No. 09-182

In The
Supreme Court of the United States

DON EUGENE SIEGELMAN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*

The undersigned are Professors of Law whose scholarship addresses constitutional issues under the First Amendment. Apart from other aspects of this case involving the fair administration of justice in the federal system, the undersigned wish to underline that important First Amendment (as well as Fifth Amendment due process) interests would be served by the Court's addressing the issues stated above.[1]

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than counsel for *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

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ISSUES PRESENTED

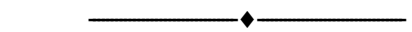
Does an indictment and prosecution under the federal "honest services" or "bribery" statutes burden the nation's long tradition of candidates raising funds from others and place a chilling effect on the First Amendment right to contribute to political campaigns, if conviction is permitted (a) without any express *quid pro quo* connection between the official act and the campaign contribution, or (b) without carefully delineated boundaries of the evidence required from which the finder of fact may infer that an explicit agreement has been reached, and (c) without independent appellate review of these factual issues? Do the statutes, as interpreted by the court below, violate the Due Process Clause because they fail to provide adequate notice and encourage discriminatory enforcement? Should the "honest services" and "bribery" statutes be construed to require an express agreement in order to avoid unnecessary resolution of these First Amendment and Fifth Amendment questions?

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a person who desired a political appointment, and a public official who (1) wanted a contribution to an issue campaign that he supported and (2) appointed the contributor to the desired position after the contribution was received. The Eleventh Circuit ruled that even though no express agreement was made between the contributor and the political official, the jury could infer that, on the evidence presented, they had "agreed to a deal," and that while "the jurors were free to give it a different construction, they did not."

The First Amendment protects the right to contribute to political causes and the right of recipients to solicit such contributions and spend the funds in furtherance of their candidacy. The Fifth Amendment requires that criminal laws (a) provide fair notice so that reasonable people may understand what conduct is prohibited and (b) establish guidelines to prevent discriminatory law enforcement. It is important that this Court consider whether the federal "bribery" and "honest services" statutes, or the First and Fifth Amendments, require an express *quid pro quo* commitment between contributors and recipients of political contributions before their actions can be made criminal, or, if not an express agreement, what quality and quantity of evidence is needed to permit a jury to infer that an "explicit"

agreement existed.[2] Further, the Court should determine whether trial judges, courts of appeal, and this Court should conduct an independent review of the record to assure that speech prohibited by the statutes falls outside the protection of the First Amendment. Otherwise, government officials who act to benefit a contributor, knowing that the contributor desired such an act to take place, and contributors who have been beneficiaries of sought-after political actions run the serious risk of being prosecuted and convicted. These uncertainties also give a dangerously spacious latitude to prosecutors in selecting, for whatever reasons, those politicians and contributors whom they desire to silence, and encourage the finders of fact to do likewise.



[2] The federal funds bribery statute bars the taking of a bribe by an official of a state agency that received over $10,000 in federal funds annually. 18 U.S.C. § 666. Honest services mail fraud bars mailing a letter in connection with a scheme to defraud a state agency of an official's honest services in the performance of his official duties. 18 U.S.C. §§ 1341 and 1346.

REASONS FOR GRANTING THE PETITION

A. The Indictment and Prosecution of Government Officials Under the Statutes in This Case Without Requiring Significant Limits on Their Coverage Produce a Significant Burden and a Chilling Effect on a First Amendment Right

1. Factual Setting

This case began when Don Siegelman campaigned for Governor of Alabama on a platform that included establishing a lottery to raise money for education. Taken most favorably to the prosecution, the evidence showed the following: An assistant of Governor Siegelman's, Nick Bailey, testified that after the successful campaign, he was present when Siegelman had a conversation with Eric Hanson, a lobbyist for HealthSouth Corporation (HealthSouth) – the healthcare service provider of which Richard Scrushy was Chairman and Chief Executive Officer. Siegelman stated that in light of a contribution Scrushy made to his opponent in the election, Scrushy would need to contribute $500,000 to the lottery campaign to "make it right." Tr. 500-02.

Bailey testified that after a meeting between Governor Siegelman and Scrushy, Siegelman showed Bailey a check for $250,000 that Scrushy had given him, made out to the Alabama Education Lottery Foundation (AELF), and stated that Scrushy was "halfway there." Tr. 504-07, 509-10. When Bailey asked Siegelman what Scrushy would want in return

for the donation, Siegelman replied "the CON Board," referring to the Certificate of Need Review Board, a state agency from which healthcare providers must obtain a certificate before opening a new facility or offering a special healthcare service. When Bailey asked, "I wouldn't think that would be a problem, would it?", Siegelman replied, "I wouldn't think so." Tr. 507.

