No. 11-955

IN THE

Supreme Court of the United States

DON EUGENE SIEGELMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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BRIEF OF RICHARD F. SCRUGGS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SAMUEL ISSACHAROFF
RICHARD H. PILDES
Counsel of Record
Vanderbilt Hall
40 Washington Square So.
New York City, New York 10012
(212) 998-6377
pildesr@exchange.law.nyu.edu

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INTEREST OF *AMICUS CURIAE* [1]

The federal government is currently prosecuting Richard F. Scruggs for aiding and abetting honest services mail fraud, 18 U.S.C. § 1346, based on his otherwise protected political activity. Before *Skilling v. United States*, 130 S. Ct. 2896 (2010), Scruggs pled guilty to a one-count information that he "aided and abetted . . . a scheme and artifice to deprive the citizens of Mississippi to their intangible right to the honest services of the Public Official," a state court judge before whom Scruggs was party to a pending case. For Scruggs, the protected political activity was not a campaign contribution, but the endorsement to a United States Senator, his brother-in-law Trent Lott, of the state judge for the Senator's consideration as a potential recommendee for a federal district court judgeship. Under *Skilling*, Scruggs pled guilty to a non-existent crime.

Scruggs currently faces a hearing under 28 U.S.C. § 2255 at which he must overcome the federal government's theory that his political endorsement of a prospective judge is still a federal crime, but it is now the crime of aiding and abetting honest-services bribery. Scruggs's case highlights that the campaign contributions at issue in the Petition for Certiorari are not the only form of otherwise protected political activity at the state level that the federal government is now seeking to turn into the basis for honest-services bribery crimes.

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[1] No person or entity other than *amicus* and his counsel has made a monetary contribution to the preparation and submission of this brief. Counsel of record for the parties received timely notice of *amicus curiae's* intent to file and have consented to the filing of this brief. Letters of consent for the submission of this brief are on file with the Clerk.

Scruggs has a direct interest in the first two questions presented. This Court's resolution of whether state campaign and referenda contributions can be treated as alleged bribes at all under the honest-services law, and if so, what standard of proof is required to permit the federal government to transform these contributions into honest-services bribery, will have direct implications for the similar attempts of federal prosecutors to categorize other forms of state-level political activity, such as endorsements of judges for higher office, as federal crimes.

STATEMENT

The Petition raises important issues concerning the increasing use of vague, conflicting, and unsettled definitions of bribery in federal criminal prosecutions of state-level political activity. Federal anticorruption criminal prosecutions of state and local political officials have skyrocketed since the early 1980s. Before 1980, there were never more than 200 such prosecutions in a single year, but since 1985, there have been more than 900 prosecutions in a peak year and an average of more than 600. *See* Daniel H. Lowenstein, *When Is a Campaign Contribution a Bribe?*, *in Private and Public Corruption* 127, 129 tbl.6.1 (William C. Heffernan & John Kleinig eds., 2004) [hereinafter Lowenstein, *Campaign Contribution*]. Many of these federal prosecutions involve high-profile political figures, such as the prosecution of former Senator Ted Stevens, the currently pending prosecution of former Senator John Edwards, the prosecution of former Governor Donald Siegelman, or the prosecution of Richard Scruggs, one of the most prominent trial lawyers in the United States.

In a number of these cases, federal judges and others have criticized federal prosecutors for excessively ambitious zeal in their pursuit of criminal charges against high-profile public or political figures. As is well known, United States District Judge Emmet Sullivan cited for contempt three attorneys in the Department of Justice (DOJ) in the Stevens case for what Judge Sullivan called their "outrageous" failure to turn over to Stevens's defense counsel certain documents.[2] The DOJ indictment of John Edwards for the crime of receiving illegal campaign "contributions," for large payments two of his supporters made to Edwards's mistress, has been strongly criticized by experts in campaign-finance law as an example of prosecutorial overreaching.[3] That prosecution is based on a novel and expansive interpretation of the term "contribution" to a context far removed from the way that term has traditionally been understood in the campaign-finance laws. In many of these contexts, as in the Siegelman case, United States Attorneys that Presidents of one party have appointed initiate prosecutions of high-level political figures from the opposite party; allegations arise that the prosecutions have a partisan cast. Given the potential vagueness of the line between campaign contributions and bribes, these allegations are not surprising. As former professor of law and Ninth Circuit Judge John Noonan wrote in his comprehensive analysis of the issue: "Depending on the decision of the prosecutor and the will of the judges, many

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[2] *See In re Contempt Finding in United States v. Stevens*, 663 F.3d 1270, 1276 (D.C. Cir. 2011) (quoting Judge Sullivan).

