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 THE INSTITUTE FOR FREE SPEECH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PAUL DAVIS COOPER
Counsel of Record
COOPER MASTERMAN, PLLC
1717 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 866-0171
davis@coopermasterman.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Institute for Free Speech is a nonprofit dedicated to advancing First Amendment rights, in particular political-speech rights, through litigation, communication, education, and related activities. The issues presented in this case are of vital concern to the Institute. Campaign contributions are core political speech. The threat of bribery prosecutions chills this speech. To prevent further prosecution of core speech, the Court should grant this Petition and provide the long-needed clarification that criminal charges based on campaign contributions require proof of nothing less than a clear and unambiguous quid pro quo.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal agents spent months trying doggedly to cause Alexander "P.G." Sittenfeld to commit a federal crime. This unconstitutional prosecution ultimately led to a Presidential pardon. But it leaves Sittenfeld with baseless felony convictions. And it starkly illustrates the need for clarity on the appropriate limits of bribery law, which many distinguished jurists have called for—including members of this Court and every member of the panel below.

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[1] The Institute certifies under Supreme Court Rule 37.6 that no counsel for any party authored this brief in whole or in part, that no party or party's counsel made a monetary contribution to fund its preparation or submission, and that no person other than the Institute or its counsel made such a monetary contribution. The Institute further certifies under Rule 37.2 that counsel of record for all parties received timely notice of the intent to file this brief.

Sittenfeld, a Cincinnati Councilmember, mounted a bid for the mayor's seat. That process involves an activity at the heart of our political system: campaigning, which itself involves gathering funds from the constituents whom the candidate promises to serve. This activity enjoys constitutional protection. Indeed, "[t]he First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office." *F.E.C. v. Cruz*, 596 U.S. 289, 302 (2022) (internal quotation marks omitted). Constituents express their political positions by contributing to campaigns, which in turn provide information that enables constituents to decide who should represent them.

Imposing criminal penalties based on campaign contributions, as the Government endeavored to do here, chills this fundamental First Amendment activity. As Judge Murphy pointed out below, political candidates of all stripes make statements like "Donate to my campaign today because," for example, "I will vote to repeal the Affordable Care Act if elected. Together we can overturn this law." Pet.App.57a. Under the decision below, however, such a statement could constitute a federal crime. "Real-world evidence suggests" that political groups and donors of all sizes will simply stop exercising their constitutional rights of political speech as a result. Br. of The Institute for Free Speech as *Amicus Curiae Supporting Pet'r* 14–20, *Blagojevich v. United States*, 138 S. Ct. 1545 (2017) (No. 17-658). The decision below also creates serious problems of due process, and, in the case of state and local politics, of federalism. The federal "prosecution of local officials for acts of public

corruption" has in fact long been recognized as "perhaps the most sensitive area of potential federal-state conflict." Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L. J. 1171, 1172 (1977) ("Ruff").

This Court has forestalled these problems, while leaving room for legitimate bribery prosecutions, in multiple contexts. Most pertinent here is the Court's construction of the Hobbs Act in *McCormick v. United States*, 500 U.S. 257 (1991), and *Evans v. United States*, 504 U.S. 255 (1992). Under those cases, there is no debate that the Government needed to prove a quid pro quo between Sittenfeld and a purported donor, *i.e.*, a campaign contribution in exchange for a public favor, and that this quid pro quo must have been "explicit." *McCormick*, 500 U.S. at 273. What "explicit" means, however, has proven to be unclear. Some lower-court decisions correctly conclude that an "explicit" quid pro quo must be clear and unambiguous: there will be a direct connection between the quid (the campaign contribution) and the quo (the promised official favor), and the connection will be so clearly conveyed in word or deed that the exchange cannot be interpreted as anything other than a bribe. *See, e.g.*, *United States v. Blandford*, 33 F.3d 685, 696 & n.13 (6th Cir. 1994). Yet other decisions—even from within the same circuit, as in this case—incorrectly hold that the jury may "infer" an unambiguous promise from ambiguous evidence. Pet.App.21a.