Mike Martin, HealthSouth's former Chief Financial Officer, testified that Scrushy had told him that if they helped Siegelman raise money for the lottery campaign, "[they] would be assured a seat on the CON Board." Bailey testified that in May 2000 he traveled with Siegelman to Birmingham, where the Governor picked up another check for $250,000 from Scrushy at Scrushy's office. This check was made out to the Alabama Education Foundation (AEF), a successor to the AELF. Tr. 538-39, 548, 1117-21. By this time, the lottery referendum had been defeated. These checks were eventually used to reduce a bank loan to the Foundation that Siegelman had personally guaranteed, the proceeds of which had been used to cover expenses of the lottery campaign. On July 26, 1999, Siegelman reappointed Scrushy to one of the seats on the nine person CON Board, a position that Scrushy previously held under three governors. Tr. 517-18, 1419. Bailey also testified that Siegelman arranged for Scrushy to be vice-chair "because [Scrushy] asked for it."

In this case, there was no direct evidence that Siegelman and Scrushy had ever discussed a

connection between a contribution and reappointment to the board, let alone that there was a *quid pro quo*. Rather, if the prosecution's evidence is to be credited, it appears that Scrushy hoped to curry favor with Siegelman by supporting a pet cause, and Siegelman was disinclined to reappoint someone who had supported an opponent without some clear sign of equally great support for the governor's program. As the Court plainly indicated in *McCormick v. United States,* 500 U.S. 257 (1991) (discussed at greater length *infra*), this is the ordinary stuff of politics, as well as part of a national tradition of reliance by public officials on financing their campaigns through funds provided by others which began very early in our history, was significantly enlarged in the Jacksonian era and then in the last decades of the 19th Century, and has continued its great expansion since then.[3] Yet, both the individual contributing to an issue campaign and the governor raising questions about a reappointment are exposed to felony conviction under the lower court's interpretation of the law, which permitted the jury in this case to infer the existence of an explicit agreement from this parallel behavior and held that no express agreement was required under *McCormick*.

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[3] See, e.g., Herbert E. Alexander, *Financing Politics* ch. 2 (4th ed. 1992); Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L. J. 871, 881-83 (2004).

2. Unclear Standards and Undue Discretion

The Court's analysis, in its foundational ruling affording First Amendment protection for financial support of a political campaign, of the critical function of contributions and their role in supporting candidates and enhancing political debate has become even more relevant today:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Buckley v. Valeo, 424 U.S. 1, 19 (1976).

Indeed, the Court has described contributions to referendum or issue-advocacy campaigns, such as the Education Lottery effort in this case, as "the type of speech indispensable to decision-making in a democracy. . . ." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978). For more than a half century, the Court has acknowledged the dangers of

imprecise regulations that affect the exercise of First Amendment rights, reasoning that:

> [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.

Smith v. California, 361 U.S. 147, 151 (1959) (citing *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)).

The discretion afforded to prosecutors, trial judges, and juries by "bribery" and "honest services" statutes that (a) do not require an express *quid pro quo* between the official act and the campaign contribution, or (b) lack carefully delineated boundaries of the evidence required to allow the finder of fact to infer that an explicit agreement has been reached, permits indictments, prosecutions and convictions of the kind in this case that violate freedom of speech. In a related context, this Court has recognized the threats posed to First Amendment values by granting prosecutors and factfinders broadly defined boundaries, noting:

> [T]hat in the area of free expression . . . placing unbridled discretion in the hands of a government official . . . intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. . . . Standards provide the guideposts that check the . . . [official] and allow courts quickly and easily to determine whether the

> . . . [official] is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the . . . official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the . . . [official] is permitting favorable, and suppressing unfavorable, expression.

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757-58 (1988).

The Court has further emphasized:

> [T]hat the more important aspect of vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citations omitted).

Placing limits on prosecutorial discretion, and articulating standards with predictable application for the review of decisions by judges and juries in respect to the quality and quantity of evidence required for conviction, is especially called for to curtail the perils confronting freedom of speech in the context presented by this case: indictments brought by an administration of one political party against a high ranking government official of an opposing

political party who is in the middle of a hotly contested election campaign.

3. Scope of Appellate Review

In reviewing the evidence in detail and affirming the convictions under the "honest services" and "bribery" statutes, the Eleventh Circuit afforded ordinary deference to the jury's decisions: "The jury's verdict commands the respect of this court, and that verdict must be sustained if there is substantial evidence to support it." 561 F.3d at 1219. But the First Amendment demands more. As this Court stated in its landmark *New York Times* decision:

> This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of . . . the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." We must 'make an independent examination of the whole record,' so as to assure ourselves

> that the judgment does not constitute a forbidden intrusion on the field of free expression.

New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (citations omitted).