[3] *See, e.g.*, John Schwartz, *Complex Case Ahead for Prosecutors*, N.Y. Times, June 4, 2011, at A11 (quoting several authorities).

contributions could be classed as bribes." John T. Noonan, Jr., *Bribes* 651 (1984). When it comes to core democratic activities, such as the soliciting and giving of campaign contributions, that is an intolerable situation.

Scruggs's case illustrates the way vagueness concerns continue to plague honest-services "corruption" prosecutions under 18 U.S.C. § 1346 despite this Court's effort in *Skilling v. United States*, 130 S. Ct. 2896 (2010), to root out such concerns. Federal prosecutors have responded to *Skilling* by replacing unconstitutionally vague honest-services fraud prosecutions of state officials and private actors, for deprivation of "intangible rights," with vaguely defined and expansive conceptions of "*quid pro quo* bribery" in honest-services "bribery" prosecutions. But if honest-services bribery convictions can rest on less than the "explicit promise" of a *quid pro quo* required under *McCormick v. United States*, 500 U.S. 257, 273 (1991), potential defendants will confront similar vagueness concerns with respect to "bribery" prosecutions under 18 U.S.C. § 1346 that this Court held unconstitutional with respect to "intangible rights" prosecutions in *Skilling*. Vague definitions of the *quid pro quo* reintroduce the same constitutional infirmity that the Court tried to stanch in *Skilling*.

Using expansive and loosely defined conceptions of "bribery" as an end-run around *Skilling* is particularly troubling when the alleged *quid*, as in the Siegelman and Scruggs cases, is otherwise valuable and common political activity, such as the making of campaign contributions, the petitioning of public officials, or the endorsement of candidates for public office. These kinds of protected political activity are often undertaken for a mix of motives, including self-

interested ones. As a result, the clarity and precision about what constitutes "bribery" under 18 U.S.C. § 1346 that is currently lacking in the lower federal courts must be provided, lest those engaged in core democratic processes be able to do so only at the sufferance of federal prosecutors.

Scruggs's case shows that this problem is not limited to the context of defining clearly the boundary between campaign contributions and bribery. The same problem is arising in federal prosecutions based on other forms of core First Amendment and democratic activity, such as endorsing candidates for federal judgeships. This Court's review is needed to ensure that such activity not subject citizens to the risk of criminal prosecution at the discretion of federal prosecutors invoking uncertain and imprecisely defined conceptions of honest-services "bribery" under 18 U.S.C. § 1346.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S REVIEW IS NECESSARY TO RESOLVE CONFUSION IN THE LOWER COURTS ABOUT THE PROPER APPLICATION OF FEDERAL CRIMINAL STATUTES THAT REGULATE CONDUCT AT THE HEART OF THE POLITICAL PROCESS

In recent decades, this Court has decided only two major cases that define the essential elements of the federal criminal law of extortion or bribery in the context of federal anticorruption prosecutions of state or local public officials. Both cases date to the early 1990s, in the initial stages of the substantial rise of federal prosecutions of this sort. Yet as lower courts and academic experts in this area have recognized, those two cases stand in considerable tension with

each other and have created ongoing uncertainty and conflicts in the lower courts over issues as fundamental as the appropriate boundary between core democratic political activity and criminal bribery. As the Petition of former Governor Siegelman indicates, this Court's return to these issues is necessary to resolve this tension and bring clarity, certainty, and predictability to this highly-sensitive area of the law of democracy—particularly given the ambitious use in recent years by federal prosecutors of the honest-services bribery law, 18 U.S.C. § 1341 and § 1346, and the federal funds bribery law, 18 U.S.C. § 666, to allege criminal bribery involving state and local officials based on otherwise protected political activity such as campaign contributions.