A growing "chorus of judges" have asked this Court "to revisit" the *McCormick* line of cases and

provide the guidance necessary to ensure that public servants are not prosecuted for vital constitutional conduct. *United States v. Householder*, 137 F.4th 454, 491 (6th Cir. 2025) (Thapar, J., concurring). The Court should take this opportunity to clarify that the exacting liability standard announced in *McCormick* entails an equally exacting standard of proof: an explicit quid pro quo requires clear and unambiguous proof. Nothing less satisfies the First Amendment, Due Process Clause, and principles of federalism.

ARGUMENT

I. THIS CASE DEMANDS REVIEW.

This is the rare case where all three judges on the panel below have effectively asked that their decision be overturned. Bound by prior circuit precedent—which had construed the *McCormick* standard not to require clear and unambiguous proof of a bribe—Judge Nalbandian held for the two-judge majority that the evidence sufficed to sustain Sittenfeld's bribery convictions even though it was unclear and ambiguous. *See* Pet.App.23a–31a. At the same time, Judge Nalbandian noted that

> whether [courts] ought to require more of the government given the First Amendment interests and the realities of our political system is a question for the Supreme Court. At this point, *McCormick* and *Evans* are nearly 35 years old and it may be time for the Court to revisit or refine the doctrine.

Pet.App.27a n.8. Concurring, Judge Murphy "agree[d] with Sittenfeld that the current reading of the Hobbs Act raises First Amendment concerns" and

invited Sittenfeld to "as[k] the Supreme Court to reassess the Act's scope in light of three decades' worth of precedent finding campaign donations entitled to strong First Amendment protection." Pet.App.68a–69a. The third panel member, Judge Bush, dissented because, properly read, *McCormick* and ensuing cases already foreclosed Sittenfeld's convictions. *See* Pet.App.99a–103a. He nevertheless agreed that "further Supreme Court guidance would help lower courts, particularly for cases like this one where there is no unambiguous evidence of a quid pro quo." Pet.App.100a.

Simply put, every member of the panel below had misgivings about the convictions the panel upheld. In voicing those misgivings, they joined the chorus of judges calling out the confusion that the *McCormick* doctrine as wrought. That chorus has included multiple Justices of this Court. *See Silver v. United States*, 141 S. Ct. 656, 656–57 (2021) (Mem.) (Gorsuch, J., dissenting from denial of certiorari); *Ocasio v. United States*, 578 U.S. 282, 300–01 (2016) (Breyer, J., concurring); *Evans*, 504 U.S. at 285–87 (Thomas, J., dissenting). And it has continued since. *See Householder*, 137 F.4th at 491 (Thapar, J., concurring).

Only this Court can provide uniform doctrinal clarity. It can and should do so here.

II. *McCORMICK* REQUIRES CLEAR AND UNAMBIGUOUS PROOF OF A BRIBE.

In *McCormick*, this Court held that campaign contributions can become illegal bribes "only if," as relevant here, "the payments are made in return for

an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. at 273. The Court framed this holding as a matter of statutory interpretation. Like Sittenfeld, McCormick had been charged under the Hobbs Act, which prohibits "the obtaining of property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b)(2). As the Court explained,

> 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."

McCormick, 500 U.S. at 272. Thus, the Court emphasized in its following Term, "the requirement that the payment must be given in return for official acts"—that is, the requirement of an explicit quid pro quo—"is derived from the statutory language 'under color of official right,' which has a well-recognized common-law heritage that distinguished between payments for private services and payments for public services." *Evans*, 504 U.S. at 268 n.20. Courts also enforce this requirement as an "implicit element" of federal-program bribery (the basis for Sittenfeld's other conviction) when campaign contributions are involved. *See, e.g.*, *United States v. Benjamin*, No. 21-CR-706, 2022 WL 17417038, at *13 (S.D.N.Y. Dec. 5,

2022); *United States v. Donagher*, 520 F. Supp. 3d 1034, 1042–45 (N.D. Ill. 2021) (explaining that *McCormick* establishes a general rule for interpreting criminal statutes).