Properly defined violations of the "bribery" and "honest services" statutes are within the "categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend," *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 504 (1984), categories which the Court has held to include libelous speech, fighting words, incitement to riot, obscenity, and child pornography. *Id.* However,

> [i]n such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact

> may inhibit the expression of protected ideas.

Id. at 505.[4]

As indicated earlier, these precautions for careful appellate review as well as clearly articulated standards carry special force in the context of prosecutions of high ranking political officers as in cases such as this one. Especially because the content of what it means for trial judges and courts of appeal to exercise their duty to engage in an independent review of the evidence has not been very fully addressed by this Court, it should grant review in this case to provide needed guidance. For example, assuming that Bailey's testimony is true (a matter of credibility to be left to the jury), there are several standards that might be used to determine whether the inferences that might be drawn support the conclusion that an explicit agreement was reached beyond a reasonable doubt: Should the courts review the question *de novo*? Should *some* deference be

[4] The point is well illustrated in *St. Amant v. Thompson,* 390 U.S. 727 (1968), where both the Supreme Court of Louisiana and the trial judge found that the defendant in a defamation action by a public official had acted "recklessly." This Court reversed because the facts "fall short of proving [defendant's] . . . reckless disregard," which "cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication" to "protect against self-censorship and thus adequately implement First Amendment policies," *id*. at 730-32.

granted to the jury? Or should there be a standard that falls some place between the two?

B. The Interpretation By the Court Below of the Statutes in This Case Violates the Fifth Amendment Because It Affords Inadequate Notice to Reasonable People of What Conduct Is Criminal and Authorizes Law Enforcement Officials to Impermissibly Discriminate

Wholly independent of the First Amendment, this Court long ago described vagueness in the terms of a penal statute as violating "the first essential of due process of law," *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926). The rationale for this precept was clearly explained more recently when the Court ruled that a broadly phrased anti-"loitering" ordinance did not interfere with protected speech, but did violate due process:

> Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

City of Chicago v. Morales, 527 U.S. 41, 56 (1999).

The court below construed the "bribery" and "honest services" statutes as making it a crime if the jury could infer that an agreement had been reached,

rather than requiring the jury to find an express *quid pro quo*. First, this violates the Due Process Clause because it creates a genuine uncertainty for public officials and potential contributors to political campaigns as to whether criminal charges may result from making a contribution with the hope or expectation, based on traditional practices and specific prior conduct, that some favorable treatment will come from the recipient, and the expectation is then fulfilled.

Second, the failure to "establish minimal guidelines to govern law enforcement," *Kolender v. Lawson, supra*, is especially dangerous in the context of this case because of the great danger, referred to above, of the abuse of power in prosecuting political opponents.

C. The "Bribery" and "Honest Services" Statutes Should Be Construed to Avoid the First and Fifth Amendment Issues

In *McCormick v. United States,* 500 U.S. 257 (1991), the Court reversed the conviction of a state legislator who received a campaign donation for which he was prosecuted for "extortion" under the Hobbs Act, 18 U.S.C. § 1951, defined as "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The facts were that after the legislator had advocated a program favorable to foreign medical school graduates, they hired a lobbyist who discussed with him the

possibility of his introducing further helpful legislation. He advised the lobbyist that he had expended considerable sums of his own in their behalf, and that he had heard nothing from them. Thereafter, a series of payments were made to the legislator by the lobbyist. In interpreting the Hobbs Act to apply "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," the Court observed:

> [T]he jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made . . . with the expectation that McCormick's official action would be influenced for their benefit, and if McCormick knew that the payment was made with that expectation. . . .
>
> . . . Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is

> unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Id. at 274, 272.

In this case, the jury charge did not include defendant's request for a *quid pro quo* instruction; rather, the district court told the jury that it could not convict unless "the defendant and the official agree that the official will take specific action in exchange for the thing of value." The court below, acknowledging the Seventh Circuit's conclusion that "extortion and bribery are but 'different sides of the same coin,'" 561 F.3d at 1225 (citing *United States v. Allen,* 10 F.3d 405, 411 (7th Cir. 1993)), nonetheless affirmed Siegelman's conviction on the ground that "the agreement must be *explicit*, but there is no requirement that it be *express*," 561 F.3d at 1226. On this basis, the court below concluded that the jury could infer that, on the evidence presented, they had "agreed to a deal," and that while "the jurors were free to give it a different construction, they did not." *Id.* at 1228.

In view of the consequential First and Fifth Amendment issues discussed above, this Court should grant review to determine whether the "bribery" and "honest services" statutes should be construed to avoid deciding these constitutional questions. Otherwise, public officials and contributors to issue and candidate campaigns will face the risk

that a prosecutor will single them out for prosecution and that a conviction will be obtained based on a jury's surmises about the mental states of the actors. The result would plainly burden and chill the vigorous political discussion that is crucial to our democracy.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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