The first case, *McCormick v. United States*, 500 U.S. 257 (1991), held that a campaign contribution could be the basis for criminal extortion under the Hobbs Act, 18 U.S.C. § 1951, only if the context involved an "explicit *quid pro quo*." 500 U.S. at 271–74. This Court used a variety of exact, consistent formulations to specify the high and precise threshold that had to be crossed before solicitation of campaign contributions crossed the line into extortion. The Court required "an explicit promise or undertaking by the official to perform or not to perform an official act. . . . [so that] the official asserts that his official conduct will be controlled by the terms of the promise or undertaking." *Id.* at 273. This high and clear threshold was essential, in this Court's view, to ensure adequate breathing room for core political activity and fair notice of potential criminal liability. *Id.* at 272–73.

But a year later, the second case, *Evans v. United States*, 504 U.S. 255 (1992), also involving a cam-

paign contribution (in part) and the Hobbs Act, appeared to conclude that an explicit *quid pro quo*, sufficient to overcome the threshold *McCormick* set, was not required. *Evans* stated that the government "need only show that a public official has obtained a payment to which he was not entitled, *knowing that the payment was made in return for official acts*." 504 U.S. at 268 (emphasis added). Because this language suggests—or has been taken by some lower courts to suggest—that less than an explicit *quid pro quo* is required to establish extortion, the relationship between *McCormick* and *Evans* confounds this fundamental arena of the law of democracy and leaves federal prosecutors with excessive discretion.

Thus, as Professor Lowenstein, perhaps the leading academic expert on the law concerning campaign contributions and bribery, put it recently: "whether *Evans* actually modifies *McCormick*, and if so to what degree, is unclear." *See* Lowenstein, *Campaign Contribution*, *supra*, at 130.[4] Surveying the lower-court decisions, Professor Lowenstein concludes that some lower courts have reasoned that *Evans* did modify *McCormick* and "thereby have dissipated at least some of the clarity that seemed to have been obtained by the majority in *McCormick*." *Id.* at 149. Professor Lowenstein goes on to note: "The *quid pro quo* requirement has become even more elastic in the hands of some of the lower courts subsequent to *Evans*." *Id.* at 154; *see, e.g.*, *United States v. Hairston*, 46 F.3d

[4] As in the decision below, Pet. App. at 14a-16a, the lower courts have tended to assume that these precedents involving extortion and the Hobbs Act also define bribery under the general federal bribery statute, 18 U.S.C. § 201, the federal funds bribery statute, 18 U.S.C. § 666, and the honest-services fraud law as applied to bribery charges.

361, 365 (4th Cir. 1995) (holding that, after *Evans*, the *quid pro quo* requirement is "not onerous"); *United States v. Coyne*, 4 F.3d 100, 111 (2d Cir. 1993) (upholding bribery and extortion convictions on the view that "the jury was free to infer" a crime without proof of an explicit *quid pro quo*). Indeed, Professor Lowenstein observes that some lower courts have so watered down the *quid pro quo* requirement that it has become "all water." Lowenstein, *Campaign Contribution*, *supra*, at 155. As one of the leading casebooks in this area of law concluded in surveying recent case law, lower courts are:

> [T]orn between the desire to set forth clear standards for applying bribery-type offenses and the recognition that the only clear standard that suggests itself—requirement of a more or less explicit agreement between the parties that the gift or campaign contribution is made in exchange for favorable official action—fails to match normative intuitions about what is and is not corrupt conduct.

Daniel Hays Lowenstein, Richard L. Hasen & Daniel P. Tokaji, *Election Law: Cases and Materials* 665 (4th ed. 2008).