Part of courts' confusion with the *McCormick* doctrine is that it appears to be "made up." *Evans*, 504 U.S. at 286 (Thomas, J., dissenting). By its plain terms, the Hobbs Act "criminalizes 'extortion,'" not bribery. *Householder*, 137 F.4th at 490 (Thapar, J., concurring). Extortion occurs "where an official makes a victim of the payor by forcing him to fork over the money," whereas bribery "requires two willing partners in crime." *Ibid.*; *accord* Pet.App.59a–62a (Murphy, J., concurring). To be sure, the Court could also grant certiorari here to reconsider the doctrine entirely—and thus clarify the extent to which the Hobbs Act and related statutes reach bribes at all, explicit quid pro quo or no. To whatever extent the Government may continue to use the Hobbs Act to prosecute alleged bribes, however, *McCormick* must still be clarified to prevent the prosecution of normal campaign contributions.

Although *McCormick* did not define the term "explicit," its relevant parameters are readily apparent. The word meant then what it means now: an "explicit" agreement is "not obscure or ambiguous." *Blandford*, 33 F.3d at 696 n.13 (quoting BLACK'S LAW DICTIONARY 579 (6th ed. 1990)) (cleaned up). Even if such an agreement is not expressly stated, it must be "[*c*]*lear in understanding*." *Id.* (quoting BLACK'S LAW DICTIONARY 579); *accord, e.g.*, *Explicit*, MERRIAM-WEBSTER, https://bit.ly/41l8Ah2 (last visited Aug. 13, 2025) (defining "explicit" as "fully revealed or

expressed without vagueness, implication, or ambiguity: leaving no question as to meaning or intent"). Several courts have accordingly recognized that "explicit" must mean "clear and unambiguous" in this context. *See, e.g.*, *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992); *United States v. Davis*, 841 F. App'x 375, 379 (3d Cir. 2021); *Donagher*, 520 F. Supp. 3d at 1045; *Benjamin*, 2022 WL 17417038, at **9–10; *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993).

That definition follows not just from dictionaries, but also from *McCormick*'s particular quid-pro-quo requirement itself. A quid pro quo is "a specific intent to give or receive something of value *in exchange* for an official act." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999) (emphasis in original). To prove a quid pro quo, then, the Government must establish more than a general intent to give or receive something of value. The Government must establish "a link between the item of value received and an understanding that the public official receiving it is to perform official acts on behalf of the payor when called upon." *United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir. 2009). That link—the specific intent to buy an official act with a campaign contribution—"distinguish[es] between an elected official responding to legitimate lobbying," which does not violate federal anti-corruption law, "and a corrupt politician selling his votes to the highest bidder," which does. *Id.*

Under *McCormick*, moreover, that intent must be *explicit*. Yet if *McCormick* required only some form of circumstantial evidence to prove the requisite intent,

no matter how unclear or ambiguous, that additional requirement would be meaningless. That cannot be what the Court meant. The Court has imposed quid-pro-quo requirements in other contexts. *See, e.g.*, *McCutcheon v. F.E.C.*, 572 U.S. 185, 192 (2014). In this context, the quid pro quo must be explicit.

That additional requirement means something. Specifically, it establishes how the requisite intent must manifest and, thus, what type of evidence the Government needs. Under *McCormick*, each element of a corrupt bargain—the quid, the pro, and the quo—must be clearly established. In *McCormick* itself, the alleged quid and the quo were clear: a state legislator received campaign contributions from a group of doctors and later sponsored legislation favorable to the doctors. *See* 500 U.S. at 260. That evidence alone could not establish a quid pro quo, however, because "*McCormick*'s point was that the *pro* itself," the agreement to exchange a campaign contribution *for* an official action, "must be clear and unambiguous," too. *Benjamin*, 2022 WL 17417038, at *10. The alleged agreement must therefore be "characterized by more than temporal proximity" between the quid and the quo, or by "winks and nods," or by "vague phrases like 'let me see what I can do.'" *Id.* That sort of evidence might suggest an *implicit* agreement interpretable as a quid pro quo. But implicit is, obviously, the antonym of "explicit."

