "significant risk" of prejudice and confusion, the courts below permitted the government — expressly and repeatedly — to "invite the jury to conflate the contribution evidence with evidence about the things of value that were actually at issue." App. 25a.

To "reward" an elected official with campaign contributions is not illegal — in fact, it is a protected feature of our democracy. *See Citizens United,* 558 U.S. at 359-60; *McCormick*, 500 U.S. at 272. Permitting the government to use evidence of such "rewards" to prove that other "things of value" were given the official not "to build a reservoir of goodwill" but as an impermissible "reward" would

unquestionably chill the exercise of the First Amendment right to make such contributions.

For better or worse, elections in the United States have become extraordinarily expensive, and candidates must raise greater and greater amounts of money to fund a successful campaign. For example, it has been estimated that the two major-party *Presidential* candidates in 2012 raised more than $2 billion. Jeremy Ashkenas et al., *The 2012 Money Race: Compare the Candidates*, N.Y. Times, http://elections.nytimes.com/2012/campaign-finance. As this Court put it:

> [C]ampaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done.

McCormick, 500 U.S. at 272. Allowing the government to put on evidence of concededly legal campaign contributions, and to expressly invite the jury to transfer the defendant's — again, concededly legal — intent to show that other things of value were given not "to build a reservoir of goodwill" but as an illegal *quid pro quo* or "reward," will chill the exercise of Americans' constitutional right to participate in the democratic process by "rewarding" elected officials with campaign contributions. This Court should make clear that this is not permissible.

CONCLUSION

Mr. Ring's jury was allowed to find honest services fraud without a showing of a *quid pro quo*, in violation of *Skilling*. At the same time, the government blurred, if it did not obliterate, the line between legal, constitutionally protected conduct and illegal political corruption by "invit[ing]" the jury to misuse evidence of lawful campaign contributions. This had a devastating impact on Mr. Ring's case, and would have the same effect on millions of people (including not only lobbyists, but also businesspersons) who make campaign contributions or who entertain officials or customers in the hope of influencing them legally. Petitioner Kevin Ring's petition for a writ of certiorari should be granted, and the decision below reversed.

Respectfully submitted,

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