In addition, lower courts are uncertain whether the *McCormick-Evans* pair of cases creates a "special rule" for campaign contributions alleged to be bribes or a general rule for all bribery cases. *See, e.g.*, *United States v. Ganim*, 510 F.3d 134, 142–43 (2d Cir. 2007) (concluding that *McCormick* created a unique rule for "the special context of campaign contributions," while *Evans* established a different rule for extortion and bribery in other contexts) (opinion by Sotomayor, J.); *United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001) (concluding that "[w]e

are not convinced that *Evans* clearly settles the question" whether proof that campaign contributions constitute a bribe requires an express *quid pro quo*, while bribes through other means can be proven under a lesser standard); *United States v. Montoya*, 945 F.2d 1068, 1074 n.2 (9th Cir. 1991) (noting, in Hobbs Act case, that "we see no rational distinction between cash payments claimed by the official to be lawful campaign contributions or those alleged to be legitimate honoraria" for purposes of the proof necessary to establish a *quid pro quo*); *see generally* Norman Abrams, Sara Sun Beale & Susan Riva Klein, *Federal Criminal Law and Its Enforcement* 232 (5th ed. 2010) ("The prevailing view that *Evans* applies only to non-campaign contributions is difficult to reconcile with the fact that *Evans* itself arose out of a payment made to a county commissioner during his reelection campaign.").[5]

This confusion would be bad enough in an area as constitutionally and politically sensitive as the boundary between federal crimes and political activity. But the uncertainty and lack of precision that

[5] In an article published before the more recent expansion of federal prosecutions of state officials, Professor Lowenstein noted that uncertainty about the proper interpretation of federal bribery laws regulating political activity appeared to be offset by prudent prosecutorial discretion: "As a practical matter, the absence of cases raising these issues suggests that in the 'law' as applied, at least at the prosecutorial level, endorsements cannot be bribes." Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 811 (1985). As the ongoing prosecutions of Siegelman and Scruggs show, along with Professor Lowenstein's own later work, Lowenstein, *Campaign Contribution*, *supra*, at 131, the "law as applied" no longer provides the margin of comfort that Professor Lowenstein described in the mid-1980s.

plagues the law of federal bribery—because this Court has not addressed these issues since the early 1990s—is all the worse because it is directly at odds with this Court's later jurisprudence in related areas of federal criminal regulation of alleged political corruption. In these other areas, this Court has insisted that federal statutes define the boundary between criminal and non-criminal activity with clarity and precision, particularly in the area of alleged political corruption and when federal anti-corruption laws reach into the activities of state and local officials.

Thus, with respect to the "illegal gratuity statute," 18 U.S.C. § 201(c), this Court has held that the government must prove a precise link "between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 414 (1999). In rejecting the United States' position, *id.* at 405–06, that the statute required only a showing that a "gift was motivated, at least in part, by the recipient's *capacity to exercise governmental power or influence* in the donor's favor" (without the need to show that that gift was connected to a particular official act), this Court insisted that "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." *Id.* at 412.

With respect to the application of the federal mail-fraud statute to alleged state and local political corruption, *McNally v. United States*, 483 U.S. 350 (1987), held that 18 U.S.C. § 1341 had to be limited to the protection of property rights, given the essential role of clarity before state and local political activity

could be turned into federal crimes. As the Court concluded: "Rather than constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," the statute should not be read to reach deprivations of "intangible rights." *Id*. at 358–60. "If Congress desires to go further," this Court noted, "it must speak more clearly." *Id.* at 360. And in *Skilling*, of course, the Court concluded that Congress's attempt to criminalize fraudulent deprivations of "the intangible right of honest services" would "encounter a vagueness shoal" unless the statute were construed to reach only schemes to defraud that involve a bribe or kickback. 130 S. Ct. at 2907.

In all these more recent cases involving the expansive use by federal prosecutors of various federal anti-corruption statutes, the consistent theme is the overarching need for judicial decisionmaking to provide sufficient clarity and precision, in the absence of clear statutory text, as to ensure fair notice to potential defendants, avoid unbounded prosecutorial discretion, and limit federal overreaching. Yet this Court's uncertain precedents from the early 1990s leave the definition of "bribery" standing oddly outside these general concerns. The proper definition of bribery arises under three federal criminal statutes, all of which are used to prosecute alleged political corruption: the general federal bribery statute, 18 U.S.C. § 201, the federal funds bribery statute, 18 U.S.C. § 666, and the honest-services fraud law when used to prosecute alleged bribery, 18 U.S.C. § 1341 and § 1346. In the face of the uncertainty about how express or explicit a *quid pro quo* must be, and whether cases involving political activity, such as campaign contributions or judicial endorsements,

must be treated according to "special rules," and what this Court understands the proper relationship between *McCormick* and *Evans* to be, the definition of bribery remains plagued with exactly the kind of vagueness and uncertainty the Court has ruled out in virtually every other context of federal anti-corruption legislation.