The exacting liability standard announced in *McCormick* thus entails an exacting standard of proof. Whether the Government seeks to prove a quid pro quo through express statements or through conduct, under *McCormick* the evidence may leave no doubt

that a campaign contribution was made and accepted as an exchange for an official act and not for any other purpose. That is what it takes to prove, beyond a reasonable doubt, a specific *and explicit* intent to engage in a corrupt bargain.

Such a showing may be relatively simple in cases of express agreements. An official should not be able to invoke *McCormick* if, for example, he promises a businessowner that he will award the business a public contract in exchange for a campaign donation, the businessowner says "Great," and a check in the agreed-upon amount arrives the next day. Where the Government lacks such express evidence, however, the agreement must be no less clear. The official might still be liable if the above deal were sealed with a handshake rather than verbal assent. But the federal bribery statutes do not broadly prohibit public officials from meeting with constituents, discussing how they might be able to serve those constituents, and accepting campaign contributions from those constituents thereafter. Liability thus does not attach if the official promises general support, or if the promise is not clearly connected to contribution offer, even if a contribution were to follow. If a quid pro quo could be found in such an exchange, it is at best an ambiguous one, discernible only by implication. *See, e.g.*, *id.* at *11 (describing scenarios on either side of the *McCormick* line).

In short, only proof of a clear and unambiguous bribe can establish the "explicit" quid pro quo that *McCormick* requires. The Government's proof in this case was anything but. By allowing Sittenfeld's convictions to stand under existing circuit law, the

panel below thus perpetuated a misapplication of *McCormick*. It also perpetuated serious constitutional problems, which the opinions below duly recognize.

III. SITTENFELD'S CONVICTIONS SHOW THE CONSTITUTIONAL PROBLEMS IN CURRENT FEDERAL BRIBERY LAW.

McCormick's explicitness requirement was driven by constitutional concerns of the most fundamental sort. Congress could not have meant to define as "extortion" any official action taken for a constituent "shortly before or after campaign contributions are solicited and received from" that constituent. *McCormick*, 500 U.S. at 272. "To hold otherwise," the Court explained,

> 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. This concern relates to the nature of our representative democracy and thus is literally "constitutional." And though not expressly invoked in *McCormick*, several constitutional principles and provisions address just this concern: in particular, the First Amendment, Due Process Clause, and, in cases involving state and local officials, federalism. To the extent that Sittenfeld's statutes of conviction cover bribery, any interpretation of those statutes—like the one applied here—will violate these protections if it subjects local officials to prosecution over anything

less than a clear and unambiguous quid pro quo.

First Amendment. Representative democracy is built on political campaigns—and on the freedom to fund them. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976). The ability of those candidates to inform the citizenry of their positions is equally essential. And it requires funds. The *McCormick* Court had this dynamic clearly in mind:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns 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.

500 U.S. at 272. This give-and-take serves both informational and expressive functions. Constituents learn from campaigns what their prospective representatives "intend to do" for them. *Id*. Meanwhile, contributing to campaigns is an exercise of the contributor's own "expressive and associational rights," namely to express support for and to associate with the candidate and his positions. *McCutcheon*, 572 U.S. at 204; *see also F.E.C. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 486 (2007) (opinion of Scalia, J.) ("[C]ontributing money to, and spending money on

behalf of, political candidates implicates core First Amendment protections."). It is for these reasons that, as this Court has repeatedly stated, "[t]he First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Cruz*, 596 U.S. at 302 (internal quotation marks omitted).

Broad constructions of anti-corruption statutes threaten these essential freedoms. Anyone who has attended a campaign event, seen a campaign ad, or received campaign mail—in short, anyone who has had any contact with a political campaign—will know the truth of *McCormick*'s observation that candidates must continually request money and that they do so to support "what they intend to do." 500 U.S. at 272. On a more retail level, "conscientious public officials arrange meetings for constituents . . . all the time." *McDonnell v. United States*, 579 U.S. 550, 575 (2016). Indeed, "[t]he basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns," from "the union official worried about a plant closing" to "the homeowners who wonder why it took five days to restore power to their neighborhood after a storm." *Id*. (emphasis in original). Federal anti-corruption law would "cast a pall of potential prosecution over these" common, constitutionally protected, and democratically essential "relationships" if prosecutors could fashion an illegal quid pro quo merely from an act of protected expression (a campaign contribution) and an act of constituent service. *Id*. "Officials might wonder whether they could respond to even the most

commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse." *Id*.

This concern is not hypothetical. Federal prosecutors have frequently tried to mount anti-corruption cases on such facts, identifying a purported "quid" and "quo" and effectively assuming the "pro," *i.e.*, a corrupt intent to exchange one for the other. They have just as frequently been rebuffed. In *McDonnell*, "White House counsel who worked in every administration from that of President Reagan to President Obama," plus more than eighty state attorneys general from across the political spectrum, "warn[ed]" that such a "breathtaking expansion of public-corruption law would likely chill federal officials' interactions with the people they serve and thus damage their ability effectively to perform their duties." *Id*. (internal quotation marks omitted). This Court agreed. *See id*. at 574–77. In *Sun-Diamond*, "counsel for the United States maintained at oral argument that a group of farmers would violate [18 U.S.C.] § 201(c)(1)(A)," which prohibits gifts to certain federal officials in exchange for official acts, "by providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy—so long as the Secretary had before him, or had in prospect, matters affecting the farmers." 526 U.S. at 407. The Court once again held that such facts could not establish an illegal quid pro quo. And that was true even without the unique constitutional concerns present in this case and in *McCormick*, where the alleged "quid" is an otherwise protected campaign

contribution. Former federal prosecutors have rung a similar alarm here. *See* Br. of *Amici Curiae* Former Federal Public Corruption Prosecutors in Supp. of Def.-Appellant, *United States v. Sittenfeld*, No. 23-3840 (6th Cir. Dec. 18, 2023), ECF No. 35.

The lesson of these cases is that a corrupt exchange cannot simply be assumed; an alleged "quid" and "quo" do not necessarily indicate a "pro." That is only more true with campaign contributions. Given the paramount First Amendment interests involved in such cases, "[a]ny regulation" of the political process must specifically "target" a quid pro quo. *McCutcheon*, 572 U.S. at 192; *see also, e.g.*, *F.E.C. v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 498 (1985); *Buckley*, 424 U.S. at 45–47. This requirement is what separates unlawful "corruption," on the one hand, from "a central feature of democracy" on the other—namely "that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon*, 572 U.S. at 192; *see also United States v. Giles*, 246 F.3d 966, 972 (7th Cir. 2001) ("[C]ampaign contributions often are made with the hope that the recipient, if elected, will further interests with which the contributor agrees; there is nothing illegal about such contributions.").

Moreover, where the regulation at issue is a criminal one, the Government may not simply target the "appearance" of a quid pro quo, as it has been allowed to do for other campaign-finance regulations. *McCutcheon*, 572 U.S. at 192. Rather, under *McCormick*, the Government must target an "*explicit*"

quid pro quo, and only an explicit quid pro quo. *McCormick*, 500 U.S. at 273 (emphasis added). And that must be so. The threat of criminal prosecution "bears many of the marks of a prior restraint," the archetypal form of an unconstitutional speech restriction, "for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability." *Multimedia Holdings Corp. v. Cir. Ct. of Fla., St. Johns Cnty.*, 544 U.S. 1301, 1304 (2005).