Moreover, the Scruggs and Siegelman cases show exactly how federal prosecutors are exploiting this remaining pocket of vagueness. Both Scruggs and Siegelman initially were convicted or pled guilty to the vaguely defined crime of fraudulent deprivation of the intangible right of honest services. When that conviction and plea became unsustainable after *Skilling*, federal prosecutors repackaged both cases as honest-services bribery prosecutions. Both prosecutions involve otherwise protected political activity. In both, the government nonetheless disclaims the need to prove an express *quid pro quo* and instead rests on inferences and implications from actions that are otherwise not improper, let alone criminal, in themselves. In both, the critical questions are what standard of proof the government must meet when this kind of political activity is alleged to be a bribe and what evidence suffices to meet that standard. That this level of uncertainty exists about these critical questions at the intersection of democratic politics and bribery is troubling. That prosecutors in cases involving political activity should be able to circumvent the vagueness concerns *Skilling* identified by invoking vaguely defined conceptions of honest-services bribery that rest on inferences and implications compounds the concern.

In cases of alleged public corruption, *Skilling*'s cure of "honest services" vagueness by limiting 18 U.S.C.

§1346 to bribery and kickback schemes will be of limited effect unless the confusion and uncertainty in current bribery law are cured as well. To provide the clarity that this area of the law requires, to resolve the ongoing confusion and uncertainty regarding the relationship between *McCormick* and *Evans*, and to bring interpretation of the honesty-services bribery law into harmony with this Court's decisions involving other federal anticorruption criminal laws, the Court should grant the Petition.

II. THIS COURT'S REVIEW IS NECESSARY TO ENSURE ADEQUATE BREATHING ROOM FOR BASIC RIGHTS OF DEMOCRATIC PARTICIPATION IN THE FACE OF VAGUE CRIMINAL PROHIBITIONS

Vague conceptions of *quid pro quo* corruption in the context of the political process raise unique and profound constitutional concerns above and beyond the criminal law issues *Skilling* addressed. The vagueness concerns identified in *Skilling* have particular resonance when criminal statutes potentially impinge upon core democratic political activities, such as contributing to campaign committees or referenda funds. The ability to contribute to a preferred political candidate or cause stands, of course, at the highest rung of protected First Amendment activity. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (political contributions and expenditures "operate in an area of the most fundamental First Amendment activities"); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) ("Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression.").

Thirty years ago, in *Brown v. Hartlage*, 456 U.S. 45 (1982), this Court set aside on First Amendment grounds an overbroad application of Kentucky law that had led the state courts to overturn an election based on a candidate's allegedly illegal promise of certain benefits to voters. As this Court noted, democratic politics works through a complicated mix of high-minded ideals and self-interest: "We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare." *Id.* at 56. Accordingly, "[a]t the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." *Id.* at 52.

Brown set the stage for the Court's insistence that extending the reach of the criminal law to cover campaign contributions creates a statutory burden to "define[] the forbidden zone of conduct with sufficient clarity." *McCormick*, 500 U.S. at 273. In addition, the bargained-for official action at issue in criminal bribery prosecutions cannot be the customary application of democratic politics, as with the promise to reduce salaries in *Brown*, or even the commonplace and well-known activity of appointing a supporter to an open public position. "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.

In the constitutionally related context of petitioning the government, this Court has recognized the need to erect robust protections around democratic political activity as security against the overly expansive reach of criminal laws, such as the antitrust laws. "[I]t is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right 'to petition the Government for a redress of grievances,' to establish a category of lawful state action that citizens are not permitted to urge." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379 (1991) (citation omitted). For that reason, "[t]he federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government." *Id.* at 379–80.

Only the naïve would believe that private parties engage the political process for purely altruistic aims. Indeed, in protecting the right to petition the government from the overreach of the antitrust laws, the Court firmly held that it is "irrelevant" that "a private party's motives are selfish." *Id.* at 380. The Court explained that *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), "shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *City of Columbia*, 499 U.S. at 380 (quoting *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)). The resulting *Noerr-Pennington* doctrine turns on the need to prevent the misapplication of criminal law doctrines from one domain into the heart of constitutionally protected political activity; thus, antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena." *Noerr*, 365 U.S. at 141.