The protection offered by this standard would be meaningless if the standard were too easy to meet—in other words, if the Government could prove an explicit quid pro quo by implication. If, for example, the Government could establish criminal bribery through a strained interpretation of disconnected phrases in a conversation between candidate and campaign contributor, then this Court's concerns, voiced throughout the above opinions, would manifest. Such conversations would be less likely to occur (at least in anything but highly guarded form), depriving citizens both of their access to their elected representatives and of their ability to exercise their First Amendment rights to support their candidates of choice on an informed basis.

Campaign contributions lose First Amendment protection only when made in a corrupt exchange for an official act, that is, only when they cross the line from an expression of policy support to the purchase of a policy commitment. And only by insisting that the Government prove, clearly and unambiguously, that a campaign contribution did cross that line can courts preserve the vital First Amendment rights implicated

in cases like this one.

Due Process. The Due Process Clause generally requires that criminal statutes provide "fair warning" of what they prohibit. *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Efforts to criminalize ordinary politics inevitably run headlong into this principle.

The fair-warning rule has three doctrinal "manifestations." *United States v. Lanier*, 520 U.S. 259, 266 (1997). First is the rule that a criminal statute is unenforceable if its terms are "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.* (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). This rule against vagueness also prevents "arbitrary enforcement," *i.e.*, efforts to capitalize on loose standards and thereby prosecute chosen targets. *Johnson v. United States*, 576 U.S. 591, 595 (2015). Second is the rule that criminal statutes must be strictly construed, commonly known as the rule of lenity, ensuring fair warning and foreclosing vague interpretations. *See Lanier*, 520 U.S. at 266. And third, courts may not supply missing clarity through "judicial gloss" and then apply a criminal statute "to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* In all cases, the "touchstone" is whether it was "reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267.

The quid-pro-quo requirement prevents federal anti-corruption provisions from becoming traps for the unwary. Indeed, the need for fair warning is especially acute in cases like this one. As seen, a basic

premise of representative politics is that officials will hear from and serve their constituents, who will in turn support those officials' campaigns, as the Constitution entitles them to do. Since these sorts of exchanges happen every day, candidates need a bright line to delineate the lawful, protected exchanges on which representative democracy subsists from the types of exchanges that might subject them to criminal prosecution. That line is a quid pro quo. *See, e.g.*, *McCutcheon*, 572 U.S. at 192. And in cases like this one, the line is an *explicit* quid pro quo. Allowing public officials to be criminally prosecuted for accepting campaign contributions based on anything less than an explicit quid pro quo would contravene all the fair-warning principles above.

This Court has been attuned to this very problem in several cases already surveyed herein. In *Sun-Diamond*, the Government had asserted that it did not need to prove a "connection" between an alleged gift and "a specific official act" and, instead, could establish the necessary quid pro quo merely by characterizing the gift as an "effort to buy favor or generalized goodwill from an official who" may "be *in a position to act* favorably to the giver's interests." 526 U.S. at 405 (internal quotation marks omitted). As the Court noted, that interpretation would produce a host of "peculiar results"; even "token gifts" for official visits might generate liability, since offerings are generally made to establish goodwill and officials are generally in positions to aid the offeror. *Id.* at 406–07. And if "the giving of gifts by reason of the recipient's mere tenure in office constitutes a violation, *nothing but the Government's discretion*"

would prevent such examples "from being prosecuted." *Id.* at 408 (emphasis added). The ultimate result would be a grave risk of "arbitrary enforcement." *Johnson*, 576 U.S. at 595.