Further, the ability to contribute to a cause in a referendum, the alleged *quo* in Siegelman's case, has thus far resisted any constitutionally permissible regulation precisely because of its distance from the constitutionally necessary threat of corruption required to uphold even limitations on campaign contributions. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." (citation omitted)). To permit the loose application of the federal criminal laws in an area where states may not even regulate the contributions themselves would be hard to square with the First Amendment.

This Court has also recognized the federalism issues posed by overly expansive interpretations of federal anticorruption statutes, written in highly general terms, that do not specifically address the difficult tradeoffs involved in determining explicitly where the boundary between democratic politics and crime should lie. *See, e.g.*, *McNally*, 483 U.S. at 360. Not surprisingly, for example, states have drawn the line over access to the political process in different places. Oregon, for example, expressly excludes properly-reported campaign contributions from its state bribery laws. Or. Rev. Stat. §§ 162.005, 162.015. Texas, by contrast, includes campaign contributions but explicitly requires "direct evidence" of an "express agreement" to take (or fail to take) a "specific exercise of official discretion"—and that the contribution be the but-for cause of the official's action. Tex. Penal Code § 36.02. The Texas law expressly precludes prosecutions that rest on "factual inferences" rather than direct evidence. *Id.*; *see generally* Lowenstein, *Campaign Contribution*, *supra*, at 140–42 (noting that "[a] few states have specifically exempted many

campaign contributions from bribery offenses," and concluding that "there is some variety among the states with respect to the law of bribery"). Yet the more expansively federal prosecutors are permitted to redefine the *quid pro quo* requirement in statutes like 18 U.S.C. § 1346 to reach ordinary campaign contributions, even after *McNally* and *Skilling*, the more that the highly general honest-services law will subordinate contrary state choices about how to treat campaign contributions. Regardless whether Congress could step in to nationalize and criminalize the entire domain of state campaign contribution laws, it is clear that Congress has not done so. *See, e.g.*, *McCormick*, 500 U.S. at 271–74 (finding that Hobbs Act does not constitute a sufficiently clear statement to justify criminalizing campaign contributions beyond those that rest on an explicit promise and the compromise of official conduct).

Cases such as the continued prosecution of former Governor Siegelman illustrate that the vagueness concerns identified in *Skilling* persist—and they persist in an area of heightened constitutional sensitivity. These concerns endure with respect to honest-services bribery prosecutions in the context of political activity, like campaign contributions, because of the confusion regarding the standards that govern precisely what constitutes an illicit *quid pro quo.* Yet traditionally, the more that vague criminal laws impinge upon constitutionally-protected political activity, the greater the clarity of the boundary this Court has required to be drawn between protected and proscribed activity. *See, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of con-

stitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) ("[T]he vice of unconstitutional vagueness is further aggravated where . . . the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." (quoting *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961))); *Smith v. California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

In this domain, the values reflected in the vagueness doctrine are important not just to ensure fair notice, but to limit the risk of excessive prosecutorial discretion regarding politically-sensitive activity. Indeed, this Court has noted that "perhaps the most meaningful aspect of the vagueness doctrine" is its role in limiting overly broad delegations to prosecutors and other officials when the exercise of constitutional rights is at stake. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). *See also Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications."). The same concerns about vagueness that led this Court in *Skilling* to limit 18 U.S.C. § 1346 to bribery and kickback schemes provide reason to ensure that those same concerns not creep back into the statute's application through loose, uncertain, and shifting definitions of bribery.

These principles regarding the intersection between vagueness concerns, protected political activity, and federal criminal law further suggest that the Court should grant the Petition and bring much needed clarity to the boundary between political activity and crime.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted.

SAMUEL ISSACHAROFF
RICHARD H. PILDES
Counsel of Record
Vanderbilt Hall
40 Washington Square So.
New York City, New York 10012
(212) 998-6377
pildesr@exchange.law.nyu.edu

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