The *McDonnell* Court similarly warned against "standardless" interpretations under which "public officials could be subject to prosecution, without fair notice, for the most prosaic interactions." 579 U.S. at 576 (cleaned up). Most pertinent among these cases, however, is once again *McCormick* itself. First Amendment problems aside, any effort to convert a campaign contribution into criminal bribery absent an explicit quid pro quo—and thus to criminalize conduct that not only "has long been thought to be well within the law," but also that "in a very real sense is unavoidable" in politics—"would require statutory language more explicit than the Hobbs Act contains." *McCormick*, 500 U.S. at 272–73. In keeping with the rule of lenity, the Court declined to read any such language into the statute. Rather, the Court drew the line between normal politics and culpability where "men of common intelligence" would draw it: at a quid pro quo. *Lanier*, 520 U.S. at 266 (cleaned up). And to make sure the "forbidden zone" was defined "with sufficient clarity," the Court required that the quid pro quo be explicit. *McCormick*, 500 U.S. at 273.

This requirement would lose its fair-warning value if the Government could satisfy it with anything less than proof of a clear and unambiguous bribe. As the *McCormick* Court agreed, "[a] moment's reflection should enable one to distinguish, at least in the abstract," what constitutes a "prohibited exchange": "a public official may not demand payment as

inducement for the promise to perform (or not to perform) an official act." *Id.* (quoting *United States v. Dozier*, 672 F.2d 531, 537 (5th Cir. 1982)). If liability could attach to exchanges less clear than that, the line between a constitutionally protected interaction and a potential prison sentence will not be the matter of a moment's reflection, but of a highly fraught "guess." *Lanier*, 520 U.S. at 266 (cleaned up). And given that *McCormick*, fairly read, does not permit a conviction to stand on anything less than proof of a clear and unambiguous bribe, any lesser standard would violate the third manifestation of the fair-warning rule. Courts may not retrofit statutes to cover "conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Id.* As this case demonstrates, however, that is what courts are doing absent this Court's further guidance.

Federalism. Finally, every federal prosecution of a state or local official raises potential federalism concerns. State and local governments have their own "prerogative[s] to regulate the permissible scope of interactions" between officials and constituents. *McDonnell*, 579 U.S. at 576. This Court has, accordingly, often declined to construe federal statutes "in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards of good government for local and state officials." *Id.* at 577 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)) (internal quotation marks omitted). Nevertheless, the risk that federal prosecution will become a tool of good-government oversight has long been recognized, *see* Ruff, *supra*, at 1172, 1228, and has only increased

as the number of federal prosecutions of state and local officials has grown, *see, e.g.*, *Evans*, 504 U.S. at 290 (Thomas, J., dissenting) (observing that "the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials").

When properly applied, *McCormick*'s explicitness requirement provides the clarity necessary to ensure that federal anti-corruption law does not "affect the federal balance" more than Congress "in fact . . . intended." *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543–44 (2002) (cleaned up). A quid pro quo that is clear and unambiguous is unmistakably within the zone of conduct that Congress sought to prohibit. A quid pro quo that can only be proven by implication is not. If proving a bribery charge requires squinting at snatches of a conversation between a contributor and candidate and choosing a corrupt interpretation over an innocent one, that is a telltale sign that a prosecution is enforcing not the letter of the Hobbs Act or another federal statute, but a federal concept of good government. Beyond clear violations of federal law, what constitutes good campaign practice within a particular state or locality is for those state and local officials to decide and enforce.

* * *

In sum, several bedrock constitutional principles fortify the proper reading of *McCormick*: in the context of campaign contributions, an unlawful quid pro quo exists only where the evidence leaves it clear and unambiguous that the contribution was made

specifically in exchange for an official favor. Allowing a conviction to stand on ambiguous evidence chills First Amendment activity, violates Due Process principles of fair warning, intrudes on the states' traditional role in setting standards for state and local government, and, in this case, has resulted in the conviction of an innocent person. The Court should remove the threat *McCormick* poses to core political speech and provide clarity on the limits of federal bribery law, which members of this Court have long recognized are sorely needed.

CONCLUSION

The Court should grant Sittenfeld's Petition for a Writ of Certiorari and reverse the decision below.

Respectfully submitted,

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PAUL DAVIS COOPER
Counsel of Record
COOPER MASTERMAN, PLLC
1717 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 866-0171
davis@coopermasterman.com

Counsel for Amicus Curiae